1915

Trust dissolution proceedings under the Sherman law

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TRUST DISSOLUTION PROCEEDINGS UNDER
THE SHERMAN LAW

By
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Iowa City, Iowa.

1915.
PREFACE

This study was undertaken not only because of an awakened interest in the trust problem due to the recent trust legislation and appointment of the Federal Trade Commission, but also in view of the fact that the subject led to the analysis of a growing problem of central importance in our economic life and progress.

The subject was suggested by Dr. Eliot Jones and the research was carried out under his supervision. I desire to express my sincerest gratitude for his help, valuable suggestions and criticisms, without which the work would lack much.
TRUST DISSOLUTION PROCEEDINGS UNDER

THE SHERMAN LAW

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CHAPTER I.

FEDERAL ANTI-TRUST LEGISLATION 1890-1914, AND

THE ATTITUDE AND POLICIES OF THE ADMINISTRATIONS.

An understanding of the legal position of industrial combinations in the United States must be preceded by a knowledge of the growth and enforcement of the governmental policies over such combinations during the past twenty-five years. During this period these policies have been determined by three agencies: by Congress in the enactment of laws; by the chief executive in the administration of these laws, and in the advice he gives to Congress; and by the Supreme Court in the interpretation of the laws as to the rights and privileges of Combinations. Behind and overshadowing these agencies is that indefinite but powerful force of public opinion. This, however, must find expression through one of these agencies.

For over five hundred years industrial monopolies have been illegal under the common law, which forms the basis of our legal system. The people of America have instinctively stood for the repression of any form of monopoly, even in governmental affairs. With the increase of industrial combination during the eighties and early nineties the common law gave place to the statute laws passed by the States and
Congress. By 1892 all but six of the states had anti-trust laws. Of the trusts organized 95% were in these six states, which by their inaction rendered ineffective the laws of the other forty-two states.

The anti-trust sentiment found its first expression in the party platforms in 1888, when both the leading parties were pledged to bring about federal legislation. Two years later Congress passed the Sherman Act, on July 2, 1890, at a time when the trust movement was still in its infancy. Of the important trusts then in existence the Oil Trust was dissolved by the Ohio Courts in 1892; the Sugar Trust by the New York Courts in 1890; the Whiskey Trust by the Illinois courts in 1896, while the Tobacco Trust organized in January, 1890, only dominated the Cigarette business. There were only about six others, all of which were financially unimportant, so that the conditions seemed highly favorable for successful federal interference and control.

A study of the Congressional debates on the Sherman act and on the amendments proposed convinces one that the measure as finally passed represented the best thought of the ablest men in Congress. There was an unmistakable determination to pass a law that would check the trusts. The act was comprehensive, and contained adequate provisions to secure its enforcement. Section I declares "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign
nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the courts."

Section 2 adds: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor." Violations of this section are punishable the same as section 1.

Thus the statute not only declares illegal but also criminal the conduct of which the trusts were notoriously guilty. All infringements of its provisions were declared misdemeanors, punishable by imprisonment as well as by fine. Section 4 imposes upon the several district attorneys of the United States, acting under the direction of the attorney-general, the duty of instituting proceedings in equity to prevent and restrain violations of the law, and it invests the Circuit Courts with jurisdiction over such suits and power to issue temporary or permanent injunctions to secure enforcement of the act. Section 6 provides that any property owned by parties to the combinations forbidden in Section 1 and held incidentally to such combinations, in course of transportation among the states, may be seized and condemned like property imported
into the United States contrary to the law. Section 7 permits any person injured by conduct forbidden in the act to sue for and recover triple damages. Thus four distinct methods of securing the enforcement of the law were provided, together with specific and ample penalties to make violations of the law no light affair.

The Supreme Court upheld the constitutionality of the Sherman Act, but rendered it very ineffective by its first decision¹ and for many years little was accomplished under this law. During that time the trust problem was assuming larger proportions in every way. Yet Congress added no legislation whatsoever until thirteen years had passed and no important legislation until after twenty-four years. It was only later decisions of the Supreme Court that restored vitality to the act.

During these years there were sporadic attempts in Congress to amend the act or to pass new laws which embodied every conceivable manner of treating the trust problem. Only two of these succeeded. In 1903 was passed an expediting act, which gave priority to important anti-trust suits in the courts in order to prevent long delays. In the same year provision was made for a Bureau of Corporations, which should make investigations into the organization, conduct and management of the business of any corporation engaged in interstate commerce, except common carriers, in order to secure data and information to guide the President in his recommendations to Congress for further legislation. This was a step in the right direction

(1) See p. 24
of publicity, but the powers of the Bureau were inadequate for securing systematic evidence. What information thus secured should be given to the public was left to the President to decide. In fact, not much information was given to the public.

The lack of legislation when so sadly needed and the failure to accomplish more under the Sherman act must be largely attributed to the attitude of our administrations. The first three Presidents after the Act of 1890, Harrison, Cleveland, and McKinley, were not fitted by training or conviction to lead the struggle against the powerful corporate interests which so opposed the enforcement of the law. Their attorney-generals were not better fitted for the task, and after losing the first important suits they became discouraged. President Harrison did not mention the Sherman act in any of his messages after its passage, and his attorney-general did not refer to it until his last annual report in 1892, and it contained no constructive suggestions. Only four bills in equity and three indictments were instituted under the Sherman act during this administration.

President Cleveland did not take up the trust question until in his last message to Congress, in 1896. In this message he deplored the accelerating growth of trusts and the insufficiency of the present law, which did not reach the evil according to the court's interpretation. He then expressed his state's right position by declaring that on account of the complexities of our political system the federal government was powerless to control the trust in an effective manner, and expressed great confidence in the ability and willingness of
the states to remedy the evils. His attorney-general, Mr. Harmon, in his annual report for the same year urged some changes of a constructive nature, such as supplementing state action, compelling witnesses to testify, clarifying the meaning of the Act of 1890, and the need of an assistant bureau or department. Only four bills in equity and two indictments were instituted during this administration.

The McKinley administration, which was much occupied with foreign affairs, was extremely lax in enforcing the trust laws. The President did not mention the Sherman Law in his messages until in December, 1899, when he referred to the great increase of industrial combination and recommended that Congress extend the law giving federal control over these combinations, since state control was a failure. His attorney-general, Mr. Briggs, in his report for the same year, announced that the department had been governed only by the sincere effort to enforce the law as it existed, and to avoid subjecting the government to useless expense and the law offices from humiliating defeat by bringing action where there was a clear want of jurisdiction. Due to the President's demand for legislation, and the urgency of the situation, a constitutional amendment extending federal control, was brought to a vote in Congress, but it failed of passage by a strictly party vote. Each of the leading parties filed reports on this proposed legislation.¹ The majority report (Republican) claimed impotency as the cause of failure in preventing the trusts; that the protective tariff had no connection with existing trusts; that the problem was

¹ H. Rept. No. 1501, 56th Congress; 1st Session.
one of national scope; and that it proposed to "regulate" monopolies. The minority report opposed each of these contentions, charging the failure to prevent trusts to bad faith in the passage and administration of the laws, as well as to the tariff, and urged both state and federal control, not by regulation, but by the repression of monopolies. Both reports were agreed upon the desirability of competition.

Only three bills in equity, none of which were important, were instituted during this administration of more than four years. This inactivity of the government is the more significant when it is known that it was during the period of the greatest trust movement of the world's history. Due to the unfavorable decision in the Sugar Trust suit, the subsequent inactivity of the Government prosecution, the rapidly rising prices accompanied with great prosperity, and especially to the activities of the trust promoters, the number of active industrial trusts increased from 82 with a combined capitalization of $1,196,724,310 on January 1, 1898, to 318 with a capitalization of $7,246,342,533 on January 1, 1904.¹ This frenzy for trust combination was not primarily for any economic or social gain, but to secure the benefits of the rising prices, and also immediate profits for the organizers and promoters whose empty promises were painfully revealed to the investing public when an inevitable reaction set in a few years later that reached a crisis in 1907.

President Roosevelt (1901-1908), in his first message to Congress, in 1901, pointed out the great problem resulting from

(1) Moody: The Truth About the Trusts. P.486.
the growth of consolidation and in his energetic language urged publicity as the only sure remedy. Two years later a positive step was made in this direction in establishing the Bureau of Corporations, as already noted. The Expediting act was also passed the same year. Following the passage of these acts the President congratulated Congress and expressed the belief that the problem was about solved and that further slight changes needed would easily be secured. But in his 1904 message the President showed a growing appreciation of the national magnitude of the whole problem and the need of further legislation. In his later messages President Roosevelt came out definitely for federal regulation by means of a Commission which should have control of accounting, publicity, supervision, issue of securites, and rebates and discrimination. He recognized some of the trusts as being "good" and others as "bad". But just as the unpopular, urgent tariff problem was avoided by this strong, popular administration, so a real constructive effort commensurate with the pressing trust problem situation, which was showing its full fruitage, was also avoided.

There were three attorney-generals during this administration. Mr. Knox made no mention of the trust question until his 1903 report, when he suggested that the $500,000 appropriated February 25, 1903, to enforce the anti-trust law should be divided up for other purposes, such as public land, postal, and naturalization frauds. Later in the same year by request he set forth his trust views. He urged federal
regulation and believed monopoly to be impossible if unfair discrimination be eliminated and proper publicity provided. To secure these he urged a Commission with adequate powers. Mr. Moody, who succeeded Knox, in his annual report for 1906, appears in harmony with the regulation principle. He urged three defects in the anti-trust act: its indefinite terms; the forbidding of agreements which run counter to the tendencies of modern business; and the insufficient means for carrying out investigations. Mr. Bonaparte, who followed Moody, believed further legislation was needed, but set forth no constructive program. The only interest shown by Congress during the last four years of this administration was in ordering a number of investigations of special trusts to be made by the Bureau of Corporations. During the administration eighteen bills in equity, twenty-five indictments, and one forfeiture proceeding were instituted.

President Taft's administration witnessed the most vigorous prosecution of the trusts since the Anti-trust act was passed. Mr. Taft had been trained in legal procedure. As a Circuit Court judge, he had rendered the decree of dissolution for the Addyston Pipe Combination. After the tariff question was disposed of, the President carefully and clearly set forth his views and recommendations regarding the trusts, in a special message to Congress on January 7, 1910. He explained the chief reasons for creating large combinations. Of these he found three: the possibility of great economies; the reduction

(1) 85 Fed. Rep. 271
of excessive competition; and the possibility of securing a monopoly and completely controlling prices and rates. Mr. Taft also gave three conclusions as to the constructions of the Sherman Act\(^2\); First, we must infer that the evil aimed at was not the mere bigness of the enterprise but it was the aggregation of capital and plants, with the expressed or implied intent to restrain interstate or foreign trade, or to monopolize it in whole or in part; Second, a combination which only incidentally, and inevitably or directly, restrained trade, did not fall within the Act; and lastly, the Act was not to interfere with a great volume of capital concentrated under one organization, which reduced the cost of production and made its profits thereby, and took no advantage of its size to stifle competition. While the Supreme Court had not read the word "reasonable" into the law, as it soon did, yet Mr. Taft held that the distinction between direct and indirect restraint accomplished the same purpose. The President then recommended and had presented a federal incorporation law for all industries doing interstate business. This law aimed to bring such corporations under federal control and supervision as to there issues of securities, reports, and interholding of stock. Although the President worked consistently for this law it was never passed. He urged that no change be made in the Sherman Act, but that it be vigorously prosecuted. The Standard Oil and Tobacco decisions of 1911 were proclaimed epoch-making in his annual message in December.

His attorney-general, Mr. Wickersham, in his first two annual reports, simply announced that he was following the policy of his predecessors towards combinations. In his next report he declared that the government's dissolution policy was the creation of new conditions so that no company would have enough business of any one kind to threaten or accomplish monopoly. In his last report, he seemed well pleased with the act of 1890 and urged that it should not be made specific by enumerating the practices which would be held illegal. During this administration forty-six bills in equity, forty-three indictments, and one contempt proceeding were instituted.

During the Taft administration, a United States Senate committee of sixteen members was appointed and given large powers and means to inquire and report to the Senate what changes were desirable or necessary in the law relating to the creation and control of corporations engaged in interstate commerce. In this report, covering 2,799 printed pages of hearings, reports, and testimony, the committee emphatically declared that the Sherman Act should remain, and every possible effort to create and preserve competitive conditions should be made. Any additional legislation for securing more effective control should be in harmony with it. The committee was opposed to a general Federal incorporation law. This committee recommended a federal commission and pointed out some of the advantages to be derived from such a body.

The trust agitation, ripened through long experience, became crystallized in the legislation passed under the Wilson administration. Both the leading parties by their platform declarations were committed to bring about a national trade commission. After the tariff and banking legislation were disposed of, President Wilson on January 20, 1914, gave a masterly address before Congress concerning needed trust legislation.\(^1\) He especially urged a trade commission. Beside other features which were in harmony with the legislation as passed, he offered for consideration the requirement that owners of stock, when their voting power in several companies which ought to be independent of one another would constitute actual control, be made to choose in which company they would limit their voting right.

The legislation passed consisted of two acts, an anti-trust act supplementing the Sherman Act and an act providing for a Federal Trade Commission.\(^2\) The anti-trust act declared unfair competitive methods unlawful. These included general unfair competition, price discrimination, and restrictive sales or leases when their effect is to "substantially lessen competition or tend to create a monopoly." It was left to the courts and commission to decide when these practices reached an unlawful degree. This act also added new provisions against combination and restraint of trade, which prohibited (only future changes of stock effected) intercorporate stockholding where the effect may be to "substantially lessen competition or tend to create a monopoly." It should be noted that this

\(^1\) Reference next page.
does not forbid community of stock ownership by individuals. Interlocking directorates were also prohibited for all corporations whose capital and surplus amounted to a million dollars.

The act creating the Federal Trade Commission was by far the most important part of the legislation. This was to be a non-partisan commission, consisting of five members appointed by the President for terms of seven years. It takes over the work of the Bureau of Corporations and decides for itself what information shall be made public. It is required to assist in enforcing the anti-trust laws by helping prosecutions, aiding the fixing of decrees, taking part in the dissolution of corporations, and following up court decrees to see that they are obeyed. The need of such a Commission will become more apparent in our study.

During the years of waiting for adequate legislation and administration, the number, size, and centralization of control of combinations had increased enormously. Many of these combinations had increased enormously. Many of these combinations were very aggressive and secured for their treasuries and

and stockholders hute profits in dividends and stocks. It is true there were prosecutions, and some combinations were apparently successfully dissolved. Fear of prosecution on the part of the rest was shown in the fact that they always sought new forms of organization different from those of declared illegal. Each succeeding form of combination became stronger and harder to disintegrate as the Court decisions aimed to prevent them.

The earliest forms of combinations were pools. Of these there were many and of many kind depending upon the nature of the industry, business habits, and the laws of the various states. Among the pooling arrangements may be mentioned; the "gentlemen's agreement which fixed the selling price; percentage agreements, limiting the business of each company to a percentage of the total output; apportionment of the estimated annual demand among the separate companies; the use of a common selling bureau which should receive all bids and let all contracts; a division of the markets and territory among the member companies; and patent pools in which the patent or patents of an industry would be purchased and the profits divided. The pools, while sometimes of long duration were in most industries of short duration and frequently renewed on a different basis. Their chief weakness was in the lack of the central control necessary to hold all parties to the agreements. Their illegality in most states and later under the act of 1890 was also a great source of weakness.

Next in the order of time was the trustee device in which all the corporations and parties to the agreement
consigned all their stock and voting rights over to a group of trustees in return for trust certificates. These trustees had the sole management of the corporations and collected all the dividends which were paid out pro rata on the trust certificates. The trustee device of the Standard Oil Trust was a typical example. Its superiority over the pool was in its centralized control and impregnable secrecy.

In the latter 80's the illegal trustee device gave way to the holding company, which was the same in principle. It had the advantages of the trustee device in addition to having legal standing. In this form of organization, the separate plants lost their independence when all or even a bare majority of their stocks were substituted for shares of the holding company, and came wholly under the control of the directors of the latter company. This was the prevailing form of combination during the great trust movements of the latter 80's and early 90's. It was a legal corporation form easy to bring about and very effective in wielding control.

When the holding company was declared illegal in 1904 the consolidation into a single corporation became the predominating form among the large combinations. In the consolidated corporation, the separate plants and companies were purchased and lost their identity. The legality of the large consolidation form of trust control has not been determined. If it is declared legal no matter how inclusive its control of an industry, there may be a renewed rush toward

(1) See page 41.
large concentration until the movement be checked by another
decision of the Supreme Court.

CHAPTER II.

THE DECISIONS AND DISSOLUTION DECREES
OF THE COURTS.

Our study will be chiefly devoted to the decisions and
dissolution decrees of the Supreme Court, for the legal
position of the trust combinations are largely and finally
determined by this tribunal. Congresses, Presidents and
Attorney-Generals come and go with at most only a short
attempt to help solve the problem, but the Supreme Court,
with a fairly constant personnel, is persistently confronted
with the trust problem in all its phases, and must act. This
Court, up to the present time, in addition to all other
questions that pile up faster than can be analyzed, has been
burdened with the comparatively recent and growing problem
of controlling concentrated wealth and industry, one of our
most important and intricate national problems, and one which
demands expert counsel for its solution.

The interpretation and application of the Sherman Act
have undergone many changes. While very conservative because
of its training and practice, and because of the importance
of its decisions, the Supreme Court has gradually reflected
changes in its decrees in an attempt to meet the changing conduct of the trusts.

This chapter will begin a study of the more important trust cases. These will be considered usually in the same order in which they were decided by the Courts. For the purpose of giving a clearer understanding of the desirability of dissolution and of the elements in each combination which must be overcome in order to restore competition, a brief description of each case will be given. This will be followed in each instance by a consideration of the dissolution and its probable effectiveness.

A discussion of the problem of monopoly versus competition is omitted, but since in our study of the decrees and decisions in the suits against the various combinations we shall consider the economic desirability of their dissolution a statement of position is needed. Congress, the administrations, and the courts have always been governed in their actions by the belief that monopoly is always bad and competition good. Congress and the Courts as well as most of the presidents have never acknowledged that there are benefits in monopoly control due to increased efficiency, lowered costs of production, and escape from ruinous competition. They have recognized the acquisition of power, the escape from competition, and the raising of prices to be the motives for such organizations. Competition does prevail over most of the industrial field, and we shall see
that in the most efficient and complete monopoly combinations, competition has not been eliminated by the economies of production. No one would question the economies in large scale production, but there are few, if any, industries that require monopoly control to secure these economies. The trusts have not in their own defence shown that these are the cause of extreme concentration. This would be their impregnable defence, if proven. There are no general economies of production applying to all industries; the economies of production are different for each kind of industry, and can be secured in most, if not all, industries with less than monopoly control. Each industry must be studied to see how large a business can be warranted on the sole basis of economy of production. The tendency to organizations larger than the economies of production warrant has been due, in large part, to the desire for promoter's profits and the desire to escape the unfair methods of competition.

The first important suit attempted under the Sherman Act was against the "Whisky trust" (the Distilling and Cattle Feeding Company). This trust, which was organized in 1887, consisted of seventy-two companies, and was a very prominent trust in those early days of modern trusts. By the use of the "trustee device", the business and management of the separate companies were turned over to a group

of trustees in return for trust certificates representing an equity of interest in all the properties of the trust. These certificates also formed the basis for declaring dividends. Under this central Control, sixty of the seventy-two companies were closed and dismantled, and the business of the trust confined to the twelve remaining companies.

In 1892, the Government brought suit against this trust in the District Court of Massachusetts. The suit was quashed in this Court on the ground that the indictment failed, according to the elementary rules of criminal pleading, to set forth an indictable offense. ¹ What seems more significant than this first failure was the abandonment of any further attempt to prosecute the whisky trust. This trust did not prove successful financially because it failed to secure a domination in the industry. After becoming involved in financial difficulties it was dissolved in 1896.

