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ALUMINUM AND MONOPOLY: A PHASE OF AN UNSOLVED PROBLEM*

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I

THE NEW CRUSADE

Monopoly, like the poor, we seem to have always with us. It seems but natural that a crusading administration so bent upon minimizing the seeming scriptural fatalism anent the ever-presence of the poor should, as part of that larger purpose, address itself to the serious business of monopoly.

The crusaders against monopoly, like the crusaders of old, are hampered by certain confusions and obscurities. The forces of the crusaders are harassed by the differences between the economist Philips and the lawyer Richards.[1] Then too there are those who see good

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1. As will appear from later discussion, when economists have talked about monopoly, they have been talking about something very different from what the lawyer has traditionally understood by the term. An examination of the literature cannot fail to reveal that the economist is capable of very nearly as much "wousening" (see FRANK, LAW AND THE MODERN MIND (1930) 60 *et seq.*) as the lawyer. Nevertheless it must be said to the economists' credit that they seem finally to have reduced their definition of monopoly to this essential—"control of the market"—i. e., control in the realistic sense, without regard to particular methods employed in achieving such control. Economists have a way of agreeing upon definitions and that is perhaps more than lawyers do, but you cannot rely upon them when they attempt to go beyond the stage of diagnosing ills. When economists attempt to cure, they seem, *mirabile dictu*, emotional people—they are inclined to disagree, sometimes violently. The composite prescription of almost any dozen economists for any given ill seems to read: "Do something, do anything, try this." To appreciate all this, one need only read the suggestions made by various economists in HANDLER, THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932).

and bad Saracens in the enemy camp, but do not see clearly which are good and which are bad.[2]

This new crusade against monopoly is distinctly an American crusade and you cannot crusade in America without a committee. Even now, on Capitol Hill, the Temporary National Economic Committee, an inquisitorial body numbering among its members legislators and administrators, lawyers and economists, is studying monopoly.[3] The factual inquiry upon which they are now engaged, it is expected, will lead to definite recommendations to the Congress.[4]

What is it that has incited this present generation of "trust busters" to the new crusade? The stark, cold, incontrovertible fact is that, despite nearly a half century of antitrust legislation, we have witnessed a steady concentration of wealth and economic control.[5]

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2. See Kales, *Good and Bad Trusts* (1917) 30 HARV. L. REV. 830, 845.

3. The Committee, created pursuant to Pub. Res. 113, 75th Cong., 3d Sess. (1938), has as its Chairman Senator O'Mahoney (Wyoming) and as its Vice-Chairman, Representative Sumners (Texas). Other members are Thurman W. Arnold, Assistant Attorney General; Senator Borah (Idaho); William O. Douglas, Chairman of the Securities and Exchange Commission; Garland S. Ferguson, Chairman of the Federal Trade Commission; Senator King (Utah); Representative Reece (Tennessee)—all lawyers. Non-lawyer members include Isadore Lubin, Commissioner of Labor Statistics, and Richard C. Patterson, Jr., Assistant Secretary of Commerce. Leon Henderson is Executive Secretary to the Committee. Two vacancies exist, occasioned by the appointment of Representative Eicher (Iowa) to the Securities and Exchange Commission, and by the death of Herman Oliphant, late General Counsel, United States Treasury. See KAHO, THE MONOPOLY INVESTIGATION (1938).

4. Senator O'Mahoney's resolution creating TNEC provided that the Committee should "make recommendation to Congress with respect to legislation upon . . . the improvement of anti-trust policy and procedure and the establishment of national standards for corporations engaged in commerce among the States and with foreign nations". Pub. Res. No. 113, 75th Cong., 3d Sess. (1938).

5. According to Bureau of Internal Revenue statistics, 618 corporations held 53 per cent. of all corporate-owned assets in the United States in 1932. These 618 corporations made up only two-tenths of one per cent. of the corporations reporting. Eighty-five per cent. of all corporate-owned wealth, in the same year, was owned by only five per cent. of the corporations. Fifty per cent. of the total net corporate income went to 232 corporations. One and two-tenths per cent. of our manufacturing corporations accounted for 63 per cent. of the total net profits. Two years later it was reported that the only group of corporations which earned an aggregate net profit was that group of corporations whose assets were in excess of $50,000,000. Concomitant with this ever progressive rate of concentration was a strikingly high degree of concentration of the ownership of these corporations. In the halcyon year of 1929, stock ownership had supposedly achieved a fairly wide spread; yet the income tax returns for that year reveal that 3.28 per cent. of the persons who filed individual returns received in excess of 83 per cent. of all dividends paid to individuals. Out of that 83 per cent., 78 per cent. were received by three-tenths of one per cent. of our people.