The National Cash Register Company.

The second important suit attempted under the Sherman Act was against the National Cash Register Company in 1893.

This Corporation, with perhaps the exception of the Standard Oil, has excelled all the trusts and combinations whose history is known in the use of unfair methods of suppressing competition, by which means its strong monopoly control was obtained.

This Company was organized in Ohio about 1882, and reorganized in New Jersey in 1889. The present Company was organized in 1906 by the same interests which controlled the former organizations. The characteristic feature of the Cash Register Company throughout was its suppression of competition. A special department was created for this purpose, and many methods were used, some of which were new.

Among these methods were: the use of "knock out" men whose business was to interfere with the sales made by the competitors and to make threats, intimidations and assaults, if necessary; espionage upon the business of competitors; buying up salesmen of competing firms; selling cash registers closely resembling those of their competitors at ruinous prices; circulating a black list containing the latest information concerning competitors, among its agents; instituting intimidating and costly court suits against competitors which were not warranted, and whose only intent was to delay, to wear out and to discredit the operation of bogus or secretly owned companies in order to overcome competition, and to secure information concerning the in-

dependents; and the persistent purchase of new cash register inventions in order to forestall competition.

In 1893, suit was brought against this company in the Circuit Court of Massachusetts. This Court found true the allegations of "intent to engross, monopolize and grasp, and of means clearly unlawful and adapted to accomplish this intent." of monopolizing the cash register trade. But the Attorney-General, Mr. Olney, allowed this suit to lapse for the reason that the complaining witness had entered into the combinations of the defendants.

Since the time of the suit in 1893, the National Cash Register Company has continued its unfair practices, and has been able to control as high as 95% of the total cash register business. A Government suit against this Company is now pending. The charges of the Government are restraint of trade and monopoly, in the cash register business.

The American Sugar Refining Company Decision.

The Government suit against the E.C. Knight Company and others was the first trust case passed upon by the Supreme Court, and its decision was sure to be brought with great future importance, however decided. The sugar trust had

(3) 156 U.S.I.
up to this time (1895) been more prominently before the public than any other trust. The excessive prices for a commodity of such common use was particularly objectionable. Also the political influence exerted by the sugar interests had become well known.

Sugar refining naturally lends itself to monopoly, but in this case it was both easier to bring about and a source of greater profit because of the protective duties. Following a period of keen competition during the latter 80's, seventeen of the twenty surviving companies entered into a trustee arrangement whereby the management and businesses of the separate companies were turned over to a group of trustees. The share holders of the separate companies received trust certificates which were the basis of declaring dividends. Under the unity of action secured by this central control, twelve of the twenty corporations were dismantled and the remaining eight consolidated into four. The capital stock of the combination, which was $50,000,000, represented properties worth only about 6,590,000. In 1888, suit was brought against the combination in the New York State Courts. The trustee device of this combination was declared illegal and the charter of the Company revoked by the New York State Court of Appeals in 1890. The American Sugar Refining Company of New Jersey then

(1) Taussig—Tariff History of the United States, P.310.
(2) Century Magazine, V. 65, 1903, P. 471.
(3) 121 NEW YORK 582
became the organization of the sugar interests of the combination. Prices were advanced, but this gave rise to new competitors. Most of these competitors were purchased by the American Company, some of which commanded fabulous prices. By 1892 there were only five independent refineries left, four of which were in Philadelphia. In 1892, the American Sugar Refining Company purchased by contract these four Philadelphia companies, the largest of which was the Knight Company. These four companies, which had 33% of the total business, gave the American Company control of 98% of the business. To accomplish these purchases, the stock of the latter company was increased to $75,000,000.

In the suit brought against this combination in 1894, the government charged that the purchase of the four Philadelphia refineries was for the purpose of controlling the price of sugar, and asked that these contracts of purchase be declared void under the Sherman Act. Chief Justice Fuller in rendering the decision, held that the "monopoly and

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restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessity of life. The power conferred upon the courts by the Act were not meant to deal with monopoly directly as such, or to limit and restrict the rights of corporations created by the States or citizens of the States in the acquisition, control or disposition of property. This power which the court held could only be used to repress monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction itself is a monopoly of commerce.

From this viewpoint the court held that the purchase of the refineries was for the object of manufacturing sugar, and bore no direct relation to interstate commerce. An attempt or even a successful monopoly of manufacture was not an attempt to monopolize commerce even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked.

This interpretation impaired the effectiveness of the Sherman Act and the American Sugar Trust, after being successfully prosecuted as a monopoly and having its charter revoked by the New York State Court of appeals in 1890, incorporated under the laws of New Jersey and continued the forbidden business. It was the signal for others to get under the safe

(1) 156 U. S. 10.
(2) 156 U. S. 16.
(3) 156 U. S. 17.
(4) 121 New York 582.
incorporation laws of New Jersey. Had the prosecution been prompt and successful the trust problem might have never grown to such difficult proportions.

Since the time of the above suit in 1894, the American Sugar Refining Company has continued its business with large financial earnings. Its percentage of the total business is not so great as at the time of the first suit. A Government suit against this Company, charging it with being in violation of the Sherman law, is pending in the Courts.

The Dissolution of the Addyston Pipe and Steel Combination.

The suit against the Addyston Pipe and Steel combination, in 1899, was the second trust case passed upon by the Supreme Court.¹ The Government charged that the six defendant corporations of the Addyston Combination, "being manufacturers and vendors of cast iron pipe, entered into a combination to raise the prices of pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting more than three quarters of the territory of the United States and significantly called by the associates pay territory."² Exhibits of the minutes of the combination showed: an extended system of bonuses; the distribution of the country

¹ 175 U.S. 211
² 175 U.S. 235.
into pay territory, free territory, and reserved cities; and price arrangements. 3 To carry out these agreements, a central board consisting of representatives of the competing shops, was appointed to receive all bids, and to let all contracts so that the party securing the order should have the protection of all the other shops. The Supreme Court said "the record is full of instances .... in which after the successful bidder had been fixed by the auction pool, or had been fixed by the arrangement as to reserve cities, the other defendants put in bids at the public letting as high as the selected bidder requested in order to give the appearance of active competition between the defendants." 1 By a unanimous vote the Supreme Court held the Addyston Combination to be a violation of the Antitrust Act, and sustained the Circuit Court decree "perpetually enjoining the defendants from maintaining the combination in cast iron pipe, and from doing any business thereunder." 2

Seven years after this decision, the Supreme Court allowed the City of Atlanta to recover, under the Sherman Act, triple the excess price and attorneys' fees occasioned by the semblance of competition set up by the Addyston Pipe Combination. 3

(1) 175 U.S. 219.
(2) 85 Fed. Rep. 302, Circuit Judge, Taft, gave the Court's decree.
(3) 203 U. S. 390.
The importance of this decision was in applying the Anti-trust Act, even though the primary business of the parties to the agreement was manufacturing or some other activity subject to state rather than federal regulation. This decision may have been a factor in checking the second trust movement.

The National Harrow Company Decision.

The suit of Bement against the National Harrow Company of New Jersey, decided in 1902, illustrates the exclusive and monopolistic character of our letters patent rights. 1 The National Harrow Company was the owner of letters patent covering the float spring-tooth harrow business. This Company sold to Mr. Bement the license right to manufacture these spring-tooth harrows. Under the binding terms of this agreement the particular kinds of harrows (and no other kind could be made by one who had license rights from this company), the prices and terms of sale for each kind of harrow, and the territory where these could be sold were all stipulated. 2 Bement did not abide by these agreements, claiming that they were invalid under the Sherman Act in being a monopoly restraint. Thereupon, the National Harrow Company brought suit against Bement.

(1) 186 U.S. 70-95
(2) 186 U.S. 72-5
The Supreme Court held that the plaintiff was, at the time when these licenses were executed, the absolute owner of the letters patent relating to the float spring-tooth harrow business. "It was therefore the owner of a monopoly recognized by the Constitution and the statutes of Congress."¹ "The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly ... (and) the fact that conditions in the contracts keep up monopoly or fix prices does not render them illegal ...... that statute (1890) clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof."² Though the contracts named prices and directly affected interstate commerce, the Court decided the owners of the patents were entitled to do this. There was found "No purpose to stifle competition in the harrow business more than the patent provided for."³

(1) 186 U.S. 88.
(2) 186 U.S. 91-92.
(3) 186 U.S. 92.
The Miles Medical Company

Decision.

The Miles Medical Company of Indiana, which was a large manufacturer of patent medicines, sought to govern directly the entire trade in the medicines it manufactured. To accomplish this, two kinds of restrictive agreements were employed. One of these was for the jobbers and wholesale dealers of whom over four hundred had signed. The other was for retail dealers of whom more than twenty-five thousand had subscribed. In either case, the jobber or retailer agreed not to resell below the prices fixed by the manufacturers, and only those signing such contracts could obtain the medicines. Thus the Medical Company not only set the price for the jobber, but for the retailer and consumer.

Suit was brought by the Medical Company against the Park and Sons Company, a jobber, who had not signed the binding contracts, because he was selling these medicines to retail dealers at cut prices. Such retailers were at liberty to sell to consumers at their own prices. Park and Sons had procured the medicines at cut prices from other wholesale dealers who violated their contracts with the

(1) 220 U.S. 374-382,394.
Medical Company. The plaintiff urged that the sales at reduced prices injured the business of the other retail dealers handling their medicine, and also damaged the firm's reputation in the country.

The Supreme Court held that the wholesale dealers and jobbers were the owners of the medicines and that the restrictive contracts eliminated all competition among most of the wholesale dealers and jobbers, and among a majority of the retail druggists of the country. A patent right of exclusive sale held not to include the control of prices over future retail sales by a notice of such fixed prices.

The Dissolution of the Northern Securities Company.

Due to the extremely lax enforcement of the Anti-trust laws during the McKinley administration, there was an interval of more than four years before another real trust case was decided by the Supreme Court. This was in 1904 in a suit against the Northern Securities Company. This decision had an important bearing upon the future organization of combinations.

The contention whether the Sherman Act applied to railroads had been definitely settled by two earlier

(1) 220 U.S. 399, 400.
decisions. In the *Trams-Missouri Freight Association* suit, an agreement made between the Atchison and seventeen other railroads, whereby rates were determined, was declared invalid under the Sherman Act on the ground that the districts served by these railroads were denied the benefits of competition. ¹

A second judicial construction of the Sherman Act for common carriers within a few months reinforced the first. The *Joint Traffic Association*, an agreement entered into in 1895 by thirty-two railroads operation between Chicago and the Atlantic Coast, was declared unlawful in 1898. This Association formed for the purpose of maintaining jointly through the medium of a managing board the freight and traffic rates already in force. This agreement was declared illegal under the Sherman Law upon the same ground as the preceding case.

The principle facts of the *Norther Securities Company* were given by the Supreme Court. ² In 1901 under the leadership of J.J.Hill and J.P.Morgan, the Stockholders of the Great Norther and Northern Pacific Railway Corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, formed a project for the combination of these two companies. The primary need for both companies was an independent entrance into Chicago; and it was plain that

(1) 166 U.S. 290.
(2) 193 U.S. 320 et seq; Ripley W.Z. Railroads Finance and Organization, pp.
a single road was amply suffice for the two. The Burlington system was finally selected, for it not only afforded the necessary Chicago connection; but it also gridironed a rich and populous territory of its own. By the terms of this purchase the Northern Pacific and Great Northern were each to receive one-half of the $108,000,000 of Burlington stock; and were to pay for it in joint long-time collateral trust bonds. About 97 per cent of the stock was thus purchased without any cash requirements at all, and deposited in trust as security for the new bonds.

The foregoing transaction was bitterly opposed by the Harriman-Union Pacific forces, who also sought the Burlington system, which would also give the Union Pacific, terminating at the Missouri river, connection with Chicago. The Harriman forces then attempted to secure control of the Northern Pacific, and through this latter road a half interest in the Burlington, by bidding for stock in the open market. A stock market panic resulted on May 9, 1901, during which Northern Pacific stock sold as high as $1,000 per share. The Harriman interests succeeded in obtaining a majority of $1,000,000 of the total amount of stock, but their majority lay in the preferred shares which could be retired on any 1st of January prior to 1917, that is before the present owners could get an opportunity of exercising the authority which was assumed to reside in them, and which would give them the coveted control. This potential power of retiring
these preferred stocks before the same could be voted, although there were doubts as to whether such action could not be prevented by the Harriman interests, generated a conciliatory attitude on the part of the Harriman forces. The Hill-Morgan interest recovered by purchase a majority of the stock in the Northern Pacific. In order to prevent the recurrence of such disorder, a holding company under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, was planned. The Northern Securities Company was organized for this purpose with an authorized capital stock of $400,000,000, and upon an agreed basis of value,\textsuperscript{1} the shareholders of the two railroad companies exchanged their stock for the stock of the holding company. In this way the Securities Company became the holder or custodian of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern Pacific. These two roads were treated as one ownership for the exclusive benefit of the stockholders of the Securities Company. Competition practically ceased. All the earnings of the two roads were put into a common fund to be distributed to the certificate holders of the Securities Company.

The Supreme Court held that no scheme or device could more certainly come within the meaning of the Sherman Act,

\textsuperscript{(1) 197 U.S. 249.}
could more effectively suppress competition. Unless such a combination be destroyed "the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory." 1

This Court, therefore, sustained the Circuit Court decree, which declared the combination illegal and enjoined the defendants from doing or allowing the voting, acquiring, exercising control, or paying dividends upon the stock of the holding company.2 The decree permitted the "Security Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from such stockholders in exchange for its own stock, or to make such transfer and assignment to such persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies." 3

The Morgan-Hill parties chose the latter alternative and proceeded to distribute the stock pro rata to the stockholders so that each holder of a certificate in the Securities

(1) 193 U.S. 327-8.
(2) " " "
Company received stock in both of the railway companies which were left intact. The Harriman interests, representing the Union Pacific and the Oregon Short Line Railroads, objected to this plan of dissolution which gave the majority of the stock of the Northern Pacific into the hands of Hill and his friends, and demanded the return of the original securities of the Northern Pacific to their former owners. This issue which was decided by the Supreme Court in favor of the defendants Morgan and Hill, left the control of the Northern Pacific in the hands of its transcontinental rival.\(^1\) Had the Harriman interest succeeded in having the original stocks of the companies restored to their owners as they were before the formation of the Securities Company, then the Harriman interests would have recovered their former control \(^2\) over the Northern Pacific Railroad. The ruling of the Supreme Court left the Harriman interests with a minority in each of the lines composing the Securities Company, while Morgan and Hill, because they had a majority of the Securities Company's stock, now received a majority of each of these competing lines. The Supreme Court held that the Harriman plan was inequitable and would result in restoring a condition not allowed by the Sherman Act by suppressing competition.

\(^{1}\) 197 U.S. 244.
\(^{2}\) 197 U.S. 248, 258-9.
Mr. Alexander D. Noyes, a well known writer on financial history, writing in 1910, cites some interesting results that followed this dissolution: Predictions of great financial demoralization were common when the Northern Securities had been finally ordered to dissolve; yet the dissolving of that holding company was accomplished with a minimum of friction or disturbance, and along with a great advance in stock exchange prices. The business of the constituent companies went on as usual. Not only so, but the Union Pacific Treasury, which, under Mr. Harriman's domination, held a very large interest in the Northern Securities and in the railway stocks held by that company, retained its holdings during all the litigation and through dismemberment of the holding company, and by Mr. Harriman's own admission sold the bulk of its part in that investment two or three years later at a profit of $34,000,000. ¹ The total profits for the Union Pacific interests resulting from this extraordinary venture was approximately $82,943,000.²

William Z. Ripley, a well known writer on railroad finance, claims that "Since the legal dissolution of the Northern trans-continental monopoly in 1905, no outward change, so far as the public is concerned, is apparent. Harmony in rate policy has been unbroken; and in all subsequent changes in rates, all roads have practically acted as a unit. This

¹ Forlorn, Jan. 1910, V. 43: P 42.
is undoubtedly because substantial blocks of the stock of both main lines are still lodged in the same hands. At all events, everything except competition in facilities has ceased, and both roads continue in control of one-half each of the Burlington system. Nor has the latter ceased to expand in the interests of its joint owners.¹

Apparently the manner of distribution in this case seemed less important than the merely legal compliance with the decree. The Securities Company was suppressed but the "Community of interest" which it was designed to protect still survives, and it is questionable whether the prosecution and resulting decree of the Court have aided much towards competitive conditions. The chief significance of this suit was the firm declaration that "not even a state, still less one of its artificial creatures, can stand in the way"² of the enforcement of the Sherman Act. This decision significantly put an end to the holding company as a legal instrumentality for the attainment of monopoly. Many of the trusts sought a new refuge in the consolidated corporation.

¹ Ibid. P 499.
² 193 U.S. 333.
The Standard Sanitary Manufacturing Company.

The Standard Sanitary Manufacturing Company, organized about the beginning of 1910, revealed an attempt to build up a monopoly business by reliance upon patent rights. In the Government's suit 1 against this Company, decided in 1912, sixteen corporations and thirty-four individuals, who controlled the production of about 85% of the sanitary enameled iron ware such as bath tubs, sinks, etc., were charged with entering into agreements and contracts whereby they agreed 2 to limit the output and sale of their products. Each grade of these wares could only be sold at prices and on terms fixed in schedules attached or by a committee of six from their number, and sold only to jobbers who should sign the resale contract prepared by the Company. Such contracts were signed by 80% of the jobbers and bound the jobber to purchase only from some of the sixteen manufacturing corporations entering the combination and to sell only at prices named in their resale price lists. To secure the loyalty of the jobbers a system of 5% rebate benefits and penalties was provided. To secure the loyalty of the manufacturers who entered the combination, a powerful pressure was brought to bear through the manipulation of royalties from the patented

(2) 226 U.S. 43-4.
automatic dredgers which were used in distributing the enameling powder over the surface of the iron ware while at very high temperatures. Each licensee was required to pay monthly a royalty of $5.00 per day for each furnace used in making these wares, but if the licensee abided by all the rules and regulations of the combination, 80% of this royalty was returned, but forfeited as a penalty if violated. The Combination not only prevented reductions in prices that would otherwise have been made, but they raised prices in a business amounting annually to at least $10,000,000 and of which the combination controlled 80%. The defendants claimed that the patented automatic dredgers made their contracts and agreements lawful but the Circuit Court held that the dredgers were in no wise "essential" but only "useful" tools. The agreements among the defendants were held by this Court to be for no other purpose but to restrict prices and competition. The Court also objected to the restrictive prices and contracts forced upon the jobbers before being allowed the wares. The Supreme Court affirmed this decree of the Circuit Court.

The Dissolution of the Standard Oil Company.

The suit brought by the United States against the Standard Oil Company of New Jersey was decided by the Supreme Court on May 15, 1911.\(^1\) This decision, in which the whole trust policy of the court was reviewed, attracted much attention and discussion, since it ordered the dissolution of the oldest, the best known, and financially the most powerful of our trusts.

The history\(^2\) of the Standard Oil Company shows that the concentration of the oil interests began at Cleveland, Ohio, about 1870. Three periods may be marked out in the history of this trust. During the first period, ending in 1882, the combining oil interests, working through the Standard Oil Company of Ohio, obtained complete mastery over the oil industry, controlling 90\% of the business of refining petroleum.\(^3\) This control was secured through the purchases of the stock of completing corporations, by notorious illegal rebates and discriminations from the railroads, by restraining contracts with competitors, by local price cutting, and by the monopolization of the pipeline transportation from the oil fields to the refineries.\(^4\)

\(^1\) 221 U. S. I.
\(^3\) 221 U.S. 33.
\(^4\) 221 U. S. 32,33.
The second period (1883-99) of the combination began with the Trust Agreement of 1882, which is a typical example of the trustee device. By the terms of this agreement, the management, stocks, business, and properties of forty corporations, including the Standard Oil Company of Ohio, were vested in a board of nine trustees "to be held for all the parties in interest jointly... during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." For these stocks and properties having a book value of about $55,000,000 trust certificates to the amount of $70,000,000 were issued to the former holders of the separate properties. These certificates represented the holder's interest in the total property of the combination and became the basis of declaring dividends.

In 1893 the State of Ohio brought suit against the Standard Oil Company of Ohio, maintaining that the relation of this Company to the trust agreement was illegal. The Supreme Court of Ohio adjudged the trust agreement illegal and ousted this corporation from the power and privilege of entering into such agreements or performing the same, directly or indirectly. By this year the number of companies in the combination had increased from forty to eighty-four, and the trust certificates issue had reached $97,250,000 of which

(1) 221 U.S. 34, 36.
(2) 221 U.S. 38.
Mr. Rockefeller owned about one-fourth, or 260,000 shares.\(^1\) Following the decision of the Ohio Supreme Court, the combination went through voluntary dissolution proceedings. The Government contended that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of stock held by the trust in 64 of the companies which it controlled to some of the remaining companies.\(^2\) The stock of the companies selected for the transfer was virtually owned by the nine trustees or the members of their immediate families or associates.\(^3\) Claiming that the trust had not been dissolved as required by the decree, the Attorney-General of Ohio instituted contempt proceedings against the Ohio Company in 1897. Fearing the results of these proceedings it was determined to change the form of organization.

The third period of the Standard Oil history began with the reorganization of the Standard Oil Company of New Jersey in 1899. During that year the management, stocks and trust corporations held by the trust were transferred to this New Jersey Company, which became the parent holding company. The original stock of the subsidiary companies were held in the treasury of this company until the time of dissolution. Each trust certificate was exchanged for a share of the Standard Oil Company of New Jersey. A share of stock of

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(2) 221 U.S. 38.
(3) Ibid.
(4)
this Company represented fractional shares in all the same Companies that the trust certificate had before represented. It was only an exchange of pieces of paper but it gave the combination legal standing.

Along in the 90's the Standard began a policy of eliminating the jobbers, and to sell direct to the retailers. The jobbers were usually driven from the business and forced to sell their plants, wagons and storage tanks to the Standard. The number of storage places where the oil was distributed to retailers increased from 150 in 1883 to 3,573 in 1906. The monopoly of the pipe lines was extended also so as to retain control of the oil fields that were being opened up. The Standard continued the purchase of competing refineries. Many of these refineries were driven from the business and upon being sold to the Standard were dismantled. The practices for which the Standard Oil Company had become notorious were continued. The acts specifically charged by the Government against the Standard Oil were grouped under the following heads by the Supreme Court:

"Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts

(1) See Bibliography No. 53 P 37. Ibid. P. 49.
with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination." ¹

It will be remembered that in 1907, the Standard Oil was fined $29,240,000 for accepting secret rebates from the railroads. The amount of the fine caused a sensation but it "was a bagatelle compared with the sums that the Standard Oil Company had extorted from the people very largely by means of such criminal methods." ² While these guilty practices were soundly established, an appeal which was made to the Supreme Court, resulted in the exculpation of the Standard Oil Company by the aid of eminent counsel and the technicalities of the law, with the escape from the extreme penalties of the statutes for rebating and personal favoritism. These notorious practices of the Standard had

¹ 221 U.S. 43-4
been a large factor in bringing about the Interstate Commerce Act of 1887 which provided a measure of commission regulation over the railroads.\(^{(1)}\)

The Standard's monopoly position as a purchaser of crude oil is shown by the Bureau's report to be due to its control of almost all the pipe lines of the country.\(^{(2)}\) In 1906, only one important independent trunk pipe line remained. The Standard repeatedly used most unfair means to prevent the construction of competing pipe lines or to destroy the business of those already laid. The Standard had 3,531 miles of pipe line in 1882. It had 54,615 miles in 1906. This pipe line control was made an engine of monopoly by the Standard as pipe line transportation was so much cheaper than by railroad. In all the important oil fields except Texas and California, the Standard bought from 80-99\% of the total crude product and in such fields had almost unlimited power to fix the price of crude oil.\(^{(3)}\)

Although the laws of several states required pipe lines to act as common carriers, and although the federal law of 1906 made the same requirements, the Standard pipe lines have never generally and uniformly transported oil for others. In instances where it has or was willing to do so, the rates have been practically prohibitive, or the minimum

\(^{(1)}\) W.Z.Ripley-Railroad Rates and Regulation, 1912,P. 558.
\(^{(3)}\) Ibid P. 32.
amount required for a shipment made so great as practically prevent shipment by others. The Standard maintained that the federal law of 1906 only effected pipe lines which exercised the right of eminent domain and some of its most important pipe lines filed no tariffs under this law. In states where eminent domain rights were exercised, the law was usually evaded by changing the legal ownership of that part of the pipe lines. Thus the principal bulwark of this monopoly remained.

The powers of the Interstate Commerce Commission following the legislation in 1906 were very inadequate for enforcing its orders over common carriers which expressly included pipe lines. The powers of the Commission were greatly strengthened by legislation in 1910 but what adjustments, if any, have been made in pipe line transportation is not known. In 1904 the Standard marketed 87.3% of the illuminating oil in the county as a whole. For certain sections of the country it was much higher, being 99.1% for the Rocky Mountain states.¹

The monopoly control is further shown by the prices and profits in the petroleum industry, and in the extent of local price discrimination. As prices were increased for refined oil the margin between the crude oil and its products allowed large and excessive profits.² The prices for export markets during 1904 and 1905 were much lower than in the domestic market.³ In the home markets prices and profits were adjusted according to the

² Ibid. P 38, 39.
³ Ibid P. 39.
degree of competition encountered. In different sections of the country prices for illuminating oil varied from 7.7 to 13.9 cents per gallon. In the Waters-Pierce Company's districts the records showed a varying profit of from 0.6 to 4.4 cents per gallon, and for individual cities even greater differences existed. Great price discrimination was made by the Standard in selling lubricating oils to the railroads. The invoice price of these oils was alike to all the railroads, but most of the railroads received a reduction. The data for 94 railroads showed that 41 roads paid the full invoice price, 8 roads paid 57.6%, 12 roads 74.4%, 15 roads 85.5%, and 17 roads 95.7%, while the Pennsylvania Railroad an important road, paid 49% of the invoice price. The less favored roads paid the excessive prices to the Standard rather than buy of independents because they feared to incur the displeasure of so great a shipper as the Standard, or because the Standard interests had a powerful voice in the directorates of some of the railways. The effect of this practice was the same as a rebate in freight rates to the Standard Oil interests.

The great economies obtained by the Standard in pipe line transportation, in large-scale refining, and in elaboration of valuable by-products, have not led to price reductions. Compared with prices of crude oil the domestic prices of illuminating oil and by-products during the last decade showed a marked advance. The average profit per gallon to the

(1) Ibid. P. 41.
(2) Pol. Sci. Quart V. 23, P. 43.
(3) Pol. Sci. Quart V. 23, P. 44.
Standard was 2.25 cents per gallon above a normal competitive profit, including depreciation and ten percent on its investment. Of this 2.25 cents one-third was due to pipeline advantages over outsiders. One cent profit per gallon made good business profit for the Standard. Thus the Standard extorted a large monopoly price and gave to the consumer none of the benefits due to its exclusive control.

With a capital stock of $97,250,000 the New Jersey holding company had, at the end of 1906, a net book value and assets of $359,400,193. In the year 1903 a dividend of 44% required only $42,877,478 from the net total earnings of $81,336,994. Frank B. Kellogg, Special Counsel for the Government in this suit, says the Standard Oil had, in 1906, "a $261,068,811 surplus and since that time for five years it has been piling up more surplus at the rate of probably forty million dollars per annum (beside a dividend of about 40% per annum) so that its total assets at the time of dissolution undoubtedly amounted, on the books of the Company to over $600,000,000. What the real value was beyond the book value, no one knows to this day. No corporation ever existed in this country with such earning capacity or such secrecy in its business."

(1) Ibid P. 48 45
(2) Ibid P. 45 38
(3) 221 U.S. 43.
That the Standard's monopolistic position is attributable to economies of production, and is therefore a desirable form of combination was not the conclusion of the Bureau of Corporations in its report on the petroleum industry. The conclusions of this report as given by Francis Walker, a member of the Bureau, are that "if the independents were given fair treatment by the railways and the unfair competition of the Standard were put an end to, the independent would be able to sell oil at lower prices than the Standard exacts on the average and yet make a fair profit. If, besides this, the Standard pipe lines were compelled to carry the oil of the independents at reasonable rates, there would not be much difference in the efficiency of the large independents and the Standard. Indeed, if all these unfair advantages were abolished, there is no reason whatever why the Standard should monopolize, or nearly monopolize, the sale of oil in this country." ¹

The suit against the Standard Oil Company was filed by Attorney-General Moody, on November 15, 1906, in the United States District Court for Eastern Missouri. The elaborate investigations of the Bureau of Corporations were used in the prosecution. The detailed facts covering a period of about forty years were so involved that the testimony taken for the case alone covered 12,000 printed pages which were bound in twenty-three volumes. The decision of this Court was rendered in favor of the Government and the defendants appealed to the Supreme Court. The Supreme Court by a unanimous vote sustained

(1) Pol. Sci. Quart. 1908, V.23, P. 44.
the decree of the lower court on the following grounds: 1

(A) Because the unification of so vast a power and control in the New Jersey corporation caused a prima-facie presumption of intent and purpose to achieve and maintain a monopoly in the oil business by unusual methods.

(B) This presumption was made conclusive by considering the conduct of those who brought about the New Jersey Combination, both before its organization during the days of the trust agreements of 1879 and 1882, and at the time of the vesting power in the New Jersey Corporation as well as by weighing the manner in which this power has been exerted and the results which have risen from it.

The substantial relief asked for by the Government was (1), that the combination be held illegal and the parties thereto be perpetually enjoined from doing any further act to give effect to it; (2) that the transfer of stock of the various corporations to the Standard Oil Company of New Jersey be held illegal and the latter company be enjoined from exerting control over these subsidiary corporations in any manner, and (3) that specific relief by injunction be awarded against further violations of the statute by any of the acts specifically complained of in the bill. 2 There was also the prayer for general relief.

(1) 221 U.S. 75.
(2) 221 U.S. 43.
In considering the remedy to be administered the Chief Justice explained that it must seek two things. "1st, To forbid the doing in the future of arts like those which we have found to have been done in the past which would be violative of the statute. 2nd, The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." 1

The Court referred to the need of adapting the law and decisions to the changing conduct of combinations according to the rule of reason in order that the purpose of the act (1890) might be realized. 2 It said in reviewing the past trust suits that modern conditions were followed by new manifestations of conduct and dealing which it was the purpose of the act to prevent.

The Supreme Court then affirmed and interpreted the decree of the District Court as follows: "The Court below, 1 adjudged that the New Jersey Corporation in so far as it held the stock of the various corporations..... or controlled the same was a combination in violation of the first section of

(1) 221 U.S. 78.
(2) 221 U.S. 57.
the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey Corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey Company in exchange for its stock (distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the Combination).  

"To make this command effective, Section 5 of the decree forbade the New Jersey Corporation from, in any form or manner, exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey Corporation or doing any act which would recognize further power in that company, except to the extent that was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had

been transferred, section 6 of the decree enjoined them from in any way conspiring or combining to violate the act,"¹ either by acquiring stock interests in potentially competitive companies, or by placing the control of any of the corporations under a trustee, or by making any agreement, implied or expressed, as to the management of other corporations, or to regulate prices, sales, rates of transportation, or output.²

In compliance with the decree of the Supreme Court, the Standard Oil Company of New Jersey sent a letter to its stockholders on July 28, 1911, announcing that:

"Obedience to the final Decree in the Case of the United States against the Standard Oil Company (of New Jersey), and others, requires this Company to distribute, or cause to be distributed, ratably, to its stockholders the shares of stock of the following corporations, which it owns directly or through its ownership of stock of the National Transit Company, to-wit: (Thirty-three corporations named).

"Such distribution will be made to the stockholders of the Standard Oil Company (of New Jersey) of record on the 1st day of September, 1911."³

¹ 221 U.S. 78-9.
³ Stevens—Industrial Combinations and Trusts P. 462.
There has been much discussion as to the effectiveness of this dissolution. Has it resulted in restoring competition, or has the Standard Oil Combine, after its long career and flight from one defense to another through pool, trustee device, and holding company, at last reached a secure position amounting to legalized monopoly?

Ex-President Taft, who announced that the plan of the administration in prosecuting the trusts was to secure "a degree of disintegration by which competition between its parts shall be restored and preserved," referred to the Standard Oil and Tobacco decisions as epochmaking. Frank B. Kellogg declared this "deed accomplished everything that it is possible to accomplish under the Sherman Act. . . . . The decree went further than any decree has ever done in any court. . . . . Since the decree the independent oil manufacturers have had free and open opportunity to engage in business and have prospered, without being clubbed to death by inordinate capital." Ex-President Roosevelt says, "To break up the Standard Oil Company, as the recent decision has broken it up, does a certain amount of good; but it does not do anything like the amount of good that would be achieved" from governmental regulation. There are others who feel that due to the

(1) Detroit Speech Sept. 18, 1911.
(2) Message to Congress, Dec. 5, 1911.
(3) American Review of Reviews, June, 1912, V. 45, P. 728.
(4) Outlook, June 3, 1911, V. 98, P. 340.
scattering of the oil interests and the scrutiny of the government the chief grievances of the past can no longer be practiced, especially since these were enumerated and publicity extended.

Most of the writers in discussions of this dissolution expressed the belief that competition would not be restored with the passing of the holding company, and that there would be no break in the coordinate activities of the separate corporations. John Bates Clark, the well known economist, in his book, "The Control of Trusts," asserts that we have dissolved the form of the combination known as a "holding company" to substitute the form of combination known as a "community of interest." We have forbidden the usual methods of unified action, while leaving the motive for it as strong as before and a way to secure it open. The original owner of an independent refinery, after selling out to the Standard for stock, became, of course a minority holder of insignificant importance in the larger Company. After the dissolution far from getting his own plant back, he becomes an insignificant minority holder in the corporation which controls it, as well as in many others in which he has no personal interests. He is a stranger in his own house without
even a strong enough foothold on which to base an effective protest." 1

Jeremiah W. Jenks, expert on trusts for the Industrial Commission, and author of numerous books and magazine articles on the trust problem, says, "the dividends and prices of stock of the various Standard Oil Companies since the decision seem to justify these judgments, (namely) that, although there might be a reorganization in form, they would still remain combinations in fact." 2 W. J. Bryan says, "The last question to be considered is, what is to be the result of this decision? We have seen one result—namely, rejoining on the part of every man pecuniarily interested in the corporations which are exploiting the public." 3

Evidently the "Street" did not take the Standard Oil decision seriously. When the case was in the Courts, the stock gradually declined and reached a low level of $585. After the decision was rendered which finally dissolved the Company, Standard Oil stock again rose until $900 was reached, more than $300 parts higher than when the Company was under attack. 4 Apparently the men, who knew best, did not believe that the dissolution would reduce the great profits which the Standard had enjoyed and which would now go

(1) PP. 146-7.
(2) Jour. Pol. Econ. V.20, P.355.
(4) See Appendix P. 16/
to the constituent companies. From December 18, 1911 to March 12, 1912 the value of the shares of most of the subsidiary Companies greatly appreciated. A number of the stocks doubled, while the stock of one company tribled.¹

To the very many charges that the Standard Oil stocks went up because of some defect in the Government decree, Frank B. Kellogg replied that, "as a matter of fact nothing is further from the truth. The reason for such increase is perfectly plain to those familiar with the Standard Oil Organization.

"Prior to the Government prosecution, the Standard Oil Company was a close corporation. It never published any statement of its assets and business even to its stockholders. All the public knew was that the Standard Oil Company stock (the holding company) paid a dividend of about 40% per annum, and its market value was regulated by those dividends. Its earnings were double this sum, but only a few insiders knew that fact. ....... Until the dissolution, in December, 1911, the stocks of the thirty-seven subsidiary corporations had never been sold on the market. They were in the treasury of the Standard Oil Company of New Jersey, the holding company.

¹) Lit. Digest V.44, P.665.

²)
"The Government, in the course of the trial, for the first time disclosed the large assets and earnings of these various companies, collectively and individually. But the reports of the trial were not, of course, generally distributed, and only gradually did the facts filter through the minds of the investing public. Moreover, so long as the suit was pending the stocks of the parent company naturally sold for much less in the market by reason of the uncertainty as to the outcome of the suit. When the Standard Oil Company was dissolved and these subsidiary companies stood upon their own foundations, and as their stocks began to be dealt in upon the market, gradually the amount of their assets became known and the stocks increased enormously in value.

"For instance take the Standard Oil Company of Indiana. When the Government instituted the suit all that was known about the Standard Oil Company of Indiana was that it had a million dollars of capital. The Government showed that in 1906 this Company had $24,373,937 of net assets, all, except the one million dollars, made out of the business of the Company in addition to its dividends declared, and was then earning at the rate of over $10,000,000 per annum."
"Take another instance. The Southern Pipe Line Company is a comparatively small company, formerly with $5,000,000 of capital stock, since increased to $10,000,000. Its rate of profit from pipe-line business on its net assets in that business ranged from 102.1 to 278.1 per cent per annum. During the seven years from 1899 to 1905, inclusive, vast sums were charged on the books as having been paid out to a trusted employee of the Company. The Government discovered two balance sheets, one in regular form, showing the true earnings ranging from three to four millions annually, and the other showing each year enormous payments to this employee, the aggregate being $22,131,160, and leaving very small apparent profits, or even losses. Extraordinary efforts were made by the Government to prove what became of this money. .... None could or did explain what became of this enormous sum.

"Take another case. The Continental Oil Company, with $300,000 of Capital stock had, in 1906, assets of $1,301,515 and profits for that one year of $575,044. Its stock is now selling on the market at about $900 per share. The Solar Refining Company, with a capital stock of $500,000 had, in 1906, assets of $3,708,899, and earnings of $1,258,519.
Its stock is now selling at about $700 per share. The South Penn Oil Company had in 1906, $2,500,000 in Capital; its assets amounted to $14,915,185. Its stock is now selling at about $690 per share.

"These assets were those shown on the books at the close of business for the year 1906. To them must be added the surplus earnings for the years from 1907 to 1911, the time of dissolution, which were very large, and we therefore have assets far beyond anything ever dreamed of by the public. No corporation ever existed in this country with such earning capacity or such secrecy in its business." (1)

Fear that a "Community of interest" would exist between the subsidiary companies was revived and the issue squarely made in the State of Missouri ex rel. Stewart V. J.D. Johnson. This litigation arose through the refusal of the Inspectors of Election of the Waters-Pierce Oil Company, who had been chosen by Mr. Pierce as President, to count the majority votes of the Company that had been cast at the instance of the Standard Oil interests. This refusal was based upon the ground that the shares were being illegally voted in furtherance of a conspiracy to violate and evade the

decree of the Federal Court. Upon the refusal to count these votes the proxies named by the Standard Oil interests brought a proceeding in mandamus in the State of Missouri against the Inspectors of Election.

In this suit the respondents claimed \(^1\) that, only two days before the Waters-Pierce election, George W. Mayer, at the request of the Standard Oil interests, had resigned his position of many years, standing with the Standard Oil interests of Indiana so that he might become a director of the Waters-Pierce Company. It was further claimed that Robert W. Stewart, counsel and attorney for the Standard Oil of Indiana and for other interests affiliated with this company and with the Standard Oil of New Jersey, purchased a share of stock of the Waters-Pierce Company in order to become a director in the election. Messrs. Mayer and Stewart together with Mr. Adams who was a Standard Oil Company man and already a director, would give the control of the Waters-Pierce Company

\(^1\) W.S. Stevens—Industrial Combinations and Trusts—Exhibit 9, pp. 516-524.
into the hands of the Standard Oil of Indiana and its majority shareholders.