The Bureau's statistics for 1933 reveal only 1,747,740 taxable individual incomes in the United States and about one-third of all property passing by death was found in less than four per cent. of the estates. See *Hearings before Senate Finance Committee on H. R. 8974*, 74th Cong., 1st Sess. (1935) 176, 213. See further, BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) c. III, and FRANK, SAVE AMERICA FIRST (1938) 235-250.

Statistics, such as the above, though revealing, sin on the conservative side. One just cannot discern the limits of this tendency toward the centralization of economic control—the holding company device and interlocking directorates have taken care of that.

The present Administration has been much disturbed by what has been called "the unsolved problem of monopoly".[6] There has been frequent protestation of the ineffectiveness of legislation touching the control of big business [7]—perhaps in no sector has the law in action looked so different from the law in books.[8] For years, economists and some lawyers have urged the amendment of the antitrust laws and the suggestions have run the gamut from the conservative lawyer who would slip in a word here and a word there to the impatient economist who would junk existing legislation and start from scratch in an entirely different direction.[9]

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6. The phrase is the Attorney General's (at the time of writing, Mr. Cummings had not resigned his office). See Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. L. Rev. 23. Other evidence of the Administration's concern with the unsolved problem may be found in Arnold, The Folklore of Capitalism (1937) 207-229; Cummings and McFarland, Federal Justice (1937) 317-351; Frank, Save America First (1938) 235 *et seq.*; Arnold, *Fair and Effective Use of Present Antitrust Procedure* (1938) 47 Yale L. J. 1294; Arnold, *Prosecution Policy Under the Sherman Act* (1938) 24 A. B. A. J. 417; Dickinson, *The Antitrust Laws and the Self Regulation of Industry* (1932) 18 A. B. A. J. 600; Jackson, *Should the Antitrust Laws be Revised?* (1937) 71 U. S. L. Rev. 575 (the same address under the title: *Enforcement of Anti-Trust Laws* is reprinted in (1937) 3 Fed. B. A. J. 71); Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. of Pa. L. Rev. 231; Richberg, *The Monopoly Issue* (1939) 87 U. of Pa. L. Rev. 375.

7. See *supra* note 6. These discussions all strike one as so many responses to President Roosevelt's call in his second inaugural address: "We must *find* practical controls over blind economic forces and blindly selfish men." (Italics supplied.)

8. Attorney General Cummings pointed to the difference: "Moreover, the complexities of modern existence and the pressure of events have undoubtedly had their effect upon the anti-trust laws, their interpretation, and their administration. If you look at the statutes do you find the law? Not at all. Only the simple expect to find the law in the statute books. The law must be searched out, as if it were a quarry in the tangled underbrush of an almost impenetrable forest." Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. L. Rev. 23, 24. The Attorney General might have been more general in framing his observation. He might have said, "Only the simple expect to find the law in the books." Perhaps it was Dean Pound who first called our attention in an arresting way to the difference between book law and active law in his memorable *Law in Books and Law in Action* (1910) 44 Am. L. Rev. 12.

9. These proposals cannot be detailed here. Typical of the wide divergence of suggestions during recent years have been the proposals of Senator Nye, Professor H. Parker Willis and Mr. David Podell, which, along with others, are detailed in Handler, The Federal Anti-Trust Laws, a Symposium (1932) 23-73.

Within the last half-dozen years the present Administration has done some mystifying things to the antitrust laws. They were early kicked into a dark closet and locked up only to be brought forth as one of the heroines of our "folklore", dressed in ermine and the finest silk and told to "get goin' and do their stuff". So it was that in 1933, Section 3 (a) of the N. I. R. A., 48 Stat. 196 (1933), 15 U. S. C. A. § 703 (a) (Supp. 1938) recited that the President might approve a voluntary code of fair competition if he should find ". . . (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title [Title I]. *Provided,* That such code or codes shall not permit monopolies or monopolistic practices". Section 5 of the N. I. R. A., 48 Stat. 198 (1933), 15 U. S. C. A. § 705 (Supp. 1938), declared that, while Title I of this act is in effect and for sixty days thereafter, any action complying with the provisions of an approved or prescribed code "shall be exempt from the provisions of the antitrust laws of the United States". Senator Wagner emphatically denied that § 2 of the Sherman Act was suspended, 77 Cong. Rec. 5163 (1933). Compare the statement of Professor McLaughlin, writing before the National Industrial Recovery Act had been enacted into law: "It is replete with contradictions and inconsistencies, some more patent than others. Perhaps the most patent is the provision that codes shall not permit monopolies, while it is clearly contemplated