The Respondents claim that the decree against the Standard Oil "has not been complied with in any substantial respect" and that the individual defendants in that suit still control the subsidiary companies through concerted action in their ownership of stock of the Standard Oil of Indiana and other defendant companies. Also "that instead of controlling all the subsidiary companies mentioned in the said decree by and through the Standard Oil Company of New Jersey, the stockholders of the Standard Oil Company of New Jersey have resumed the ownership of the stock of the subsidiary companies, through a pretended distribution thereof from the Standard Oil Company of New Jersey, and are continuing to control all of the subsidiary companies through their ownership of the majority shares of the said subsidiary companies, including the Waters-Pierce Company, just as they had prior to the organization of the Standard Oil Company of New Jersey,.... that said pretended dissolution is a farce, a disguise and a pretext, and has made no change whatsoever in the relation of said Companies or their direction, management and control."  

In the opening legal skirmish of the Waters-Pierce suit, the court, by a temporary injunction, forbade Mr. Rockefeller,

(2) Ibid, P.
and others to exercise the voting power of their stock holdings for the directors of their choice. Meanwhile, the whole matter of the Control of the former subsidiary companies is under investigation. After all, the price control, which is the essence of monopoly, is the best gauge of whether competition has been restored.

During the first two years following the dissolution of the Standard Oil Company, those shareholders of the old New Jersey Company, says the Wall Street Journal, who have held on to all their fractions have benefited greatly in the appreciation in the market value of the Companies' shares and in the cash dividends paid. This paper adds:

"These indicate a total profit in Standard Oil shares since the dissolution (two years) of at least 115 per cent. On December 15, 1911, Standard Oil stock, which included the New Jersey Company and all subsidiaries, sold at $640 a share while today these shares are quoted around $1,230, an increase of $590 a share, or over 90 per cent. Cash dividends paid by the Standard Oil Companies during the past two years have aggregated more than $160,000,000, equivalent to over 160 per cent on the capital stock . . . . . , and equivalent to over 25 per cent on the investment in the old shares at $640 . . . . .
"A review of the thirty-four companies included in the Standard Oil group for 1913, the second year of restored competition between these companies under the watchful eye of the Washington Government, discloses a state of prosperity probably unequaled by any other group of companies in the United States." ¹

The almost complete ineffectiveness of this merely legal dissolution is a striking example of the lack of adaptation on the part of the Courts for the work of re-organizing an industry. It is a travesty upon justice that this trust, unexcelled in the use of unfair methods of suppressing competition by means of which it obtained and maintained its monopolistic position in the oil industry for over forty years, should escape after such a long costly investigation and trial in which the case against the Company was clearly shown. This dissolution, which largely overshadows the good accomplished by the government's suppression policy toward the trusts, has been a large factor in bringing about additional trust legislation and the Federal Trade Commission.

¹ Lit. Digest 48; 740-2, April 4, 1914.
CHAPTER III.

THE DECISIONS AND DISSOLUTION DECREES
OF THE COURTS (CONTINUED).

The Dissolution of the
American Tobacco Company.

The unanimous decision of the Supreme Court, in the suit against the American Tobacco Company, rendered on May 29, 1911, only two weeks after the Standard Oil decision, did not add any new features to the trust policy. Its chief significance lies in the greatness and complexity of the combination involved, the attitude of the Courts in assisting to carry out the trust laws, and the manner and kind of dissolution required.

The history of the Tobacco Trust, which is fully related in the report of the Bureau of Corporations on the tobacco industry,¹ shows that the concentration of control in this industry began with the (old) American Tobacco Company organized under the laws of New Jersey in 1890. The five original Companies entering this company controlled practically all the cigarette production of the

country. The capital stock of $25,000,000, divided among the five companies, was shown to be five times the value of the assets of these companies. From this significant beginning the growth of the combination was one of rapid acquisition and frequent recombination. The capitalization was kept very excessive by the issue of new securities against good will of the combination. The large profits from the start enabled an excessive capitalization. The capital stock of the original company was increased to $35,000,000 the second year. A 90% control of the cigarette trade was secured and maintained by making exclusive agreements for the use of cigarette machines, and by the purchase of competitors. The immense profits of the business were used in the plug tobacco war, waged with fighting brands, sold sometimes below the cost of production, and by purchasing competing plants. The American Tobacco Company sacrificed several million dollars in this war, but it rapidly increased its control in the plug business. Many of the independents, wearied by the fierce competitive struggle, were induced to join a combination of the plug tobacco business in 1888. This resulted in the formation of the Continental Tobacco Company with a capital stock of $62,290,700, which took over the plug businesses of a number of leading independents and also of the American itself. The Continental Company, in the

(1) Bureau's Report Part II, P. 8.
following year, 1899, acquired the Liggett and Myers Tobacco Company, the largest and most important of the plug tobacco concerns, increasing its own capital stock at this time to $97,690,700. Of this stock one-half was issued wholly as a bonus.\(^1\) A strong monopoly control of the plug business was now had. The American Tobacco Company by 1899 had also secured the control of smoking tobacco business, increasing its capital stock during that year from $35,000,000 to $68,500,000.

In 1901, the leading interests of the American and Continental Companies, in order to completely centralize the control of the tobacco industry, organized the Consolidated Tobacco Company, a holding company with a capitalization of $30,000,000, later increased to $40,000,000, all paid in cash. This Company acquired practically all the common stock of the American and Continental companies, issuing in exchange therefor $157,378,800 of 4% bonds. This Company was a large financial success; besides paying for interest on the preferred stock and on its bonds, there accumulated for the common stockholders, during three years and four months, a profit of fully $30,000,000.\(^2\) Enormous sums were expended in extending the operations of this Company, at home and abroad. Many competing businesses were acquired by purchase,

\(^{1}\) Bureau's Report, Part I, P.3.
and either closed or continued as bogus competitors. The
snuf and cigar business were entered on a large scale.
Abroad, a powerful position was secured in Great Britain
and in Cuba.

In 1904 the American, Continental, and Consolidated
Companies were merged into the present American Tobacco
Company, the central concern of the combination, with a
capitalization of $255,292,100, consisting of stocks and
bonds. This Company continued the same methods and policy
which the Supreme Court found characterized the transactions
of this trust at every period.\footnote{221 U.S. 162-3.} The chief means of extend­
ing control over the tobacco industry were by repeated con­
solidations; restrictive covenants with competitors whose
interests had been purchased, not to reenter the business;
binding agreements with jobbers and dealers by which only
the trust goods could be handled; secretly owned and operated
factories and retail stores; trade wars waged with fighting
brands which were sometimes sold below cost; and especially
by the acquisition from competitors or others of shares of
stock, plants, trade marks and other essential elements of
tobacco manufacture.

The structure of the combination in its expansion be­
came an exceedingly complex heirachy of holding companies.
In addition to this, the business of tobacco manufacture
was specialized in separate plants, systematized and co-ordinated to a very high degree.¹ Many plants were abandoned to accomplish this unity.

The American Tobacco Company at the time of the suit, either directly or through its ownership of stock in other companies, controlled ² the production of 75% of the smoking tobacco manufactured in the United States, 80% of the plug tobacco, 79% of the fine cut, 80% of the cigarettes, 13% of the cigars, 90% of the snuff, and 93% of the little cigars. Through its ownership of two-thirds of the stock of the Conley Foil Company, it had a large control over the tin foil business. By its stockholding in the American Snuff Company it had a controlling influence of the snuff business. By its ownership of the stock of MacAndrews & Farbes Company it dominated the manufacture of licorice paste. By the ownership of two-thirds of the ordinary shares of the British-American Company it had a controlling position in trade with foreign countries. Its control of two-thirds of the stock of the Porto-Rican-American Tobacco Company made it the most influential factor in the manufacture of Porto Rican tobacco. Because of its ownership of two-thirds of the stock of the United Cigar Stores Company it was an important factor in the retail tobacco trade.

This American Company had outstanding an issue of 4% debenture bonds of $51,354,100, an issue of 6% debenture

bonds of $52,882,650, $78,689,000 of 6% preferred stock, and
$40,260,400 of common stock. 1 Of the common stock, which
received nearly half the entire earnings as dividends,2 the
29 individual defendants of this suit owned 56%, while the
great majority of the preferred stock, which never had voting
rights, was owned by the public. The capital and surplus of
the entire combination had increased from $25,000,000, in 1890,
to $350,000,000,3 in 1910, and the value of the annual
business from $10,000,000 to over $200,000,000.

The report of the Bureau of Corporations on the tobacco
industry shows conclusively that the exhorbitant prices
charged and immense profits received by this trust were
directly attributable to its high degree of monopolistic
control.4 This control was so complete as to enable it to
absorb practically all the benefits of the reduction of the
Spanish War tax on tobacco products, which added millions
of dollars yearly to its income.5 By the use of this cen­
tralized control, a single branch, the Duke business, valued
in 1885 at $250,000 yielded the owners by 1908, in securities
and cash dividends an aggregate of $37,000,000.6 The rate
of profit for the latter years of the combination, based
upon tangible assets, was nearly four times the rate for
the more important and prosperous of the independents.7

(2) Bureau's Report, Part II, P.3.
(3) See appendix, P. 160.
(4) Bureau's Report, Part II, PP.331-2,239-240.
(5) Ibid, P. 27.
(6) Ibid, P. 312.
(7) Ibid, P. 331.
The rate of profit for the different branches of the trade varied with the degree of control held by the trust.\(^1\)

The constancy of prices retained over long periods of time and with usually raised prices for each succeeding period since the organization of the American Company, are further evidence of the unity of control.\(^2\)

The suit brought against the American Tobacco Company in the District Court of Missouri, in 1907, resulted in a decision favorable in most respects to the Government, but was appealed by both sides. The defendants\(^3\) were twenty-nine individuals, sixty-five American Corporations, most of which were created in the State of New Jersey, and two English Corporations. The corporal defendants exclusive of the foreign ones were classified\(^4\) as American Tobacco Company primary defendant; five other New Jersey corporations as accessories defendants, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and Conley Foil Company; and the other fifty-nine American corporations as the subsidiary defendants.

Concerning the disputed propositions of facts the Supreme Court said, "in our opinion the case can be disposed of by considering only those facts which are indisputable.\(^5\) That the facts condemned the defendants seemed too clear for argument as the court said:\(^6\)

(1) Bureau's Report, Part II, P.290.
(2) See Appendix, P.159.
(3) 221 U.S. 142.
(4) 221 U.S. 143.
(5) 221 U.S. 155.
(6) 221 U.S. 181-3.
Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations:

(A) By the fact that the very first organization or combination was impelled by a previously existing fierce trade was, evidently inspired by one or more of the minds which brought about and became parties to that combination.

(B) Because, immediately after that combination and the increase of capital which followed, the acts which ensued (1)
justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued.

(C) By the ever-present manifestation which is exhibited of a conscious wrong-doing by the firm in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem from the beginning contemplated the mastery of the trade which practically followed:

(D) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco
products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

(E) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade.

(F) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufactures, stockholders or employees, were required to find themselves generally for long periods, not to compete in the future.

The Supreme Court did not believe that the relief granted by the lower court was broad enough and, therefore, from an original point of view gave its own decision, being guided by three dominant influences: (a) giving complete effect to the statute; (b) the least possible harm to the public; and (c) the protection of innocent stockholders. The conviction that a prohibition of interstock ownership would afford only partial relief and that the unification and complexity of the consolidation made it impossible to formulate a remedy that would restore original lawful conditions, deterred the court from decreeing any specific dissolution lest "any remedy it might suggest should operate to injure the public and to perpetuate the wrong created."

(1) 221 U.S. 185.
(2) 221 U.S. 185-6.
(3) 221 U.S. 185-6.
To give permanent relief it decreed: 1

1. "That the combination in and of itself as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Anti-trust Act.

2. "That the Court below, in order to give effective force to our decree in this regard, be directed to hear the parties by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law." 2

3. That six months be allowed to complete this arrangement with an extension of sixty days if necessary.

4. That in case no arrangement was made the court should prohibit defendants from interstate commerce by means of an injunction, or appoint a receiver over the whole property to give effect to the law. Pending adjustment the powers of the defendants were not to be enlarged. This arrangement should be made without unnecessary injury to the public or the rights of private property. Administrative power were granted the

(1) 221. U. S. 187.
(2) 221. U. S. 187.
the lower court "to take such further steps as may be necessary to fully carry out the directions which we have given." 1

In compliance with these directions the Circuit Court heard the parties for the purpose of determining upon a plan of dissolution. The plan adopted was proposed by the defendants. "The proposed plan was filed two weeks before this (final) hearing at which not only the parties, but any persons interested who might wish to express their views as friends of the Court, were given opportunity so to do. While the plan is correctly described as the proposed plan of the American Tobacco Company, since that corporation and the other defendants offer to carry it out, it should be remembered that in its present form the plan is the fruit of much discussion. For upwards of two months successive conferences, in the presence of two or more members of the Court, were had between the Attorney-General and the Counsel and representatives of the Tobacco Company." 2 This group at the conferences also included the attorneys of all the defendants, "and nobody else was permitted to go to these secret conferences." 3

The Circuit Court was not bound by the decree of the Supreme Court to accept this plan of the defendants, yet in discussing the plans submitted by the independents the Court said,"No time need be given to the consideration of

(1) 331 U.S. 187.
(3) Mr. Felix Lery, Hearings Before Senate Interstate Commerce Committee, P. 374, 1911-1912.
these so long as there is no suggestion that the defendants will adopt them. On the contrary, counsel for the defendants expressly stated on argument that they would not undertake to carry them out. Presumably, they think they might better take their chances at a receiver's sale. This Court has neither authority nor power to carry out and enforce any plan of readjustment without the cooperation of the owners of the property, the holders of these stocks and bonds. It would be a sheer waste of time, therefore, to consider any plan radically different from the one now before us."¹ A committee representing a majority of the preferred stockholders also asked that the proposed plan be approved.²

The disintegration of the consolidation into fourteen companies was accomplished by one or the other of the following methods:³  1. By distributing by way of dividends, to the stockholders entitled thereto, securities of other companies held by the companies sought to be disintegrated;  2. By forming one or more new companies and selling to them property and business of the company to be disintegrated, in return for securities of the new companies, and distributing such securities to the rightful stockholders.  3. By sale of property and business for cash;  4. By forming a new company and transferring to it property and business of company to be disintegrated, for cash and new securities to be offered in exchange for and retirement of the se-

curities of the vendor company; 5. By terminating all restrictive covenants and making all free to enter the business; 6. By radical changes in the voting rights of stock.

The first provision of the disintegration plan was the dissolution of the Amsterdam Supply Company. This Company was a wholesale supply house used chiefly by the defendants and all of whose stock was owned by them. Dissolution was accomplished by converting its assets into cash and distributing them to its stockholders.

Next all restrictive covenants, both foreign and domestic, were abrogated so that all were made free to enter the tobacco business.

The disintegration of the five accessory defendant companies followed. First: The Conley Foil Company. This Company whose plant was at New York, completely owned the Johnston Tin Foil and Metal Company of St. Louis, including $100,000 par bonds. These two companies which made the tinfoil used by most tobacco manufacturers were divided. The Conley Foil Company was required to cancel the bonds of the Johnston Tin Foil and Metal Company and distribute the stock of the latter among its own common stockholders. The American Tobacco Company which owned over half the stock of the Conley Foil Company was re-

(2) Ibid.
quired to cease its interests in the latter company by a distribution of its Conley stock among its own common stockholders.

Second: The MacAndrews and Forbes Company. This Company which had two plants, one at Camden, New Jersey and the other at Baltimore, Maryland, produced about 90% of all the licorice paste manufactured in the United States. Over half of its products consisted of a single brand known as "Ship Brand". The MacAndrews and Forbes Company was separated into two Companies by the creation of a new organization— the J.S. Young Company— which received the Baltimore plant with assets valued at $1,000,000 and the brands of licorice paste manufactured at that plant. In payment, the J. S. Young Company issued $1,000,000, at par of 7% preferred nonvoting stock and $1,000,000, at par, common stock. The Mac Andrews and Forbes Company upon receipt of these securities distributed the common stock to its own common stockholders. The preferred stock thus received was allowed to be exchanged, at par, for preferred stock of the Mac Andrews and Forbes Company according to the provisions of the decree. All such preferred stock remaining unexchanged must be sold by January 1, 1915.

This division gave the MacAndrews and Forbes Company a licorice business, based upon the net selling value in

year 1910, of $2,514,184. Of this $2,214,127 was derived from the sales of a single brand. Upon the same basis the J. S. Young Company received a business valued at $1,201,109.

The American Tobacco Company, which held $2,112,900, at par, of the total $3,000,000, of common stock and $750,000, of the $3,758,300, of the nonvoting preferred stock of the Mac Andrews and Forbes Company, distributed the above named common stock as a dividend to its common stockholders at the execution of the decree, and was required to dispose of the preferred stock by January 1, 1915.

Third: The American Snuff Company. This Company held all the stock of the DeVoe Snuff Company and one-half of the stock of the National Snuff Company. The American Company, controlling 90½% of the entire snuff business, was broken up into three companies by the organization of two new companies, the George W. Heline and the Weyman and Brutton Snuff Companies, to which were conveyed certain plants, brands, and the holdings in the DeVoe and the National Snuff Companies. This division upon the basis of data for 1910 is as follows:

|                     | Tangible Assets | Sales Value | Net Income | Business Percent- | Value of Business Percent-
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
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</tr>
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<tbody>
<tr>
<td>American Snuff</td>
<td>$5,075,969</td>
<td>$5,520,423</td>
<td>$1,591,280</td>
<td>32.05</td>
<td>35.55</td>
</tr>
<tr>
<td>George W. Heline</td>
<td>4,909,000</td>
<td>4,494,556</td>
<td>1,259,280</td>
<td>30.88</td>
<td>28.95</td>
</tr>
<tr>
<td>Weyman &amp; Brutton</td>
<td>3,691,588</td>
<td>4,297,486</td>
<td>1,293,759</td>
<td>29.23</td>
<td>27.68</td>
</tr>
</tbody>
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Each of the new corporations paid for the property and business conveyed to it by the issue of $4,000,000 at par of 7% voting preferred stock, and $4,000,000 of common stock. The American Snuff Company thus received $16,000,000 of these new stocks, of which the common stock was distributed as a dividend to its common stockholders. Preferred stockholders of the American Snuff Company were allowed to exchange at par proportionally their preferred stock of the American for preferred stock in the new companies, and all such stock not exchanged and retired must be disposed of by January 1, 1915.

The American Tobacco Company which held nearly half of the American Snuff stock participated in the distribution, and in turn distributed its dividends and stocks of the American Snuff Company to its common stockholders.

Fourth: The American Stogie Company. The only assets of this corporation was all of the issued stock of the Union-American Cigar Company. Its total production based upon the business of 1910 was 1.58% of the cigar production in the United States. The American Cigar Company held $40,000 at par of its $976,000 preferred stock, and $7,303,775 at par of its $10,879,000 common stock. No other defendants owned any of its stocks.

The American Stogie Company in dissolving was given the choice of converting its assets into cash and distributing them to its stockholders, or of effecting a reorganization as best it could; provided that either event, there should be a separation into at least two different ownerships of the factories and businesses then owned and operated by the Union-American Cigar Company.

Fifth: The American Cigar Company. This Company with its various factories, including the production of the companies it owns in whole or part, had 13.36% of the cigar business of the United States for the year 1910. Among these companies was the Federal Cigar Company. Through its Havana Tobacco Company, it controlled 24.06% of the total cigar production in Cuba; 46% of total cigar exportation from Cuba; and 38.15% of cigar exportation from Cuba to the United States.