The crusading forces are moving against monopoly along two distinct fronts. The Congress, through its Temporary National Economic Committee, is both spying and reconnoitering. It seeks to ascertain the economic strength of the enemy and to determine the strategic positions the enemy forces occupy. Upon what it finds will depend the nature of its recommendations to the Congress. But the high command is waging war in still a different direction. It is testing its available weapons, and what the high command may decide to do in the future may well depend upon whether existing weapons now being wielded by the inspired "trust busters" will prove adequate. In the campaign now raging, the Department of Justice has singled out as one of its major targets the Aluminum Company of America. The theatre of war is the United States District Court for the Southern District of New York. In the succeeding pages, the hopes and prospects of both parties in the case of *The United States of America v. The Aluminum Company of America et al.* will be appraised. It is

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that the codes will involve market control which can only be effective on a monopolistic basis. The part of the preamble about the fullest utilization of present productive capacity was inserted after the bill was introduced. It appears to be an afterthought in the nature of window dressing, and not in keeping with the spirit of the rest of the bill. The implication that '*undue* restriction of production' 'may be temporarily required' may be attributed more to mere awkwardness than to Machiavellian design." McLaughlin, Cases on the Federal Antitrust Laws of the United States (2d ed. 1933) 719. The depression period attitude toward the antitrust laws is illustrated by Cabot, *The Vices of Free Competition* (1931) 21 Yale Rev. 38; John Dickinson (former Assistant Attorney General, and former Assistant Secretary of Commerce) *The Antitrust Laws and the Self-Regulation of Industry* (1932) 18 A. B. A. J. 600; Jaffee and Tobriner, *The Legality of Price Fixing Agreements* (1932) 45 Harv. L. Rev. 1164. In the recent past business men have been bombarding the monopoly laws. Among many printed attacks, one might single out Strawn, *Should the Antitrust Laws be Modified?* (1931) 54 N. Y. S. B. A. Rep. 381; Williams, *The Reign of Error* (1932) 147 Atlantic Monthly 788.

But all this is history and the antitrust laws are again in the center of the stage supported by an all star chorus of "lusty trust busters" . Here are a few notes sung by the more prominent members of the chorus.

The Attorney General: "My proposition is that the Anti-Trust Division of the Department of Justice should be more adequately implemented. Laws do not operate *in vacuo*. They do not achieve their results automatically. There must be behind them the driving force of the Government." Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. L. Rev. 23, 25, 26.

The Solicitor General: "Hence American business must make up its mind whether it favors truly effective regulation by competition, as contemplated by the antitrust laws or the inescapable alternative—government control. *Every step to weaken those laws, or to permit price fixing or monopolistic* practices, is thus a step toward direct public control of economic operations hitherto performed by private enterprise." (Italics supplied.) Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. of Pa. L. Rev. 231, 238.

The Assistant Attorney General, in charge of enforcement of the antitrust laws: ". . . monopoly means, sooner or later, government interference in business. I am willing to face the problem when the need arises. Yet it is precisely because I do not wish those areas of necessary interference to increase and because I want to keep the government out of business that I am an advocate of the consistent enforcement of the Antitrust Laws. . . . The Antitrust Act represents a public policy to keep open and free the channels of opportunity, which has never been more important than today." Arnold, *Fair and Effective Use of Present Antitrust Procedure* (1938) 47 Yale L. J. 1294, 1295, 1303.

a case that may well prove to be significant in the long list of prosecutions under the elusive Sherman Act.[10] But one thing must be obvious; just as public opinion is manufactured by high-geared propaganda mills and disseminated among the public in time of war, so too, in this important economic-legal struggle between the Government and Alcoa, the parties are studiously devoting themselves to the dissemination of "truth" with the hope of garnering the good will of the reading and the listening public. And so it is that the Attorney General, the Solicitor General and the chief "trust buster" never lose an opportunity to present the larger issues by the spoken and the written word,[11] often concluding with "the goblins'll get you ef you don't watch out".[12] And so it is, too, that when you open your Sunday rotogravure section, you may see the beautiful full page display of Alcoa's proud crest—the advertisement itself shimmering with the beauty of "silver from clay" [13]—telling you that Alcoa's eight thousand stockholders are "the most enthusiastic advocates of cheap aluminum". From the mouths of those eight thousands, so the advertisement tells us, has come this profession of faith: "The mere fact that no one else in this country has chosen to go into the business of producing raw aluminum can never make our company successful. Our success depends on customers, and an ever widening circle of customers." And then follows Alcoa's proud boast! *"Nature* made Aluminum *light* but *man* has made it *cheap* and *plentiful* and *strong."* [14]

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10. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 *et seq.* (1927).

11. See *supra* note 6.

12. The goblins seem to be threats of the possibility, if not probability, of the Government's intrusion into "private" business in one way or another.

The President: "We must find practical controls over blind economic forces and blindly selfish men"—from his second inaugural address, significantly used as the closing note by Solicitor General Jackson in a number of his public addresses. See, for example, Jackson, *Should the Antitrust Laws be Revised?* (1937) 71 U. S. L. REV. 575, 582.

The Attorney General: "In this welter of things, nothing is more obvious than the fact that big business, if I may use that term, is moving blindly but with accumulating acceleration down the road leading to ultimate Governmental supervision." Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. L. REV. 23, 27.

The Solicitor General: "American business must make up its mind whether it favors the regulation by competition contemplated by our antitrust laws or the only probable alternative—government control." Jackson, *Should the Antitrust Laws be Revised?* (1937) 71 U. S. L. REV. 575, 577.

The Assistant Attorney General: "Intelligent men of all political parties agree that unless competition can be maintained government regulation and interference with business is inevitable." Arnold, *Prosecution Policy Under the Sherman Act* (1938) 24 A. B. A. J. 417.

S. E. C. Commissioner Frank: See statement, quoted note 153, *infra.*

13. The name applied to the new metal when first it was called to the attention of Napoleon III in 1854. See WALLACE, MARKET CONTROL IN THE ALUMINUM INDUSTRY (1937) 3.

14. See N. Y. Times, Dec. 11, 1938, § 9, p. 4. It is interesting to compare with this advertisement, so carefully calculated to excite the good will of the public toward the industry, with the type of advertising indulged in by the Aluminum Company some years ago, the purpose of which was, apparently at least, simply to sell its product. *Cf.* Advertisement (1934) 10 FORTUNE, No. 3, p. 39.

And now follows something by way of history—first, in brief compass, the adventures of the Sherman Act in the federal courts during nearly half a century; then, the story of the rise and progress of Alcoa. It is only upon this two-fold background that the significant issues of the present litigation take on perspective.

II

THE SHERMAN ACT—FORTY YEARS OF JUDICIAL PARRY AND THRUST

The industrialization of the United States, a comparatively undeveloped country, aided immeasurably by the advent of the steamship and railroad and the consequent breaking down of natural trade barriers, gave rise to a concerted scramble for wealth and power. Beginning before the Civil War and gaining momentum thereafter, especially during the Reconstruction Period, a movement toward concentration of wealth and toward monopoly [15] had reached a point where a considerable number of "trusts" [16] had arisen, concentrating in the hands of comparatively few the control of the nation's wealth.[17] The resultant increase in prices and the stifling of that competition which was too weak to crush the more powerful aroused widespread public outcry which culminated in the passage of the Sherman Act.

The history of this particular legislation need not be given here, as it is treated fully elsewhere.[18] Suffice it to say that the problem of monopoly and restraint of trade could not be adequately treated by the several states [19] and that, while the common law forbade various types of monopolies and practices in restraint of trade,[20] the fact that there existed no common law of the United States [21] necessitated proper legislation by the Congress, if there were to be any effective protection afforded against these "trusts".

15. The term "monopoly" is here used in its popular sense, not in the technical sense of exclusive grant by the state.

16. This is another popular misnomer. The term is applied to large combinations in trade and industry.

17. In this connection see HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 208; JONES, THE TRUST PROBLEM IN THE UNITED STATES (1928) 318, quoting Harlan, J., in his dissent in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 83 (1911). See generally, JOSEPHSON, THE ROBBER BARONS (1934).

18. JONES, *op. cit. supra* note 17, at 318-320; KNAUTH, THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY (1914); WALKER, HISTORY OF THE SHERMAN LAW (1910).

19. For an excellent discussion as to why state legislation was inadequate see OWENS, BUSINESS ORGANIZATION AND COMBINATION (Rev. ed. 1938) 547-550.

20. See Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act* (1917) 31 HARV. L. REV. 246.

21. See Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 50 (1911); 21 CONG. REC. 3253-3261 (1890) (debate on Sherman Act). The decision of the Supreme Court of the United States in Erie R. R. v. Tompkins, 304 U. S. 64 (1938), which overruled Swift v. Tyson, 16 Pet. 1 (U. S. 1842), is of interest in this connection. The Court held that there is no federal common law of the United States but only the common law of the several states.

The first two Sections of the Sherman Act[22] are of the most importance since it is in these that the offences are designated, and it is in the construction of these two sections that the effectiveness or lack of effectiveness of the Act lies. As may be seen, the prohibitions of the Act are couched in language so general in its terms as to be susceptible to a variety of interpretations.