This American Cigar Company was dissolved and its properties disposed of (a) by selling to the American Tobacco Company for cash the stock it held of the Porto Rican-American Tobacco Company. This latter company was engaged in cigar and cigarette making in Porto-Rico. The price paid was $350 per par share or $2,301,600; (b) by selling to the American Tobacco Company, all the stock of the Federal Cigar Company for $3,965,616.05; (c) by disposing of all interests in the American Stogie Company.

when the latter company dissolved. The American Tobacco Company disposed of all these stocks thus attained as later explained.

The Stocks and securities owned or acquired by the American Tobacco Company as above set forth, either by purchase or as dividends from other accessory defendants, were distributed among the common stockholders. Part of these were distributed at the execution of decree; the distribution of the rest was deferred. The P. Lorillard Company held 11,247 shares of preferred stock and 34,594 shares of the common stock of the American Snuff Company. The American Tobacco Company purchased at par the preferred stock and received as dividends the common stock thus held by the Lorillard Company. The securities to be immediately distributed \(^1\) by the American Tobacco Company to its common stockholders were all held of the following classes: The preferred stock of the American Snuff Company; the common stock of the American Snuff, George W. Heline, Weyman and Briston, MacAndrews and Forbes, and the J. S. Young Companies; the Conley Foil Company stock; the Johnston Tin Foil and Metal Company stock; corporation of United Cigar Stores stock; R. J. Reynolds Tobacco Company stock; ordinary shares of British-American Tobacco Company stock, Limited; Porto Rican-American Tobacco Company stock; and whatever was

received from the American Stogie Company upon its dissolution.

These securities, received and distributed by the American Tobacco Company, had a book value of $35,011,865.03, on December 31, 1910, and their earning capacity for 1910 was $9,860,410.76.

The deferred disposition of stocks to be distributed in a like manner was to be accomplished by January 1, 1915. It included the following securities; the non-voting preference shares of the British-American Tobacco Company; ordinary shares of the Imperial Tobacco Company (of Great Britain and Ireland) Limited; bonds of United Cigar Stores; and the preferred stocks of MacAndrews and Forbes Company. While these securities remained in possession of the American Tobacco Company, the owners were enjoined from voting them, or from gaining them by foreclosure proceedings.

The most important provision of the dissolution plan was the division of the manufacturing assets and business of the American Tobacco Company with two new corporations organized for this purpose.1 To these new corporations, the Liggett and Myers Tobacco Company and the P. Lorillard Company, were conveyed factories, plants, brands, businesses, and capital stocks of tobacco manufacturing corporations. These conveyances were stipulated and were "to include proper and adequate storage houses, leaf tobacco, and other materials

and supplies, provisions for book accounts, including in each case a ratable proportion of the cash held by the American Tobacco Company on December 31, 1910, so that each of the new corporations will be fully equipped for the conduct of the business of manufacturing and dealing in tobacco."

The resources and capitalization of the companies and ways for exchanging and retiring the securities held by the American Tobacco Company were all provided in the dissolution decree. On December 31, 1910, the American Tobacco Company had outstanding $52,882,650 of 6% bonds, $51,354,100 of 4% bonds, $78,689,100 of 6% preferred stock, and $40,242,400 of common stock. It had also a surplus of $61,119,991.63 which would be further increased by the earnings for the year 1910 but from this surplus would be subtracted the $35,011,865.03, the book value of the securities to be immediately distributed as above provided, none of the assets of the American Tobacco Company are overvalued."

The value of the tangible and intangible assets such as brands, good will and trade marks, were figured separately. For each of the new corporations the annual earning, based

(1) Ibid. P. 424.
(3) Ibid. P. 424.
upon the year 1910, would be 11.02% on both kind of assets.

The division among the three companies is shown in the table.

<table>
<thead>
<tr>
<th></th>
<th>Tangible Assets</th>
<th>Intangible Assets</th>
<th>Total</th>
<th>Earning Capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liggett &amp; Myers</td>
<td>30,607,261.96</td>
<td>36,840,237.04</td>
<td>67,447,499</td>
<td>11.02%</td>
</tr>
<tr>
<td>P. Lorillard</td>
<td>28,091,748.86</td>
<td>19,460,752.14</td>
<td>47,552,501</td>
<td>11.02%</td>
</tr>
<tr>
<td>American</td>
<td>53,408,498.94</td>
<td>45,023,974.89</td>
<td>98,433,473.83</td>
<td>11.55</td>
</tr>
</tbody>
</table>

The capitalization of the new organizations will be as follows:

<table>
<thead>
<tr>
<th></th>
<th>Liggett &amp; Myers</th>
<th>P. Lorillard</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>7% bonds</td>
<td>$15,507,837</td>
<td>$10,933,488</td>
<td>$26,441,325</td>
</tr>
<tr>
<td>5% bonds</td>
<td>15,059,589</td>
<td>10,617,461</td>
<td>25,677,050</td>
</tr>
<tr>
<td>7% preferred stock</td>
<td>15,383,719</td>
<td>10,845,981</td>
<td>26,229,700</td>
</tr>
<tr>
<td>Common stock</td>
<td>21,496,354</td>
<td>15,155,571</td>
<td>36,651,925</td>
</tr>
</tbody>
</table>

All these securities of the new corporations were turned over to the American Tobacco Company as the purchase price for the properties and business received. Of these securities the common stock must be sold for cash before March 1, 1913 by the American Tobacco Company to its own common stockholders in proportion of their individual holdings. Three years were allowed to retire the bonds during which time they were to be deposited with the Guaranty Trust Company of New York. Each 6% bond holder of the American Tobacco Company was to be offered $120 cash for half of his holdings, and for the other half, the 7% bonds at par of the new companies. Each 4% bond holders of the American Tobacco Company was to be offered $96 in cash for half of his holdings and for the other half, the 5% bonds of the new companies. Also each preferred stockholder
of the American Company was to be offered the right to exchange one-third of his holdings at par for 7\% preferred stock of the new companies.

The effect of these changes was to pay off the entire bonded indebtedness ($104,236,750) of the American Company and reduce its assets accordingly. All its outstanding securities remaining would be its preferred ($52,459,400) and common ($40,260,400) stock. As provided in the decree the preferred stock was given full voting rights so that the twenty-nine defendants would be deprived of a majority vote.

To insure competitive conditions despite the common ownership of stock and the unequal distribution of the tobacco business, the court relied upon the following restraining provisions of the decree: (1) No two concerns shall have any common directorships for a period of five years; (2) No principal or accessory company shall hold stock in another principal or accessory company; (3) None of the companies shall have a buying or selling agency in common with any other company; (4) There shall be no common stock ownership of outside concerns; (5) The different companies shall purchase no stock or property from each other; (6) All agreements and covenants both foreign and domestic with companies or in-
dividends are rescinded and none could be made in the future; (7) No arrangement shall be made or entered into among the different companies relative to; (a) price of product or leaf; (b) control or management; (c) apportionment of business; or (d) jobbers agreements; (8) There shall be no common officers for the different concerns; (9) There shall be no common clerical organization for two or more of the companies; (10) No voting trust or similar device shall be created; (11) The twenty-nine individual defendants shall not increase their individual holdings for a period of three years save "That any of said defendants may, notwithstanding this prohibition, acquire from any others of said defendants, or in case of death from their estates, any of the stock held. many of said corporations." ¹

The chief problems presented in the disintegration and reorganization of the tobacco combination were two. The first was, as far as was practicable, to eliminate the collective control of the twenty-nine individual defendants from the new companies. This problem was disposed of by several measures. Voting rights were conferred upon the preferred stocks. The common stockholders of the American Tobacco Company were required to purchase with cash the common stock of the new companies organized. Preferred stockholders

of the American Company were allowed favorable exchange of their stock for stock of the new companies. Also the securities held by the American were to be disposed of either at once or by 1915. To decrease the monetary influence of the American its bonded indebtedness was all to be paid, the bond holders being induced to exchange the bonds for the securities of the new companies at more favorable rates.

The second problem was the distribution of the business of the combination in such a way as to make no part taken over by each concern monopolistic. This was solved by limiting the business of each concern to approximately one-third of the total business in any branch of the trade. The previous concentration of manufacture, the extraordinary development of single brands and the difference in their profitableness made this distribution the most difficult feature of the disintegration.

On October 25, 1911, by privilege of the court, the National Cigar Leaf Tobacco Association, the Cigar Manufacturers' Association, and the Independent Tobacco Salesmen's Association through their counsel, Louis D. Brandeis and Felix H. Levy, submitted objections to the plan of dissolution filed by the American Tobacco Company. While this plan was afterwards modified in some parts the chief objections remained in the decree.

They (Independents) claimed that "the plan if approved,

(1) Hearings Before Committee on Interstate Commerce, United States Senate, 62nd Congress, 2nd Sess., 1911-1912 pp. 315-350. Hereafter referred to as Hearings
would result in legalizing monopoly instead of restoring competition. Its effects would be more injurious than the continuance of the present illegal monopoly. There are five fundamental defects in the plan, each so serious that it forms alone a sufficient ground for the rejection of the plan.

"First (Community of Interest)\(^1\) The plan proposes to divide the main properties of the trust among several corporations legally distinct, but to distribute the stock in these several corporations pro rate among common stockholders of the American Tobacco Company. No plan can be effective to restore competition which does not include as an essential condition a provision that the separate corporations or segments which are to carry forward the business of the trust shall at the outset and for a limited period thereafter, be owned by absolutely distinct groups of individuals."\(^2\) While the twenty-nine defendants now controlling 56% of the voting power "will have a smaller control, yet it is obvious that a legal majority of the stock of a corporation is not essential to actual control. A small minority may control; and as the same individuals would at the outset select the directors and the officers of each

\(^1\) Ibid. 314-5.
\(^2\) See table in Appendix P. 160
of these colorable competitors it is certain that the officers and directors of the several companies would be friendly if not in fact identical.\(^1\) It was held that not only the twenty-nine defendants but all who shared in the distribution should be enjoined from acquiring stock in the other companies. How limited a number controlled the entire business of the combination is shown in the Report of the Bureau of Corporations.\(^2\) Fifty-two stockholders held 355,065 shares of the total 402,424 shares of common stock. The directors and four others together owned 77%. Indeed, ten of the largest, six of whom were directors held 63% of the total. The Supreme Court said that "the same six men in control of the combination through the Consolidated Tobacco Company continued that control by ownership of stock in the merged or new American Tobacco Company."\(^3\) This Court also held that "in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof, would afford no adequate measure of relief."\(^4\)

To this objection of the independents the Circuit Court entrusted with dissolution said: "The main objection to the proposed plan, an objection found in every document filed by those who were given permission to be heard and

\(^{\text{(1)}}\) Ibid P. 316.
\(^{\text{(2)}}\) Part, P.
\(^{\text{(3)}}\) 221 U. S. 174.
\(^{\text{(4)}}\) 221 U. S. 186.
which seemed to be principally relied on by those who spoke, is what is referred to as "Common stockholding." For instance, under the plan two new companies, "Lorillard" and "Liggett and Myers" will be formed out of the American, which will itself, thus reduced in size, continue in existence. The same individuals, the present 1,800 or more common stockholders of the American, will hold the entire common stock of each of the other companies. A similar condition will exist with some, at least, of the other companies. It is contended, that, although under such circumstances there may be potential competition, no real competition can exist. With this argument or the reply to it, it seems to me this court is not concerned. In two recent cases (Northern Securities and Standard Oil) the Supreme Court---- in the disintegration left the stock of the separate entities into which the group was split in the hands of the same body of individual stockholders. Since there was no disapproval of this method of disintegration indicated in either opinion it would seem that the question whether or not common stockholding is "repugnant to the law"---- has been settled for this Court by Controlling Authority."

"Second,(Dominating Concerns) The plan provides for a division (generally) among only three huge corporations of

nearly all the properties now held by the trust. 

The three or four concerns formed to carry forward the main business of the Tobacco Trust would together be in a position to crush the independents given more effectually than has been done in the past."  

1 The relative position in the trades show this:

**Distribution of Different Branches of Tobacco Business by volume**

<table>
<thead>
<tr>
<th>Company</th>
<th>Cigarettes</th>
<th>Smoking Plug</th>
<th>Fine Cut</th>
<th>Snuff Cigars</th>
<th>Little Cigars</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>37.11</td>
<td>33.08</td>
<td>25.32</td>
<td>9.94</td>
<td>6.06</td>
</tr>
<tr>
<td>Liggett &amp; Myers</td>
<td>27.22</td>
<td>20.05</td>
<td>33.83</td>
<td>41.61</td>
<td></td>
</tr>
<tr>
<td>P. Lorillard</td>
<td>15.27</td>
<td>22.82</td>
<td>3.73</td>
<td>37.80</td>
<td>5.72</td>
</tr>
<tr>
<td>R. J. Reynolds</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Union American</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Snuff</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>40.68</td>
</tr>
<tr>
<td>Bristol &amp; Weyman</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>32.05</td>
</tr>
<tr>
<td>All Independents</td>
<td>19.80</td>
<td>21.39</td>
<td>19.05</td>
<td>20.65</td>
<td>7.82</td>
</tr>
</tbody>
</table>

The cigarette business of the trust carried on in seven separate factories was divided into three companies. It should be divided among seven. It was also charged that the distribution of the cigarette brands was such as to give

(1) Hearings, P. 316.
the trust companies dominance in this branch of the trade. The smoking tobacco business of the trust made in twelve separate factories was divided among four concerns. It should have been divided among twelve. There was the same charge of improper distribution of brands. The plug tobacco-business of the trust carried on in twelve factories was divided among four companies where it should have been among twelve. The same charge as to distribution of brands was repeated. The little cigar business of the trust carried on in seven separate factories was divided among three concerns. It should have been among seven. The snuff business of the trust carried on in more than three factories was divided among three companies but should have been divided among six. The trust controlled 90% of the licorice-paste business. This was divided among two companies. It should have been four as there was only one independent competitor. It was also charged that "the control by the trust of the licorice-paste business gave it control of the chewing-tobacco business, as chewing plug cannot be made without licorice; and its control of the licorice-paste business of the whole country is fortified by its control of the raw material, licorice root. The plan makes no provision for breaking the trusts' monopoly of licorice root." The tin-foil business of the trust was divided among two plants. It should have been divided among five separate companies.

(1) Hearings, P. 318. These three companies controlling the trust business in this trade had all been found guilty of monopolizing licorice paste and fined in 1907. 212. U.S. 585.
To this second objection of the independents the Circuit Court said "Manifestly the minuter the fragments into which the old combination is split, and the more they are prohibited from conducting business as other companies are free to conduct it, the less will be their ability to compete with such other companies. This whole line of argument deals with the economics of the tobacco business. No doubt the novel problem presented to this court is connected with questions of economics as well as with questions of law. But this is a court of law not a Commerce Commission, and the legal side of the proposition would seem to be the controlling one." "Third. The plan provides that the three companies among which all the manufacturing properties of the trust are divided shall be "each completely equipped for the conduct of a large tobacco business." No independent concern is now "Completely equipped for the conduct of a large tobacco business, "or indeed completely equipped to do any tobacco business covering all the main branches of the tobacco trade." The impossibility of fair competition is due to the cumulative effect of three advantages which the trust secured through its illegal combination: (1) The large percentage of the whole business in each department which the trust companies received; (2) Their business

(2) Hearings P. 319.
extends to all departments of the tobacco trade; (3) The indispensable brands by means of which the dealers would be compelled to give preference to its other products over those of the independents. These brands would also give large profits with which competitors could be crushed.

Fourth: Many restraints on unfair competition were asked for by the independents. Some of these were granted and the rest wholly or in part refused. The independents contended that for a limited time they should have more than ordinary protection. The request that the twenty-nine defendants be enjoined from increasing their holdings was granted for a period of three years but the special provision allowing the defendants to purchase each others stocks made this less effective. The request for the liberty of applying to the court for relief in case of alleged violation of the injunctions was denied also.

Fifth: The decree left the United Cigar Stores Company intact and passed it over as a complete entity to the common stock holders of the American Tobacco Company. The Independents asked that this company growing up through the illegal operations of the trust be separated into ten separate corporations with separate group of owners for each. Its strong bond of union with the American and its illegal practices was a menace to manufactures and retailers.

(1) Hearings, P. 320.
(2) Hearings, P. 321.
The British-American and the Reynolds Tobacco Co. were in the same manner given wholly into the same hands.¹

Felix H.-Levy, arguing for the independents, said, "The United Cigar Stores Co. has been the most powerful agency of the combination in obtaining the control of the tobacco industry. Through the hundreds of stores which that company operates, and by virtue of the special trade advantages given to it by its owner, the American Tobacco Co., and by exercise of the most ruthless and cruel practices in driving out retail opposition and obstructing the avenues of distribution on the part of independent manufactures, this Company has proven the most effectual of all the barriers to the entry of others into the tobacco trade. Of the mild expedient of merely separating this company from the combination but of leaving its control in the hands of the same men who have heretofore controlled the combination, if the rose-water remedy of gently setting aside this vast agency of distraction from its former control by the combination and placing it in the hands of the same men who control that combination, is to be adopted, it is no exaggeration to say that, in this respect at least, the decree of the Supreme Court of United States might as well have been a blank piece of paper". As to the United Cigar Stores

(1) Hearings P. 349.
Company the Attorney-General said, "there is one feature of this combination which, in my personal experience, has been the subject of more complaints than all the rest put together. That is the United Cigar Stores Company. The connection of that organization with this combination had given the combination the greatest opportunity to— I do not know that I can say to injure, but certainly to harass, the domestic trade and to incense a larger number of people than anything else they have done, because they have gone in and reached the poor comer dealer, bought the house over his head and when his lease came to an end, instead of his being able to renew it as formerly, he finds that he can not get a renewal of the lease, that it has been taken by the United Cigar Stores Co. It was the hand of the trust; it reached out and touched the little man who has nobody to protect him. I have on my files in Washington letters— my files are full of letters and complaints running down to within the last few days, and I do think if that concern can be cut lose,— it would do more to make the rest of the plan acceptable to the people of this country than anything else that could be done........, they are a great big organization today. They have something like a thousand stores, or seven hundred or eight hundred, at least, scattered throughout the country, and they have ample capital, and, with the impetus that they have got they are the most potent competitor of the small dealer in the United States.------

Therefore, I say, it is entirely within your honors'}
power, whether you chose to exercise it or not, to say as a condition of this plan: You have got to get rid of them and turn them loose so that that concern will no more have any connection with the American Tobacco Co. or with any of the distributive companies or with any of these individuals who have built up this combination through so many years."

Many others have discussed the effectiveness of this dissolution. Mr. Roosevelt says it "practically leaves all the companies still substantially under the control of the twenty-nine original defendants. Such a result is lamentable from the standpoint of justice. The decision of the Circuit Court, if allowed to stand, means that the Tobacco trust has merely been obliged to change its clothes, that none of the real punishment, while, as the New York Times," a pro-trust paper, says, the Tobacco concerns in their new clothes, are in a position of "ease and luxury" and "immune from prosecution under the law."

"Surely, miscarriage of justice is not too strong a term to apply to such a result when considered in connection with what the Supreme Court said of this Trust."²

It is too early to detect the full effects of this dissolution. Attorney-General Wickersham says the "plan, with the restrictive provisions embodied in the decree, will accomplish a recreation of lawful conditions, and being so convinced, opposed the efforts of outsiders to inject them-

(1) Stevens, W.S. Industrial Combinations and trusts, Exhibit 5 Pp. 483-4.
(2) Outlook, Nov. 25, 1911, V. 99 P 711.
selves into the situation, and to delay or prevent the carrying out of the plan. .... Except the enforced sale and distribution to outsiders of the United Cigar Stores Company, and on authorization to the Government to apply to the Court for relief at any time within five years upon a showing that competitive conditions have not actually resulted from the plan,"¹ all the requests made by the Government have been granted.