And it was precisely this generality of expression, intended by the framers of the Act to provide ample room for judicial interpretation,[23] that gave the courts considerable difficulty and resulted in the oft-repeated accusation of "judicial legislation".[24]

To assist in the approach to the difficult problems afforded by the present case, it might be well to examine the more important cases which were brought against various corporations and associations by the Government under Sections 1 and 2 of the Sherman Act. The treatment will necessarily be brief and is included only to supply a springboard into a welter of difficulties, as yet unsolved, which may well face the court in its determination of the case against the Aluminum Company.

The first case to come before the Supreme Court is now of historical interest only. This is the *Knight* case[25] in which the court held that a combination producing some 98 per cent. of the refined sugar of the United States was not violative of the Sherman Act, since "the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations".[26] This case has been actually although

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22. The provisions of §§ 1 and 2 of the Sherman Act are as follows:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927).

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." 26 STAT. 209 (1890), 15 U. S. C. A. § 2 (1927).

23. See 21 CONG. REC. 2524 *et seq.* (1890). Senator Sherman in his speech before the Senate said: "It is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and . . . the courts will apply them so as to carry out the meaning of the law." *Id.* at 2529.

24. 2 HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS (1903) 364. "It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected." Senator Hoar was the draftsman of the Antitrust Act.

25. United States v. E. C. Knight Co., 156 U. S. 1 (1895).

26. *Id.* at 17.

not expressly overruled,[27] but in fairness to the Court it should be pointed out that the presentation of the Government's case was not all that it might have been, and suffered on account of inadequate preparation.[28]

The next two cases of importance to be decided by the Supreme Court may be considered together, since the defendants in both were associations of railroads formed for the purpose of stabilizing rates. Both were held to be in violation of the Sherman Act. These *Freight Association* cases [29] showed that railroads, although regulated by the Interstate Commerce Act of 1887 were also within the prescriptions of the Sherman Act. In both cases, the fact that railroads are common carriers had considerable influence upon the decisions. Thus, it may be noted, these associations were something more than mere associations of corporations formed to stabilize prices; they were in the nature of public utilities and hence subject to the most stringent regulation because of the direct effect on the public at large. Combinations of public utilities operating under special franchise stand upon a different footing than other combinations and may be said to be illegal per se. The rationale of this doctrine evidently is that public utilities, operating under special franchise, necessarily exclude the general public from competition and hence any combining on their part must be in restraint of trade and destructive of competition.[30]

The vigorous dissenting opinion of Mr. Justice White in the *Trans-Missouri Freight Association* case is of note since the doctrine there propounded, later, in the *Standard Oil* case, became in effect the view of the majority of the Court,[31] although in the latter case the same Mr. Justice White endeavored to reconcile the two.[32]

The question of the constitutionality of the Sherman Act under the commerce clause was determined in the *Joint Traffic Association* case, the Court saying:

> "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has." [33]

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27. See HANDLER, THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932) 181; Morawetz, *The Supreme Court and the Anti-Trust Act* (1910) 10 COL. L. REV. 687, 688, 704 *et seq.*

28. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914) 59.

29. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897), and United States v. Joint Traffic Ass'n, 171 U. S. 505 (1898).

30. To this effect see Kales, *The Sherman Act* (1918) 31 HARV. L. REV. 412, 419.

31. Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911).

32. *Id.* at 64 *et seq.*

33. United States v. Joint Traffic Ass'n, 171 U. S. 505, 569 (1898).

The *Live Stock Exchange* cases,[34] coming before the Supreme Court in the same year as the *Joint Traffic Association* case, are relatively unimportant for present purposes. The decision of the Court was based on the same doctrine as that pronounced in the *Knight* case —that the Sherman Act is violated only by those contracts or combinations that directly affect interstate commerce—although the parties defendant in the *Stock Exchange* cases were not industrial combinations but rather an association of commission merchants in one case, and in the other an association of cattle merchants who sold and traded for themselves.

The *Addyston Pipe & Steel Company* case [35] is the next case of importance and for several reasons. It was the first case involving an industrial combination since the ill-fated *Knight* case, but this time the issue was squarely presented to the court. The defendants were a combination of pipe manufacturers which by agreement had undertaken to fix prices and divide markets, and in the localities to which no member of the association had been exclusively assigned, a committee determined the price and awarded the contract to the member who would pay the largest bonus to the other members. The market controlled by this combination extended over a large area. In a unanimous opinion, the Court held that the agreement constituted a direct restraint on interstate commerce and violated Section 1 of the Sherman Act. The effect of this decision was to revitalize and to restore to a large measure the effectiveness of the Act against combinations in restraint of trade, which the *Knight* case had "emasculated".

Next to be considered is the famous case of the *Northern Securities Company*,[36] one of the three most far-reaching cases to arise under the first two Sections of the Act (the others being the *Standard Oil* case [37] and the *United States Steel* case [38]). The victory gained here by the Government marked another forward step toward the crystallization of consistent judicial application of the Sherman Act which reached its culmination in the *Standard Oil* case. In this case the Court begins to emerge from the darkness and doubt which had enveloped it in the earlier days.

The Northern Securities Company was a holding company, the first of this type to be brought before the Supreme Court as a corporate instrument wielded in defiance of the Sherman Act. It was organized under the laws of the State of New Jersey in 1901 to con-

34. Hopkins v. United States, 171 U. S. 578 (1898), and Anderson v. United States, 171 U. S. 604 (1898).
35. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899).
36. Northern Securities Co. v. United States, 193 U. S. 197 (1904).
37. Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911).
38. United States v. United States Steel Corp., 251 U. S. 417 (1920).

solidate control of the Northern Pacific Railway and Great Northern Railway which had been parallel and competing lines between Minnesota and Oregon.[39] It acquired in exchange for its own stock a majority of the shares of each of the two lines, thus subjecting them to a unified control. The Government brought suit in equity for the dissolution of this consolidation. The lower court's judgment for the Government ordering dissolution was affirmed by the Supreme Court, per Harlan, J.,[40] who in addition to summarizing the precedents of anti-trust litigation under the Sherman Act affirmed the power of the Act to reach the holding company device by declaring that no device,

> ". . . however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress." [41]

In the year following the decision in the *Northern Securities Company* case, the Supreme Court considered the case of *Swift & Company v. United States.*[42] The group against whom the prosecution was directed was

> ". . . a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors." [43]

The decision to be reached was obvious if it could be shown that the combination was directly in restraint of interstate trade. The court

39. The background of the consolidation negotiations and achievement is an interesting story of the battle of the Titans—Morgan, Hill and Harriman. For an account of these transactions see JOSEPHSON, THE ROBBER BARONS (1934) 231-252, 432-450.

40. The decree enjoined the Northern Securities Company from voting the stock of the Northern Pacific Railway and the Great Northern Railway. The latter two were enjoined from paying any stock dividends to the Northern Securities Company. The Northern Securities Company was given the choice of returning the stock held by it to each of the railway companies or of transferring such stock to holders of its own shares originally issued in exchange for the stock of these companies. As a commentary on the effectiveness of such decree the reported words of Mr. James J. Hill, one of the defendants and the well-known "Empire Builder", are of interest: "two certificates of stock are now issued instead of one; they are printed in different colors, and that is the main difference." Quoted in JOSEPHSON, THE ROBBER BARONS (1934) 450, and alluded to in CUMMINGS AND MCFARLAND, FEDERAL JUSTICE (1937) 331.

41. Northern Securities Co. v. United States, 193 U. S. 197, 347 (1904).

42. 196 U. S. 375 (1905).

43. *Id.* at 394.

had no difficulty in finding such restraint, easily distinguishing it on this basis from the *Knight* case.[44]

In 1911 there were decided two cases [45] in which the doubt that had been plaguing the Court ever since the passage of the Sherman Act was finally resolved. The interpretation of Sections 1 and 2 of the Act had been impeded up to now by the dilemma confronting the Court concerning the meaning to be given to the words "in restraint of trade".[46] How inclusive was the phrase? Did it extend to any or all restraints, whether reasonable or unreasonable? Or must the restraint be shown to be unreasonable or of a cértain kind and degree? If extended to any or all restraints, whether reasonable or not, then conceivably a very small partnership, typical of those which may be found in practically every city and town in the country, would be subject to dissolution if engaged in interstate commerce. Could such have been the legislative intent? The answer was given in the opinion of Mr. Justice White in the most important case arising under the Sherman Act, the historic *Standard Oil Company* case.[47]

The history of the activities of the Standard Oil Company from its inception up to the time of the filing of this suit is notorious and has been the subject of many exhaustive treatments.[48] Only a brief summary is needed here. Suffice it to say, as far as the main facts are concerned, that there was here involved a concentration in the hands of a holding company of the stock of various corporations dealing in petroleum and petroleum products and occupying a preponderant position in the industry.[49] In view of the nature and number of predatory practices of which the Standard Oil Company was guilty [50] in its rise to a dominating position, it was obvious which way the decision would turn under any view of the law. The case is important, not for its

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44. United States v. E. C. Knight Co., 156 U. S. 1 (1895).

45. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911), and United States v. American Tobacco Co., 221 U. S. 106 (1911).

46. See Kales, *supra* note 30, at 413.

47. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).

48. See Dodd, Combinations, Their Uses and Abuses, with a History of the Standard Oil Trust (1888); Tarbell, History of the Standard Oil Company (reissue 1925).

49. According to Jones, *op. cit. supra* note 17, at 58, in 1904, only 9 per cent. of the total production of refined oil in the United States was produced by independent refiners.

50. The predatory practices, as listed in the Court's opinion, were "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 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. . . ." Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 42 (1911).

decision, but for the reasons for its decision as set forth by Mr. Chief Justice White. It was here that the now famous "rule of reason" was enunciated in the most definite statement of doctrine made by the Court to date. It was in this case that the darkness was dispelled. Speaking of the interpretation to be given to the Sherman Act the Court, after a searching exposition of the common law doctrines dealing with "monopoly" and "restraint of trade" and a consideration of the generality of expression in the wording of the first two Sections of the Act, said:

> ". . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some *standard* should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." [51] (Italics supplied.)

The meaning given, then, to the Sherman Act is that it prohibits not any and all, but rather *unreasonable* or *undue* restraint of trade or attempts to monopolize. The import of the decision was more fully defined in the *American Tobacco Company* case.[52] The Court held that there had been a violation of the Sherman Act by a combination which, although employing a very complicated method of stock ownership, had engaged in predatory practices to stifle competition and achieve to all intents and purposes a monopoly. In making the decision the Court elaborated further upon the "rule of reason" and declared that the record before the Court

> ". . . if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the *Standard Oil Case,* the application of which rule to the statute we now, in the most unequivocal terms, reexpress and reaffirm." [53]

The *St. Louis Terminal* case [54] decided in 1912, was concerned with an unusual factual situation and for this reason stands in a different position from other "monopoly" or "restraint of trade" cases.

51. *Id.* at 60.
52. American Tobacco Co. v. United States, 221 U. S. 106 (1911).
53. *Id.* at 180.
54. United States v. St. Louis Terminal Ass'n, 224 U. S. 383 (1912).

The peculiar topographical situation of St. Louis made possible a combination of all of the railroad terminal facilities of that city by an association controlled by fewer than all of the companies who had to use these facilities in order to have a means of entering and leaving the city. This combination was held to be illegal even though the companies who were not associated in the control of the facilities, were not, as a matter of fact, prevented from utilizing them. The restraint was actual although unexercised. The decree of the Court is interesting. It recognized the efficiency and benefits to be gained by unification and hence did not order a dissolution of the association as desired by the government. Instead, the association was to be dissolved only if it did not reorganize so that it would be controlled by all of the companies needing to use the terminal facilities, without discrimination against any.[55] In connection with this case, it should be reiterated that the unusual topographical situation of St. Louis was a decidedly important factor in the result for, as the Court said: "But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact." [56] It is also worthy of note that there is no evidence in the record of predatory practices.

A combination of railroads again invited the attention of the Supreme Court in the *Union Pacific* case [57] which was decided in 1912. Again the combination, achieved this time by stock acquisition, and not by the holding company device as in the *Northern Securities Company* case,[58] was held to be illegal. The case is different also from the *Northern Securities Company* case in that there were not involved parallel and competing lines; neither did the lines operate between the same cities nor over similar routes. At best, they were competitors for some of the transcontinental traffic. Lacking also was the element of price stabilization present in the *Traffic Association* cases.[59] The mere combining of competing railroads is *per se* illegal, for as the Court said:

> "The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates." [60]

55. See a discussion of this case in Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 Col. L. Rev. 201 *et seq.*
56. United States v. St. Louis Terminal Ass'n, 224 U. S. 383, 405 (1912).
57. United States v. Union Pacific R. R., 226 U. S. 61 (1912).
58. 193 U. S. 197 (1904).
59. See *supra* note 29.
60. United States v. Union Pacific R. R., 226 U. S. 61, 88 (1912).

Although nowhere does the Court indicate in this case that railroads should stand on a footing different from other industries, yet it is submitted again (at the risk of being repetitious) that if the holdings in railroad cases, seemingly inconsistent with the decisions in the other cases, are to be reconciled with the latter it should be on the ground that railroads are public utilities operating under franchises which effectively prevent competition from being freely entered into against them by the public, and, that this being so, any combination of competing railroads is contrary to the public policy expressed by the grant of a franchise and is *per se* in restraint of trade and hence illegal under the Sherman Act.