When the order was given by the Supreme Court to dissolve the corporation, the stock of the American Tobacco Company fell to $390 per share; but after the decision of the Circuit Court as to the kind of disintegration which was to take place, the common stock rose within a few weeks to as high a price as ever before in the history of the company, with the exception of a single day, $529 per share.² Moreover this was right after four years of litigation which cost about $22,000,000 as claimed by the defendants.³ Mr. Louis D. Brandeis, counsel for the independent, declares that "A combination heretofore illegal has been legalized. The value if that legalization is shown by the high market value of the common stock of the American Tobacco Company. (And) At a time when the business of the country is depressed, when railroad shares and other industrial stocks are relatively low,..... Surely other trusts would welcome such an "immunity bath".⁴ That the dissolution is a failure because the price of stocks immediately increased does not necessarily follow. The stocks were depressed during the period of litigation and

¹ World To-day Dec. 1911, V. 21, P 1439.
² Hearings, Senate Interstate Commerce Committee, P. 1368.
the fact that a surplus of more than $61,000,000 was accumulated in less than a decade allowed the prospect of a freer distribution of earnings, even if in the aggregate the earnings were less.

That the plan of dissolution was defective in some of its most important features has been shown in later dissolutions by the courts, as well as by certain provisions of the anti-trust legislation of 1914. It was a more effective dissolution than in the Standard Oil Case. The mere prohibition of interstock ownership was not deemed sufficient in this case. The business of the trust was reorganized and more restrictions placed upon the defendants. The new corporations formed were well equipped to maintain all the economies of production. The most serious defect of the dissolution was the arrangements of the stocks and securities. While the defendants did not have a direct majority vote as formerly yet their common interest in the new corporations remained, and by a slight enlargement of the Community of interest a controlling interest could be secured. The maintenance of a community of interest was made the more probable and easy by granting to the defendants the privilege of exchanging their shares among themselves. The defendants control could be perpetually retained. A second defect was the the prohibition of common directors for only a period of five years. No assurance could be had against the gross abuse of this privilege at the expiration of the period. This latter defect will be partly overcome by
the provisions of the anti-trust legislation of 1914. The control of the American Tobacco Company over the United Cigar Stones Company should have been released. Even the Attorney-General urgently plead for this inclusion in the decree.

This decree of dissolution was not framed by the Circuit Court judges entrusted with the disintegration proceedings. It was signed by them because both parties to the litigation agreed upon its provisions. It is standing evidence, as is the Standard Oil dissolution, of the lack of adaptation of the Courts in handling the complex administrative problems involved in concentrated industry. For the task of reorganizing the great properties of an industry men who are trained in business affairs are a necessity.

The Dissolution of the Powder Trust.

The Powder Trust was the oldest save one of the trusts dissolved. Its history began in 1872 when seven of the largest manufactures of powder and other explosives in the United States entered into what was called the Gunpowder Trade Association. At the quarterly meetings of this Association, or through a chosen committee of five members, prices and the apportionment of trade and territory were determined upon for the constituent members who were required to observe these arrangements under penalty of fines.

(1) See Page 12
It also authorized the cutting of prices in particular localities in order to drive competitors out of the markets or force them to come into the association, and apportioned the losses, if any, from such price cutting between the members. Following 1872, ten more companies were taken into the Association, which continued in the same purpose and methods, though with changes in the fundamental agreements,\(^1\) until 1902. The gunpowder trade had been monopolized by 1890 and the dynamite trade by 1902. By means of the various successful agreements both domestic and foreign\(^2\) as to prices, distribution of trade and territory there had developed by this time close and harmonious relations among the members of the association.

In 1902, the E. I. du Pont de Nemours and Company, then the most influential member of the organization, was reorganized into a Delaware corporation, known as E. I. du Pont de Nemours Company, with a capital stock of $20,000,000. Three of the du Pont brothers, who organized this company, received as promoters' profits almost half the capital stock and thereby retained its control. In 1903, a New Jersey holding company was organized, the E. I. du Pont De Nemours Powder Company, with a capital stock of $50,000,000 of which half was common stock. For $30,200,000 of this stock the Du Pont Company of 1902 transferred to the 1903 corporation all its stockholdings in the other (35) companies.\(^4\) The policy already inaugurated in 1902, of acquiring the assets of other

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(2) 188 Fed. Rep. 139; Brief V, 2, pp.174-175.
(3) 188 Fed Rep. 140.
corporations and vesting the ownership of their plants and the control of their business with the parent company, was pursued more vigorously than ever. So successfully was the policy carried out that within a period of a little over three years, this company had acquired the stock of and caused to be dissolved sixty-four corporations engaged in the manufacture of powder and other explosives. ¹ Besides the possession of these dissolved corporations, this powder combination had, in 1907, through aid of its subsidiary corporations, control of 64% of the black blasting powder of the United States; 72% of saltpeter blasting powder; 72% of dynamite; 73% of black sporting powder; 64% of smokeless sporting powder; and 100% of the smokeless military and ordnance powder, exclusive of what the Government itself made.² Frequent advances in prices were evidence of the ability to control the business in explosives. In 1903, a sales board was created which, after 1904 when the powers of price fixing and policies of the corporation were brought under corporate management, superseded the committee plan of price making and control.³ The Circuit Court held that the "du Pont Company of 1903 was created to aid the combination in

concentrating its power and fastening its hold on the monopoly which it had seditiously built up, and which brough to its members in the short period of six years the enormous profit of $11,000,000 in dividends and $12,000,000 or $13,000,000 in its surplus account. The control of the du Pont Company of 1903 remained in the du Pont Company of 1902.

In the suit against the du Pont Company of 1903, in the United States Circuit Court of Delaware, fourteen corporations and fourteen individual defendants were found to be violating the Sherman Act. An interlocutory decree rendered June, 31, 1911, granted to both the petitioner and defendants a court hearing at which a plan of dissolution would be agreed upon. Either side could submit their own plan or plans, but any such plans must not deprive the defendants of the opportunity to recreate a new condition in harmony with the law.

On June 13, 1912 the above Court filed its final opinion and decree in this suit. The final decree enjoined and ordered dissolved the combination consisting of twelve corporations and fifteen individual defendants. Of the individual defendants, ten were du Ponts by name.

The decree ordered the properties of the following companies to be distributed among their stockholders; the Hazard Powder Company, Delaware Securities Company, Delaware

(2) 188 Fed. Rep. 156.
(3) W. S. Stevens, Industrial Combinations and Trusts, P.463 of Exhibit 3.
Investment Company, California Investment Company, Judson Dynamite and Powder Company, and, unless as provided for below, the Laflin and Rand Powder Company, and the Eastern Dynamite Company. All or a majority of the stocks of each of the above corporations was owned by the du Pont Company of 1903. The du Pont Company of 1902 which owned the stock of the du Pont Company of 1903 was ordered dissolved and its property distributed among its stockholders.

The property and business still remaining with the Du Pont Company of 1903 was ordered to be shared with two new corporations provided for, with the alternative that the Laflin and Rand and the Eastern Dynamite Companies referred to above might be reorganized and utilized instead of the two new corporations, or either of the former could be used for one of the latter.

To the first of these two new corporations were assigned three plants for the manufacture of dynamite, one in New Jersey, one in Michigan, and one in California; seven plants for the manufacture of blasting powder, two in Pennsylvania and one each in New York, Ohio, Wisconsin, Kansas and California; and two plants for the manufacture of black sporting powder, one in Connecticut and one in New York. To the second cor-

(1)
poration were allotted mur plants for the manufacture of dynamite, one located in New Jersey, one in Michigan, one in Missouri, and one in California; and five plants for the manufacture of black blasting powder, two in Pennsylvania and one each in Tennessee, Illinois, and Kansas.

This distribution would still leave the Du Pont Company of 1903 eight plants producing dynamite, one located in each of the states of Missouri, Wisconsin, Washington, Pennsylvania, Colorado, Indiana, New Jersey, and Alabama; seven plants manufacturing black blasting powder, one each in Colorado, Alabama, Pennsylvania, Iowa, W. Virginia, Oklahoma, and Minnesota; two plants for the manufacture of black sporting powder, one in Delaware and one in New Jersey; and also two plants for the manufacture of government smokeless powder both located in New Jersey.

A partial division of the smokeless sporting powder business was made by requiring that a plant located at some easter point, with a capacity of 950,000 pounds per annum of this trade, be transferred or furnished to the first of the new corporations organized. The du Pont Company was left the sole contractor for Government smokeless powder as the Court maintained that a division of that business among several competing companies would tend to destroy the practical and scientific co-operation now pursued, between the
Government and the defendant company just named, and to im­pair the certainty and efficiency of the results thus ob­tained. (The Government by ownership and operation of its own plants is enabled to control the price it pays for powder.)

The method of handling the securities of the new corpora­tions was much different than in the analagous case of the American Tobacco Company. The new corporations were re­quired to pay for the properties, brands, good will and business transferred to them by issues of bonds and stocks.¹ Fifty per cent of the purchase price consisted of non­cumulative bonds not secured by mortgage bearing six per­cent that was payable if earned by the company during said year, or to the extent thereof earned but not otherwise. These bonds were to be paid within ten years. The other half of the purchase price was the total stock issue of the two new corporations. All of this stock, some of which had no voting rights, and half of the bonds or proceeds of the bonds were ordered distributed among the stockholders of the du Pont Company of 1903. Such of the stocks as were due to any of the twenty-seven defendants was ordered to be one-half voting and the other half non-voting stock. Upon transfer of death or will to some person not one of the defendants non-voting could be exchanged for voting stock. This privi­lege of exchange was extended to any purchaser of non­

¹
voting stock provided the purchaser was not a defendant or
the wife or the child of one of them.

The decree ordered that as far as practicable a fair
proportion of the explosives business should be transferred
to the new corporations. These new corporations were granted
for a period of five years free access to the records of the
Trade Bureau of the trust, and also to such facilities as
the du Pont Company may possess in reference to the pur-
chase of materials, experimentation, scientific research,
and the like.

The defendants and the new companies were enjoined
from: (1) Uniting in any way the businesses of the new
concerns with their own or vice versa, or placing the stocks
of either in the hands of a voting trust; (2) Making any
agreement or arrangement relative to prices or apportioning
trade by either customers or localities; (3) Using local price
cutting to eliminate competition, except that prices may be
lowered to meet or compete with those of rival manufactures.
(This was one of the leading weapons of the trust); (4) Re-
taining either the same clerical force or the same office;
(5) Operating bogus independents, all subsidiary concerns us-
ing their names upon their products were required to use also
a statement indicating their control.

The three corporations, stockholders, officers, and
agents were further enjoined for five years as follows: (1)
No one corporation shall have an officer or director who also holds such an office in either of the other corporations;

(2) No corporation shall have the same sales agent as another, though they may sell through the same merchant or dealer;

(3) None of the corporations shall acquire stock, factories, plants, brands, or business of any other.

For three years the individual defendants were forbidden to increase their stock or other interests in the new companies, although they could acquire the interests of other defendants. A number of agreements entered into by the defendants were ordered annulled. Six months were allowed to put in force the terms of the decree; that is until December 15, 1911. The Court retained its jurisdiction of the cause and ordered that a report be made for its approval after the plan had been carried out.

After a consideration of the history of the Powder Trust and its dissolution, W. S. Stevens declares that the "effect of this dissolution is difficult to predict. The distribution of plants in order to insure competition promises well. In the transfer of securities the theory has been apparently to divide the strong stock control of the du Ponts by returning half the purchase price of the plants transferred in an income bond. The du Ponts interest after this process is again split in half by the distribution to the twenty-seven
defendants of half their stock in a non-voting issue. Regarding this latter provision it is to be borne in mind that by sale to other than the defendants or their wives and children such non-voting stock becomes exchangeable for voting stock. This clause is pregnant with suggestions of dummy vendies. It is very questionable if the division into voting and non-voting stock as it stands gives any real safeguard. Had the court forbidden the exchange of the non-voting stock for voting stock for a period of five years or more this provision would have been more satisfactory.

"As in the Tobacco dissolution which contains the same clause, the provision against the acquisition for a period of three years by defendants of further interests in the new companies than those assigned, is open to serious criticism. The result after three years no one can fortell. It may be pointed out further that the clause forbidding local price cutting contains one exception that makes it of no value if by chance an independent manufacturer cuts the price first. As the clause now stands that act would apparently justify a trade war." \(^1\)

In conclusion it may be said that the injunctions laid upon the defendants and the three corporations are very similar to those of the Tobacco Dissolution Plan and are to that extent subject to nearly all of the objections raised against that plan. \(^2\)

\(^{(2)}\) See pp. 96-100
The Dissolution of the Union Pacific Railroad Company.

The main line of the Union Pacific Railroad Company extends from Council Bluffs, Iowa to Ogden, Utah. From Ogden the Union Pacific Company has a line extending in a north westerly direction to the coast at Portland over the Oregon Short Line and the Oregon Railroad and Navigation Company. At Portland it has steamboat connection with San Francisco. This was a much longer route to the coast than from Ogden directly to San Francisco over the Central Pacific, which was only 800 miles. The Central Pacific was owned by a strong rival system—the Southern Pacific Railroad, and much of the Union Pacific's though trade had to be turned over to its competitor at Ogden. The Union Pacific tried repeatedly to avoid its "bottled up" position at Ogden by purchasing the Central Pacific Railroad, but without success. Finally, the Union Pacific secured control of Central Pacific indirectly, in 1901-2, by purchasing a controlling interest in the Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles and railroad lines aggregating over 8,000 miles together forming a transportation system from New York and other Atlantic ports to San Francisco and other Pacific ports, with various branches and connections, besides a steamship line from San Francisco to Panama thence to the
Orient, and a half interest in another line between the two latter points.\(^1\)

This stock thus purchased, which was held by a proprietary company of the Union Pacific, the Oregon Short Line, amounted to 46 percent of the total stock of the Southern Pacific Railroad. While this was less than a majority of the stock, the Supreme Court held "this stock did prove sufficient to obtain control of the Southern Pacific."\(^2\)

In fact as much was frankly admitted by Mr. Harriman who was the prime mover in the purchase of the Southern Pacific.\(^3\)

After the purchase Mr. Harriman, who dominated the affairs of the Union Pacific, became President and Chairman of the Executive Committee of the Southern Pacific Company with the same ample powers which he had in like positions in the Union Pacific.\(^4\)

A suit brought under the Sherman Act against the Union Pacific in the Circuit Court for the District of Utah resulted in a dismissal of the Government's bill charging that the acquisition of the Southern Pacific stock was illegal. This dismissal was based upon the ground that the Union Pacific and Southern Pacific were connecting, and only incidentally, competing lines. One of the three judges dissented from this view. The case then went on appeal to the Supreme Court. The Supreme Court rendered its decision December 2, 1912. This Court declared that the purchase of the stock of the

\(^1\) 226 U. S. 93.
\(^2\) 226 U. S. 95-6.
\(^3\) Ibid.
\(^4\) Ibid.
Southern Pacific constituted an unlawful combination in restraint of trade. Three months were allowed the Government and defendants to work out a plan of dissolution agreeable to the District Court. In the meanwhile the Union Pacific was enjoined from exercising control, voting, or paying dividends on the stock while in its possession, or in the possession of a subsidiary company, or held by a corporation or person for the Union Pacific. It was meant to be a real dissolution by a compulsory sale of the stocks.

Very shortly after the decree, both the Government and the defendants joined in asking the Supreme Court to instruct the District Court whether a pro rata sale or distribution of the Southern Pacific stocks to the share holders of the Union Pacific Railroad, as was done in the Norther Securities and Standard Oil dissolutions, would meet the requirements of the Supreme Court. The appellees urged that such a dissolution would end the consolidation, especially since the Union Pacific had outstanding $316,215,600 of stock and $37,000,000 of convertible bonds, and since these securities were distributed among 22,150 stockholders.

The Supreme Court refused this proposed plan, maintaining that it would not end the combination. This Court declared it would not be bound by the former precedents saying that "each case under the Sherman Act must stand upon

(2) 226 U. S. 470-7.
(3) 226 U. S. 472,476.
its own facts, and we are unable to regard the decrees in the Northern Securities Company case and the Standard Oil Company case as precedents to be followed now, in view of the different situation presented for consideration."¹ No credence was given to the alleged wide distribution of stock ownership. While the Union Pacific had 22,150 stockholders, the Chief Justice found that 68 stockholders owned 44% of the stock, and 300 others owned 18.8% of it.² Thus, 368 persons controlled 62.8% of all the stock of the Company, so that consolidation might easily be perpetuated through the activity of the large stockholders. The purpose of such suits as this under the act of 1890 is to end such unlawful combinations and conspiracies by as effectual means as a court may.

Much difficulty was experienced in arriving at some agreeable plan of dissolution. Upon the refusal of the first plan by the Supreme Court, a second scheme was tried.³ It proposed; first, a sale of Southern Pacific stock, under privileged conditions, to all shareholders both of the Union Pacific and Southern Pacific Companies, except the Union Pacific Corporation or the Oregon Short Line Company; and secondly, with the funds thus acquired, an outright purchase by the Union Pacific from the Southern Pacific of the Central Pacific link. This plan also failed. Conflicting stipulations in the bond issue, and the almost hopeless phisical entanglement of the two properties hindered

¹ 226 U.S. 474.
² 226 U.S. 476
in the carrying out of this plan. But the chief objection came from the aroused public sentiment of California, which through its railroad commission insisted upon the continuance of actual competition at all points. Thus the Union Pacific lost the long coveted short line to the coast.

A third plan proposed a pro rata distribution of the Southern Pacific stock among the shareholders of the Union Pacific, as by the plan vetoed by the Supreme Court, but such a disposition was to be coupled with disfranchisement for all purposes of control, of all holders of 1,000 shares or over. A trustee was to issue certificates of interest upon deposit of all Southern Pacific shares held by the Union Pacific, which were to carry no voting rights while so held, and which should be exchangeable for actual Southern Pacific shares only on affidavit that the applicant for exchange held less than 1,000 shares. This plan would exclude 368 private shareholders from further increase of their holdings, and in so doing be of doubtful legality.

By the plan finally adopted in July, the Union Pacific was obliged to dispose of its 46%, $126,650,000 par value, of the Southern Pacific stock. Of this amount, $38,292,400 was exchanged with the Pennsylvania Railroad for stocks of the Baltimore and Ohio Railroad, a competing line of the former railroad. This was an attempt at a double dissolution of two railroads, by substituting in each case control or at least

(1) Ibid.
a dominant interest in a competing line for the interest of merely a connecting line. The stocks of the Baltimore and Ohio thus acquired by the Union Pacific were distributed as a dividend among its shareholders. This still left the Union Pacific with a balance of $88,357,600 of Southern Pacific stock. This amount was distributed among the other general shareholders of the Union Pacific limiting the amount received by any one shareholder to 27 per cent of his individual holdings. In restoring these stocks, the expedient of issuance of certificates of interest by a trustee to be exchanged for actual stock upon affidavit that purchase was made in good faith on his own behalf, independent of the Union Pacific interests, was borrowed from the preceding plan.

This plan of dissolution left the Central Pacific in the possession of the Southern Pacific, a feature of the dissolution held to be essential by the outgoing administration, but not emphasized by the new Democratic Attorney-General. The Harriman interests had always held right to the possession of the Central Pacific under the Acts of Congress of 1862-'64, which aimed to encourage by liberal land grants and subsidies the construction of the first transcontinental railroad, and which provided that "the whole line of said railroad..... shall be operated and used for all pur-
poses of communication...... so far as the public and Government are concerned, as one connected continuous line."

Reconsideration and conviction upon this point led to the institution of another suit in 1914 by the Department of Justice, this time to compel the Southern Pacific to terminate its control of the Central Pacific. The Government contended that such a change would promote the public, especially for California and the Pacific slope, by having a direct continuous transcontinental line that could freely compete and bind more closely the East and West. Logic as well as some of the facts of the situation seem to support the Government in its contention even though certain Californai shippers opposed such an arrangement at the time of dissolution.

The dissolution of the Union Pacific marked a decided advance over the previous dissolutions. The defendant corporation adjudged illegal was denied the privilege of retaining any stock or ownership in the properties illegally joined. No controlling interest in the Southern Pacific was allowed among the shareholders of the defendant corporation. The portion Southern Pacific stock received by the latter shareholders was in proportion to their individual holdings and then only upon affidavit of no intent to unite with the Union Pacific interests.

(1) Ripley, P. 569.
(2) Ibid.
The adoption of such a policy had been far more urgent in previous dissolutions. The Union Pacific had a far better justification for its combination. Neither had it been charged with the flagrant abuses or the extortion of excessive prices, which had usually characterized the corporations previously dissolved. Had such measures as forbidding large stock ownership been adopted in the Standard Oil and American Tobacco Company dissolutions, better results would have followed.
Suits Against the Anthracite Coal Combinations

A study of the anthracite coal combination and the efforts made to break its power brings an added sense of the complexity of the trust problem, which presses upon our courts and law making assemblies for solution. An extended study of this combination both as to its history and present legal position has recently been made by Mr. Eliot Jones: The Anthracite Coal Combination in the United States. This work published in the Harvard Economic Studies has furnished the basis for the following pages on this subject.

The situation of the anthracite coal industry of the United States is such as to invite concerted action and make easy of accomplishment any purpose to dominate the supply and control of prices of this commodity, a prime necessity as a fuel. Such control would give a monopoly of a natural resource whose production in 1911, was valued at $175,000,000. The monopoly position would be further fortified by the fact that there is practically no foreign competition in this kind of coal.

The hard coal deposits of our country are localized to a

remarkable degree, five adjoining counties in the northeastern part of the State of Pennsylvania producing 96% of the total output of this country. The 484 square miles of workable beds lie in a broken and mountainous region one-hundred and fifty to two-hundred and fifty miles from tide water. The commercial value of this coal is dependent to a large degree upon quick and cheap transportation from this difficult region to the tide-water points, whence it is shipped to the consuming markets.

From early days the State of Pennsylvania attempted to help this industry to overcome its difficulties. Railroads were given power to acquire coal lands and engage in the business of mining and selling coal or to assist coal companies by purchase of their stocks and bonds. These opportunities were readily made use of, and by 1875 most of these coal lands were in the hands of the railroads. The evils of the union of transportation and mining privilege resulted in a constitutional amendment, passed by this state in 1874, forbidding common carriers from directly or indirectly mining or manufacturing articles or commodities for transportation over its own lines, but this law was too late to save the independence of this industry.

The enormous annual interest charges due to the purchase of these coal lands and the seasonal demand for hard

(1) Jones, P. 5.
(2) 226 U.S. 339; Jones, P 27.
(3) Laws of Penn., 1874, P. 24.
coal, since it is used almost exclusively for domestic purposes, gave the railroads a strong incentive to seek pooling devices to prevent competition of prices.

From 1873-1898 the railroads entered into various combinations for controlling through restrictive policies the production and price of coal. These were usually of short duration, being followed by periods of fierce competition and increased production of coal. The large indebtedness of these railroads made them too eager to exceed their annual allotments agreed to by the combination. When pooling was made illegal by the Interstate Commerce Act of 1887, reliance was placed upon the leasing of competing railroads. The leased roads were guaranteed an interest rate plus a division of the profits earned above the guaranteed rate. To secure the operation of this arrangement, through the Reading Company, which in 1892 had 70% of the anthracite shipments under its control, interlocking directors among the roads and seven year contracts with independent mine operators were effected. The latter agreed to accept for their production of coal 60% of the tide-water price. None of these arrangements were successful for more than a short period, partly because of the changing financial conditions of the country.

With the period of general rising prices beginning about 1897, effective methods of restraining competition in

(1) Jones, pp. 40-58.
the anthracite industry were secured in more extensive consolidation. The first step\(^1\) in this direction was made in the consolidation of railroads competing in the anthracite transportation. In 1888 the Erie Railroad purchased a complete controlling interest in the New York, Susquehanna and Western Railroad. The Reading Company through its purchase of the Central Railroad of New Jersey obtained nearly one-third of the total coal shipments. The New York, New Haven and Hartford and the Lehigh Coal and Navigation Company each secured by purchase and inter-directorate arrangements the control of several competing lines. A second step\(^2\) in securing an effective combination of the Anthracite interests was made in developing a community of interest among the railroads. This was brought about through the inter-ownership of stocks and by interlocking directorates with other railroad systems. The unity of action was sufficient by 1901 to restrain competitive factors and command control of the situation. The third and final step\(^3\) in the consolidation plan was the practical elimination of the independent operators. This was effected in two ways; first, by purchase; second, by means of the percentage contracts. Many of the seven year percentage contracts with the independents expired about 1899,

\(^{(1)}\) Jones, pp. 59-67.  
\(^{(2)}\) Jones, pp. 67-73.  
\(^{(3)}\) Jones, pp. 73-97.
and the independents claiming that 60% of the tide-water price was not enough planned to build an independent railroad for their coal production. This new road was started, but the combination railroads through the instrumentality of the Temple Iron Company purchased enough of the mines of the independents to prevent the construction of this new line. A second attempt of the independents to build their own line was also crushed, but as a result of this effort, the independents secured a raise in their percentage contracts from 60% to 65% of the tide-water price. But it is important to note that these contracts, instead of being for a short period, were for the most part perpetual. Thus most of the independents not purchased either directly or indirectly were shortly eliminated by means of the perpetual percentage contracts. Only a few independents were left.

The Temple Iron Company organized in 1873 had just prior to the time of the above purchases, in 1899, a capitalization of $240,000 and employed from 100 to 200 men. Its capital stock was increased to $2,500,000 and a bond issue of $3,500,000 made. Mr. Baer, President of the Reading Company and formerly President of the Temple Iron Company itself for several years prior to 1899, remained President of this company almost continuously since that time. He was very familiar with the rich charter privileges of this company for he had aided in drawing

(1) Jones pp. 87-97.
(2) Jones, pp. 76 ff; 151-5.
up the acts for its corporation and the practical control of this company rested with him. The directors of this company included the presidents of the combining railroads and some personal friends of Mr. Baer. This Company, though small in capital, through the men and interests brought together formed the medium for the understandings that gave unity of action in the Anthracite Coal industry. In 1912 the Supreme Court declared "its board of directors.... supplies time, place, and occasion for the expression of plans or combinations requiring or inviting concert of action." The debts of this company, through which the purchases and percentage contracts were made, were guaranteed by the supporting railroads.

This combination controlled in 1907 91.3% of the total production of hard coal even though the independents mined 22% of the total. From the figures contained in this report of the State Department of Mines "one may conclude that in 1911 as in 1907, the independent concerns mined and controlled less than one-tenth of the total output while the railroad companies mined and controlled over nine-tenths." Of the unmined coal the railroad companies owned in 1896, 90.93%, and if the future tonnage controlled by them through contracts be included they owned and controlled 96.29%, leaving only 3.71% of the future available tonnage in private hands. Mr. Jones believes that since the independents in 1907 owned less

(1) 226 U.S. 353.
(2) Transcript of Record in Sherman Anti-trust Case,...Exh.170; 226 U.S. 339.
(3) Jones, p. 107.
(4) Jones, P. 107.
than 9\% of the unmined tonnage and owned nearly 22\% of the
total output, we shall witness the elimination of the independ­
ent element in the comparatively near future unless new con­
ditions are secured through effective legislation.¹

Also, the transportation rates on anthracite coal were
made unduly high for the independent operators.² Since the
railroads had their own mining interest it made no difference
whether the profits came from stocks in the mines or the rail­
roads. If a coal company incurred a deficit it was reimbursed
from its respective railroad company. These coal railroads all
enjoyed a very rapid advance in the value of their stocks after
1898. In all cases their value was doubled and for most roads
traveled. That this was due to effective cooperation was
further shown by the fact that during the very rapid increase
of shipments, though fluctuating in 1902 by even as much as
half the usual output, yet the percentage carried by each
railroad remained quite constant.

A study of the prices of anthracite coal at tide-water
points shows that the fluctuating prices prior to 1899 gave
place to a steady and rapid advance until the year 1903 after
which they remained very constant until 1913, the year of the
strike, when prices were raised twenty-five cents per ton.

(2) Ibid. 132-55.
(3) Jones, pp. 154-179.
This steady rise and the constancy of price, which can only be partially attributed to increased cost of operation, indicates a harmonious understanding among those who control the production of this commodity. Excess profits is further shown by the fact that in addition to the heavy burden of interest on unused coal lands and the watering of stock, the railroad companies usually paid large dividends.

In spite of the numerous investigations and suits both state and national, the coal combination since 1898 has succeeded in building up and maintaining an effective control over the production and selling of anthracite coal. The strike of 1902 and the resulting use in price provoked the first attack upon the combination. The Interstate Commerce Commission began taking testimony in April, 1903, but the officials of the railroad and coal companies refused to give the necessary evidence and testimony. The Commission took their complaint to the District Court, which decided against the commission, but the Supreme Court reversed (1904) the decision of the Circuit Court, and the Commission continued the taking of evidence up to 1906. The commission rendered no decision in this case and accomplished little good beyond the accumulation of useful information. Something had to be done soon. The consolidation movement, numerous labor difficulties, complaints of railroad discrimination against the independents, and the various investigations into the in-
dustry together with the agitation for further regulation of common carriers were factors forcing legislative relief which came with the Hepburn Act in 1906. The portion of this Act effecting this situation is known as the Commodity Clause.

This legislation intended to prevent railroads from engaging in any other business than that of common carriers made it illegal for any railroad company after May 1, 1908 to transport in interstate commerce "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."¹

In the interpretation of this law, the Circuit Court² held that the coal company railroads would either have to cease transporting coal to other states or divest themselves of all title and interest direct or indirect in their coal properties, by a compulsory sale of their coal lands and their stocks in coal companies. But the decision³ of the Supreme Court may 3, 1909, so interpreted this clause as to render it quite ineffective. It held "interest" referred simply to a "legal" interest, and that a railroad could not be said to be interested directly or indirectly, in the mining of coal, merely

(1) 34 Stat. 584 C. 3591.
(3) 213 U.S. 366-419.
because it owned all the capital stock of a coal company which conducted the mining operations.

Thus interpreted this clause affected only a few railroad companies which directly mined their own coal without a separate organization. These companies proceeded to reorganize their affairs by the creating out of their own funds a perfunctory corporation to which was transferred the coal before shipment. This process enabled a disguised stock dividend to be declared and the new companies, having in most cases the same officers and stockholders as the railroad company, have since their creation paid very good dividends. Other suits carrying indictments of these devices to evade the commodity clause are pending.

Coincidently with these cases involving an alleged violation of the commodity clause, the Government was conducting a prosecution of certain anthracite coal roads and their subsidiary coal companies for violation of the Sherman Act. The defendants of this suit, started in the Circuit Court of Pennsylvania, June 12, 1907, may be grouped as (A) the Reading Company (the holding company); (B) seven railroad companies; (C) the respective coal companies of the railroads, including the Temple Iron Company, jointly owned by the defendant railroads; and (D) the individual operators who had signed over their coal production through the percentage contracts.
The Government charged (1) that defendants had entered into a combination or conspiracy by which they restrained and monopolized the anthracite coal trade; and (2) that in developing this combination, a number of contributory acts had been committed, each of which in itself was in restraint of trade. These unlawful acts were (a) the purchase of certain railroads by the Erie: (b) the defeat through the Temple Iron Company of an attempt to build an independent road to tide-water; (c) the purchase of the Pennsylvania Coal Company and its allied railroads and the consequent abandonment of a second independent outlet; (d) the purchase of the Central Railroad of New Jersey by the Reading Company; and (e) the signing of the uniform percentage contracts. The only one of these contentions of the Government that was sustained by the Circuit Court in its decision on December 8, 1910, was that the railroads had unlawfully combined through the Temple Iron Company to prevent the building of a proposed independent railroad. The charge that the defendants had entered into a general combination or conspiracy was unanimously dismissed.

An appeal being made, the Supreme Court rendered a decision in this suit on December 16, 1912. In regard to the charge that there existed a general combination, the Court unanimously held (three judges not participating) that the case was "barren of documentary evidence of solidarity."

(2) 226 U.S. 324-373.
The Court said that the Government had failed to show any specific acts or agreements between the defendant carriers to distribute the total tonnage of coal according to a definite scale of percentages. The other charges of the Government were dismissed save two. The perpetual percentage contracts were declared unlawful thereby reversing the Circuit Court decree. These contracts were ordered to be cancelled and perpetually enjoined from further execution. The Supreme Court also upheld the lower court in adjudging the combination through the Temple Iron Company to be unlawful combination. This Company, the Court held, "has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other States." The final decree provided that a purchaser of the properties of this company must be a bona fide purchaser, not one in pivity with or sustaining any relation in interest, direct or indirect, to any of the earlier defendants.

In accordance with the decree of the Supreme Court the directors of the Temple Iron Company announced that the company had sold the stock of its eight coal companies to Mr. S. B. Thorne, who was at one time general manager of the Temple Iron Company. The perpetual percentage contracts for the sale of the coal of the independents have been terminated.

(1) 226. U.S. 352.
(2) Jones, P. 217.
(3) Ibid.
When the Supreme Court in this suit dismissed without prejudice the Government's charges against the minor combinations formed by the purchase of the Central Railroad of New Jersey by the Reading Company, and the purchase of the New York, Susquehanna and Western Railroad and the Pennsylvania Coal Company by the Erie, the legality of these combinations was still undetermined. The Government in 1913 began suit against the Reading Company and its allied railroads and coal companies charging that its purchase of the Central of New Jersey in 1901 was a violation of the Sherman Act. This suit is still pending.

Thus the Government has endeavored to effect the dissolution of the Anthracite Coal Combination in suits under both the Commodity Clause and the Sherman Act. The principle and intent of the former of these laws has met with little success in its application, because of the interpretation put upon it by the Supreme Court. Even though later decisions of this Court should restore vitality to the clause, so that in other industries it may be effectively enforced, Mr. Jones does not believe that competitive conditions would be restored in the anthracite industry since the railroads or their subsidiary companies now own or control over 90% of the annual output, and even a larger percentage of the yet unmined coal. "Were the coal companies to be separated from their present railroad control, the result, in all probability, would be either
the organization of a coal trust, or an agreement of some kind among the coal companies to restrict output or to fix prices."¹

Prosecutions to dissolve this combination under the Sherman Act have likewise proved unsuccessful because sufficient "documentary evidence" was not presented. But even though, through further remedial measures the dissolution of the combination should be finally effected it would be exceeding difficult (in view of the concentration within a few hands of substantially the entire supply of anthracite coal) to prevent the formation of an entente cordiale among the companies which would effectively maintain prices and yet be less open to attack.²

The United Shoe Machinery Company Decision.

In 1909 the foot and shoe industry³ ranked eighth in importance among the manufacturing industries of the United States. Trust control had made no headway in this industry. There were in this year 1,343 shoe manufactures, all independents, whose aggregate capital stock of $277,468,000 produced products valued at $442,600,000.

Prior to the Civil War, the hand labor cost of sewing the welt and stitching the sole on a pair of shoes ranged from 60 to 75 cents. The invention of the Good-year welting and

¹ Jones, P. 218.
² Ibid. pp. 218-9
stitching machines about this time reduced the cost of this work to about 10 cents per pair, of which 4 cents were for the use of the machine and 6 cents for the labor. This revolutionized the shoe industry. One invention followed another until no less than fifty-eight machines were used to make a good shoe, and frequently twice that number were used. Among these machines there were four kinds which were essential for the process of shoe manufacture. These were the lasting machines, welt sewing and outsole stitching machines, heeling machines, and the metallic fastening machines. ¹

Prior to 1889 four independent shoe machinery companies, all of the State of Maine, under letters patent of the United States, sold and leased from 70-80% of these four kinds of essential machines.² In 1889 these Maine Companies united to form the United Shoe Machinery Company with an authorized capital stock of $25,000,000. Before this merger these shoe manufactures both sold and leased these essential and costly shoe-making machines to the shoe manufacturers, but after the merger all such machines were only leased under binding contracts of seventeen years duration in which the leasee agreed to use only the machinery of the combination under penalty

¹ 227 U.S. 205.
² Ibid.
of the forfeiture of all their leases and contracts with the United Company. Under these conditions, which tied up the sale of the unessential machines to the companies holding the essential ones, many companies engaged in the manufacture of shoe machinery were forced to sell out to the combination. Besides the two other companies operated from the start, the control of thirty-seven subsidiary companies was secured by the expenditure of enormous sums. Moreover these companies agreed not to engage in competition and to turn over any invented, improved or acquired processes or patents. Thus while the basis of the control of the Machinery Company has been the patents, it was only by means of the binding contracts with shoe manufactures, the covenants with vanquished competitors, and the repeated purchase of concern after concern at enormous prices, and the taking over of newly invented processes and patents that have enabled it to survive.

The effectiveness of the tie clauses in preventing competition in the manufacture of shoe machinery is shown by the fact that the United Shoe Machinery Company has a monopoly control in many European Countries where the same leasing policy is pursued. Its percentage of control in the United States in 1911 was claimed to be 98% but the Supreme Court did not believe its control was so great. The tie clauses worked

(1) 227 U.S. 216.
(4) Quart. Journ. Econ. V. 26, P. 611.
greater injustice to the manufacture of shoe machinery than to the shoe manufacture. All shoe manufactures, big and little, rich and poor, were treated alike. In return for a royalty each had the use of the best modern machinery without initial cost to himself, and each paid according to the unit of service received. The Company kept the machines repaired and was interested in the output of the shoe manufacturer. Neither were the royalties deemed excessive. For all the machines which the Company furnished, the royalty for the highest grade shoe was only about \(5\frac{1}{2}\) cents per pair, for the average grade about \(2\frac{2}{3}\) cents, and for over \(164,000,000\) pairs of shoes out of the annual production the royalty is only \(1\frac{1}{2}\) cents.\(^1\) Nor have the royalties ever been increased since established in 1889. Many of the small shoe manufacturers declare they could not compete with the larger manufacturers were it not for the equal royalties and small capital required.\(^2\) They believe that the leasing system alone has prevented a trust in the shoe making industry.

In 1907 the State of Massachusetts passed a law prohibiting leases with tiering clauses in connection with patented machinery, and also prohibited the offer of unreasonable discounts or other advantages which should have the same effect.\(^3\) Thereupon, the United Shoe Machinery Company attached to all its leases a rider providing that "any and all agreements,

\(^1\) Jour. Pol. Econ. V. 21, 1913, P. 944.
\(^2\) Ibid. V. 20, pp. 624-6.
\(^3\) Jour. Pol. Econ. V. 21, p. 945."
stipulations, provisions, and conditions hereinbefore printed in this instrument which are in violation... (of the law above referred to), if there are any such, are hereby stricken out before execution and are not agreed to nor made a part of this contract.¹

In 1911, a number of shoe manufacturers organized the Shoe Manufacturer's Alliance in order, as they stated, "to secure a change in the methods now pursued by the United Shoe Machinery Corporation, which today in effect monopolizes the shoe machinery business in this country through its system of leases with tieing clauses."² In the same year the Government filed suit to dissolve this company under the Sherman Act, and to have annulled the tieing clauses as violations in restraint of trade. The decision of the Circuit Court, on March 2, 1912 was adverse to the Government. In 1912, two of the three members of the Canadian Investigation Board reported that "the United Shoe Machinery Company of Canada is a Combine and.... competition in the manufacture, production, sale, and supply of shoe machinery in Canada has been and is unduly restricted and prevented."³

On February 3, 1913, the Supreme Court gave its decision in the United Shoe Machinery suit. This Court held "the combination was simply an effort after greater efficiency. The

(1) Ibid. pp. 945-6
(2) Jour. Pol. Econ. V. 21, P. 946.
(3) Ibid. V. 22, P. 57.
business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them a monopoly in any case. The exclusion of competitors from the use of them is the essence of the right conferred by the patents.\(^1\) The validity of the leases were not considered at this time because the conditions in the leases were not alleged to have been contemporaneous with the formation of the Combination.

The status of the Shoe Machinery Company was not changed by the decisions of the Courts. After the decision, the legality of the tieing clauses was taken up in a new suit. Whether they be found to exceed the patent rights or not, the consensus of opinion is that the exclusive and tieing clauses should be eliminated. The Clayton Act of 1914 seems plainly to forbid these and similar arrangements when it declared it unlawful for any person engaged in commerce to lease, sell or contract for the sale of goods, etc., patented or unpatented, or to fix a price charged therefor, or discount, or rebate, upon such price, conditioned upon the lessee or purchaser thereof, not using or dealing in goods, etc., of competitors of the lessor, or seller, where the effect may be to substantially lessen competition, or tend to create a monopoly.\(^1\) But since the jurisdiction over price discrimination, and exclusive and tieing arrangements is shared by

(1) Section 3.
the courts and the Federal Trade Commission, it is very probable that the legality of these clauses, upon which the monopoly control largely depends, will have to be passed upon by the Courts.
CHAPTER IV.

CONCLUSIONS

A quarter of a century has passed since the Sherman Law was enacted, yet we are without much definite knowledge of what is and what is not permissible in the conduct of the large corporate business. The results obtained from prosecutions under this law have been quite unsatisfactory. Many old combinations have been allowed to continue and many more new ones have been formed. Grossly unfair restraints of trade have continued regardless of the laws. Yet some progress has been made since the more rigorous prosecution of the trust has been undertaken during recent years. This activity together with the long delayed legislative provisions of 1914 give hope of a more effective control over large corporate industry.

Until about 1900, ten years after the Sherman Act, the trust problem was largely regarded as a state problem. Since then it has become distinctly recognized as a national problem requiring federal jurisdiction. It is significant that the first important application of the anti-trust act fell upon the labor unions, perhaps the least of all organizations designed to come under the requirements of this law. It was rather a law against a certain class of capitalists.
The next important application of the Act affected the railroads, another class of organizations, which it is doubtful if the framers of the Act intended should come within the scope of the Act. Not until near the end of the first decade was an important industrial trust condemned under this Act. Very few of the latter organizations were dissolved during the second decade. It was after this that most of the important dissolutions occurred.

No classification of trusts has ever been made by the Courts or Congress save the legal one, which distinguishes between corporations doing intra-state and interstate commerce. During the first decade 1890-to 1900, the intra-state commerce was extended as far as possible, as in the Knight Case, but since then the tendency has been to regard all commerce as being inter-state commerce within the meaning of the Act. The distinctions between direct and indirect restraint of trade, as was made in the Knight Case, also disappeared. No class of combinations are exempt; Pools, railroads, labor unions, holding companies, and also individuals being included.

The Supreme Court, following the spirit of Congress and of the common law, has always regarded competition as beneficial and as a sufficient regulator of prices. Anti-social motives; the acquisition of power, the suppression of competition, and the raising of prices, have been set forth as the reason for forming monopoly combinations. The evils of such
combinations have been taken for granted and all the efforts put forth by the Government have been to suppress them, and to maintain competitive conditions in the industrial field. The only monopolies justified by the Government were those in which patented inventions were relied upon for control.

In the application of the Sherman Law no attempt has been made by the Courts to enumerate the specific acts or practices which constitute a violation of the Anti-trust Act. The Act broadly included all monopolizations and attempts at monopolizations and restraints of trade. The 1914 legislation made no attempt to enumerate specific acts or practices, leaving it for the Courts and Federal Trade Commission to decide when these were violations of the law. At first the Supreme Court was inclined, as in the Knight Case, to consider monopoly and restraint of trade as being due to specific acts, but later the combination as a whole was considered. Acts or contracts that, considered singly, were lawful, when viewed together as parts of a plan, were held to be illegal. It was the scope of the combination, and its power to suppress or stifle competition or create a monopoly that determined the applicability of the Act.

A limitation of the size of a corporation has seemed to some people the obvious way of preventing monopolies. This might be attempted either by limiting the actual, physical amount of
capital employable under one management in any industry, or by limiting the percentage of either the capital or the gross business of an industry, which any one corporation could include. Congress was agreed upon the prevention of monopoly, but never fixed a size limit or standard, leaving this to the Courts to determine. In the Knight Case, the Supreme Court held that the law did not limit or restrict the rights of corporations, created by the states, in the acquisition, control, or disposition of property.¹ "Bigness" seems to have been a factor in Addyston and Northern Securities Company decisions. Mr. Taft, when reviewing the Sherman law, in 1910, held that the evil aimed at was not mere bigness of enterprise but the use of size to restrain trade, or create a monopoly. In the Standard Oil decision (1911), the size of the combination was emphasized, the Supreme Court maintaining that the unification of so vast a power and control in the New Jersey Corporation caused a prima facie presumption of a combination in restraint of trade. In the Tobacco Case, size was expressly excluded from consideration in arriving at the decision. However the way in which the business of this trust was reorganized implied a condemnation of its size. In the Tobacco dissolution for the first time we find an approximate standard of size applied. All previous dissolutions were merely legal separation of the combining corporations, regardless of the resulting distribution of

(1) 156 U. S. 16.
the business. In the Tobacco dissolution the business of the trust was roughly divided so that no one corporation should have more than about one-third of the total business of any one branch of the trade. The same principle was followed in the dissolution of the Powder trust business. There was a legal division of the size but not of control, since the dissolved trust still corporately owned a large part of the stocks and securities of the new companies organized to take over portions of the trust business.

Some progress has been made in making the dissolutions more effective. The Northern Securities dissolution was merely formal being condemned by the dissenting opinion of the Supreme Court.\(^1\) The Standard Oil dissolution was the most farcical of all. It left the control of the immense oil interest in exactly the same few dominant hands as before. Corporate control was exchanged for that of the dominant stockholders. None of the bulwarks upon which its control depended were removed. In the suits, brought under the commodity clause legislation of 1906, against the railroad and coal companies in order to separate these companies, the same kind of farcical dissolution proceedings followed. Only a colorless legal separation was required. Even though the railroad completely owned all the stock of a coal company the former was held to be interested neither directly nor indirectly in the latter company. There was more effort to make the Tobacco

\(^1\) 193 U. S. 373.
trust dissolution effective. The business of this industry was reorganized and more restrictions placed upon the defendants. But the common interest of the defendants in practically all the trust business remained with quite easy means of effecting and maintaining a community of interest. Large inter-corporate stock holding was permitted by the Courts. This latter feature has been forbidden for organizations of the future by the 1914 legislation. In the Powder dissolution the control of the defendants was lessened still more. The business of the trust was reorganized and shared with two new corporations as was done in the Tobacco dissolution, but the control of the defendants in the new corporations was further reduced in this instance by being compelled to receive in payment, one-half the price in bonds and half of the remainder in non-voting stock, thereby reducing the inter-corporate stockholding control to one-fourth of the capital of the new corporations and decreasing the possibilities of a community of interest. The most distinct advance was made in the dissolution of the Union Pacific merger. The defendant company which held corporately 46% of the stock control in the illegally joined properties was required to dispose of all this stock. Practically one-third of it was disposed of to a wholly disinterested company while the remainder was allowed to be distributed among its own stockholders in proportion to their individual holdings and then only upon affidavit of no intent to unite its control with the severed properties.
While there has been a growing tendency to reduce the intercorporate ownership of stock and control, and although the former has been forbidden in the future by the recent trust legislation, the crux of the whole problem remains in the community of interest formed among the dominant stockholders. This is the present form of trust combination made possible by accumulated fortunes and the concentration of wealth. Even the prohibition of a community of directors will not overcome this evil. The director is but the voice of those who elect him. The new legislation forbidding community of directors will doubtless increase the number of dummy directors.

Neither Congress nor the Courts have attempted to overcome this latest form of the trust. President Wilson offered for the consideration of Congress the requirement that owners of stock, when their voting power in several companies, which ought to be independent of one another would constitute actual control, be made to choose in which company they would limit their voting rights. Such a requirement, if time were given for a readjustment of a few present stock holdings, would not need to work hardship. It would certainly eliminate a host of abuses and be a long step forward, if the maintenance of competitive conditions in industry be the goal.

(1) See Page 12
It is needless to say that Congress did not follow the President's suggestion or show any serious intention of restricting community of stock ownership by individuals. The Courts seem to consider it an inalienable right of the individual to hold whatever stock he pleases. On April 7, 1914, a Circuit Court declared that "no Act of Congress or judicial decision has declared it to be illegal for an individual citizen to invest his money in two enterprises merely because the enterprise may be closely connected." This was the decision in a suit to separate the railroads from the coal companies. Should it be sustained by the Supreme Court trust dissolution will receive another delay and the desire for trust formation will doubtless be stimulated. Some day our law makers may be forced to take a bolder step; they will not permit any supposed right of private property to serve as a bulwark for monopoly.

Again no solution has been found for those monopolies due to the ownership of natural resources, a situation well illustrated in the anthracite coal industry. The attempt to free this industry from monopoly combination with the railroads has so far been a dismal failure. Even had the attempt succeeded a community of interest would be almost inevitable because of the extreme concentration of the hard coal fields and because of the already concentrated control in the hands of a few. The problem of

(1) Bibliography, No/3, p. 209.
public ownership may be considered in arriving at a policy for this and similar situations where natural resources are relatively limited.

Toward securing systematic and adequate publicity on the part of interstate companies, little had been accomplished prior to 1914 beyond the occasional, yet important, investigations made by the Bureau of Corporations, which was created largely for this purpose in 1903. The Commissioner of this Bureau in his annual report of February 22, 1913, reviewed the ten years' accomplishment of the Bureau. He reported that publicity had been hampered and restricted by the limitations of the Charter Act, and that the results attained were no fair measure of what might be expected under broader powers. In the dissolution decrees for the trusts dissolved, there were scarcely any publicity provisions required of the different corporations, and no way for adequately checking up to know if the decrees were effectively carried out. One of the important features of the 1914 legislation was its provision for publicity and investigation. Its need has been imperative, and when properly secured will go far toward securing the efficiency of corporations, safety to investors, needful data for legislation, and a basis for dissolution decrees and reorganization of dissolved corporations.

Our patent laws are still aids to trust formations, and obstacles to trust dissolutions. The notorious abuse and evils of
of our patent laws are well known. While we as a nation have been
the most inventive yet nearly every other leading nation excels us in controlling and securing the public benefits of patented
inventions. A number of trusts relying solely upon the monopoly
control of patents have been described. Nearly every trust con­sidered in this study has taken advantage of our patent system.
Its abuses are well known in the field of telephony, picture film,
cash registers, shoe machinery and petroleum refining. The
holder of a patent obtains a complete monopoly of his invention
which a recent decision of the Supreme Court has extended to the
materials used in connection with it, and may if he chooses
suppress it instead of marketing it. The trust has usually ob­tained the patents in its respective industries either through its
own hired inventors, or through the purchase of patents in order
to forestal competition, or through the well known method of
delayed and prolonged court litigation.

Nothing was done to overcome our patent abuses and evils in
the 1914 legislation. Congress might have provided that a patent
be forfeited if it combined with another patent or entered into a
combination. To have a patent become void if not used is surely a
just demand. Patent monopolies could perhaps be further elim­i­nated by granting any royalty right to inventors, so that any one
so wishing could be permitted to manufacture a patented article
under license from the Government and upon payment of a fixed royalty. The refusal to rent one machine unless others are also taken should be prohibited. Otherwise a patent which gives a monopoly in a new invention might be extended to give a monopoly in things already in common use.

There is need of a change in the enforcement of our suppression policy against trusts— a change from our system of treating this problem by means of occasional prosecution to a system which will bring continuous administrative action. In most of the trust suits, after gross violations of the Sherman Act were uncovered, many years of judicial deliberation and delay passed before there was final condemnation. Because of this administrative delay there resulted great financial loss to the consumers together with a stronger entrenchment of the trusts' unified action in the industry. Violations of the law should be taken up as soon as possible so that reparation for wrongs can be secured or the abuses stopped at least. One object of the establishment of the Federal Trade Commission was to supply this need.

One of the most serious problems in connection with suits brought under the Sherman Law was to find a proper method of disintegrating the combinations that have been adjudged unlawful. The dissolution usually required a reorganization of the prop-
erties so that they might be lawfully used in commerce. The Courts were not adapted for this work of reconstruction. The dissolutions, especially of the Standard Oil and American Tobacco Companies, have convinced the nation of the need of a federal administrative body with adequate powers of investigation, publicity, and administrations, whose members shall be in close touch with business affairs and acquainted with the commercial situation. A trust dissolution is an immensely difficult economic problem rather than a legal problem.

The members of the Federal Trade Commission have been appointed by the President. The accomplishments of this Commission will largely depend upon the personnel of this body. The appointments promise well in this respect. The failure to give the Commission more powers independent of the Courts prevents a prediction of the immediate accomplishments of this Commission.

It is not probably that the subordination of this Commission to the Courts will deprive this Commission of its larger usefulness, as was done with the Interstate Commerce Commission for more than twenty years. The awakened interest, shown in the recent trust legislation and appointment of the Commission, will follow the Commission in its work, and may
secure for it larger powers, if necessary, for maintaining competitive conditions free from the more important unfair methods of competition and restraints of trade.

The ineffectiveness of so many dissolutions does not necessarily condemn the anti-trust policy or prove the impossibility of restoring competition among the constituent members of a trust that has been dissolved. No strong efforts or methods have yet been used. Flagrant violations of the law have not been taken seriously. The chief violators have not been punished, or deprived of any portion of their illegally gotten fortunes. The good resulting from the anti-trust policy has been largely of a preventative nature. Trusts under the ban of the law, even though most gently enforced, have not spread into the branches of industry as they would have done under the sanction of law. Perhaps a continuous rigorous prosecution of monopolies and restraints of trade followed with real dissolutions would soon effectively prevent monopoly in so large a country and market as ours.
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APPENDIX

TABLE I

AVERAGE PRICES OF PETROLEUM (FOR EACH YEAR, 1890-1914)

<table>
<thead>
<tr>
<th>Crude Petroleum</th>
<th>Refined Petroleum for Export</th>
<th>Refined: 150° fire test, water white.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ave. price per barrel</td>
<td>Ave. price per gallon</td>
<td>Ave. price per gallon</td>
</tr>
<tr>
<td>1890</td>
<td>0.8680</td>
<td>0.0733</td>
</tr>
<tr>
<td></td>
<td>0.6697</td>
<td>0.0685</td>
</tr>
<tr>
<td></td>
<td>0.5564</td>
<td>0.0609</td>
</tr>
<tr>
<td></td>
<td>0.6398</td>
<td>0.0522</td>
</tr>
<tr>
<td></td>
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</tr>
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<td>1895</td>
<td>1.3581</td>
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<tr>
<td></td>
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<td></td>
<td>1.2934</td>
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<td>1905</td>
<td>1.3842</td>
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</tr>
<tr>
<td></td>
<td>1.5975</td>
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<td>1910</td>
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</tr>
<tr>
<td></td>
<td>1.3000</td>
<td>0.0733</td>
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<tr>
<td>1911</td>
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</tr>
<tr>
<td></td>
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<td>0.0863</td>
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### TABLE II

**AVERAGE WHOLESALE PRICES OF TOBACCO (FOR YEARS 1890-1914)**

<table>
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<tr>
<th>Tobacco</th>
<th>Tobacco</th>
<th>Tobacco</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burley, dark red</td>
<td><strong>Plug Series</strong></td>
<td><strong>Smoking</strong></td>
</tr>
<tr>
<td><em>good leaf</em></td>
<td>No. I</td>
<td>No. II</td>
</tr>
<tr>
<td>Ave. price</td>
<td>Ave. price</td>
<td>1 ounce bags</td>
</tr>
<tr>
<td>per 100 lbs.</td>
<td>per pound</td>
<td>Ave. price</td>
</tr>
<tr>
<td></td>
<td>I</td>
<td>II</td>
</tr>
<tr>
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</tr>
<tr>
<td></td>
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<td>.5000</td>
</tr>
<tr>
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<td>.3725</td>
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</tr>
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<td></td>
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<td>1895</td>
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<td>.5000</td>
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<td></td>
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</tr>
<tr>
<td></td>
<td>.4175</td>
<td>.5000</td>
</tr>
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<td>1900</td>
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</tr>
<tr>
<td></td>
<td>.4658</td>
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<td>.4000</td>
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</tr>
<tr>
<td></td>
<td>13.2019</td>
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</tr>
</tbody>
</table>

TABLE III.

DISTRIBUTION OF THE BUSINESS OF THE TOBACCO COMBINATION. 1

<table>
<thead>
<tr>
<th>Company</th>
<th>Capital and Surplus</th>
<th>Defendants' Percentage of control</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>$138,611,344</td>
<td>35.16</td>
</tr>
<tr>
<td>Liggett &amp; Myers</td>
<td>67,447,499</td>
<td>40.76</td>
</tr>
<tr>
<td>P. Lorillard</td>
<td>47,552,501</td>
<td>40.76</td>
</tr>
<tr>
<td>British-American</td>
<td>36,000,000</td>
<td>34.66</td>
</tr>
<tr>
<td>American Snuff</td>
<td>17,535,938</td>
<td>38.65</td>
</tr>
<tr>
<td>R.J. Reynolds</td>
<td>9,541,322</td>
<td>37.53</td>
</tr>
<tr>
<td>United Cigar Stores</td>
<td>9,000,000</td>
<td>37.65</td>
</tr>
<tr>
<td>Burton &amp; Weyman</td>
<td>8,000,000</td>
<td>28.44</td>
</tr>
<tr>
<td>G.W. Helme</td>
<td>8,000,000</td>
<td>28.44</td>
</tr>
<tr>
<td>MacAndrews &amp; Forbes</td>
<td>5,714,148</td>
<td>39.77</td>
</tr>
<tr>
<td>Porto Rican-American</td>
<td>2,357,562</td>
<td>45.31</td>
</tr>
<tr>
<td>J. S. Young</td>
<td>2,000,000</td>
<td>43.87</td>
</tr>
<tr>
<td>Union-American</td>
<td>2,517,740</td>
<td>24.65</td>
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<tr>
<td>Conley Foil</td>
<td>1,215,381</td>
<td>33.88</td>
</tr>
<tr>
<td>R.R. Richardson, Jr. &amp; Co.</td>
<td>500,000</td>
<td>None</td>
</tr>
<tr>
<td>Herneheim</td>
<td>400,000</td>
<td>None</td>
</tr>
<tr>
<td>Johnston Tin Foil and Metal</td>
<td>400,000</td>
<td>33.73</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>$356,393,375</td>
</tr>
</tbody>
</table>

Figures of table are based upon data for 1910. R.R.Richardson Jr. & Co. was freed from the combination after a long court struggle. The Herneheim Co. is a former branch of the American Cigar Co., but now separated and operated by a director of the latter.

<table>
<thead>
<tr>
<th>Year</th>
<th>High</th>
<th>Low</th>
</tr>
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<tbody>
<tr>
<td>1912</td>
<td>900</td>
<td>790</td>
</tr>
<tr>
<td>11</td>
<td>690</td>
<td>593</td>
</tr>
<tr>
<td>10</td>
<td>67c</td>
<td>585</td>
</tr>
<tr>
<td>9</td>
<td>712</td>
<td>635</td>
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<tr>
<td>8</td>
<td>71c</td>
<td>559</td>
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<tr>
<td>6</td>
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<td>5</td>
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<td>590</td>
</tr>
<tr>
<td>4</td>
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<tr>
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<td>613</td>
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<tr>
<td>1</td>
<td>842</td>
<td>470</td>
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<td>1900</td>
<td>825</td>
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</tr>
<tr>
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<td>445</td>
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