In 1913 the question of the trade association was presented to the Court in the *Lumber Dealers' Association* case.[61] The defendant was an association of retail lumber dealers which circulated among its membership a "blacklist" naming certain wholesalers who dealt directly with the consumer, with the object in view that members of the association would not trade with such wholesalers. The circulation of these lists was enjoined on the ground that the intended effect was an undue restraint of interstate trade and commerce and violative of the Sherman Act. This case is of interest because of the nature of the combination involved and because of the type of boycott enjoined.

The shoe machinery trust was attacked by the Government from two sides, the criminal and the equity. In the criminal prosecution[62] under the Sherman Act, a demurrer to the indictment was sustained and the ruling was affirmed by the Supreme Court. The defendants were a combination of several companies, each controlling basic patents for machinery used in the various phases of shoe manufacture so that the United Shoe Machinery Company of New Jersey, the resulting combination, produced over 90 per cent. of the shoe machinery of the country.[63] Mr. Justice Holmes, who delivered the opinion of the Court affirming the ruling of the lower Court characterized the combination as follows:

61. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600 (1914).

62. United States v. Winslow, 227 U. S. 202 (1913).

63. See the chart given in the dissenting opinion of Mr. Justice Clark, in the Supreme Court decision in the equity proceeding:

"Machines in Use in This Country	Manufactured by Defendants	Manufactured by all others
Lasting machines	7,496	7
Standard screw machines	409	None
Pegging machines	146	None
Tacking machines	3,488	6
Welt sewing machines	2,527	142
Outsole stitching machines	2,676	758
Loose-nailing machines	1,835	24
Heeling machines	2,019	17"

United States v. United Shoe Machinery Co., 247 U. S. 32, 89 (1918).

> "On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, . . . it is hard to see why the collective business should be any worse than its component parts. . . . The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree." [64]

Similarly in the equity proceeding,[65] the Court viewed the combination as legitimate, declaring, "certainly improvement of business and its efficiency can be striven for without offense to the law",[66] and again:

> "The company, indeed, has magnitude, but it is at once the result and cause of efficiency and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements made by the company and new machines are substituted for the old one without disproportionate charge." [67]

In 1920, the extremely interesting case of the *United States Steel Corporation* [68] was decided. The decision here is one of the most severely criticized in the whole line of antitrust cases. The defendant was a holding company controlling twelve important concerns engaged in every phase of the iron and steel business which at the time of its formation amounted to well over one-half [69] of the total iron and steel business of the country although the percentage of control had dwindled at the time suit was brought to approximately 50 per cent.[70] At the time of effecting the combination there was an intent to monopolize; there were also numerous "gentlemen's agreements" in restraint of trade,[71] purchases of competitors' businesses,[72] very heavy overcapitalization and watering of stocks, enormous promoters' profits and large

64. United States v. Winslow, 227 U. S. 202, 217 (1913).
65. United States v. United Shoe Machinery Co., 247 U. S. 32 (1918).
66. *Id.* at 53.
67. *Id.* at 56.
68. United States v. United States Steel Corp., 251 U. S. 417 (1920).
69. See HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 422.
70. For an interesting discussion of the economic effects of combinations of competitors in a large company, controlling a great percentage of a particular business see the discussions by Burns, Berle, and Laidler, in HANDLER, THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932) 143-172. The theories of Mr. Louis D. Brandeis are expressed in his testimony before the Committee on Interstate Commerce of the U. S. Senate pursuant to SEN. RES. No. 98, Dec. 14-16, 1911, and before the Committee of the Judiciary of the House of Representatives pursuant to H. R. 11380, January 26-27, 1912.
71. These agreement were reached at the noted "Gary dinners".
72. Chief among these was the acquisition of the Tennessee Coal and Iron Company in 1907. The approval of President Roosevelt had been obtained previous to the purchase.

dividends as the result of high prices. At first glance one would think in view of previous decisions that here was an excellent opportunity for the application of the sanctions of the Sherman Act—but not so the Court, which found that any predatory practices which had been indulged in were abandoned before suit was brought, as was the intent to monopolize, and that since no monopoly in fact existed,[73] the Steel Company was not violating the Sherman Act. As to the immensity of the corporation the Court declared that:

> ". . . the law does not make mere size an offense, or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible." [74]

The case, therefore is an example of how flexible and susceptible of wide application is the so-called standard or norm, applied to antitrust cases since the *Standard Oil* case [75]—the "rule of reason".

The *International Harvester* case [76] is frequently mentioned in connection with the *United States Steel* case. A consent decree had been entered against the Harvester Company in 1918 after it had been prosecuted under the Sherman Act.[77] In 1927, the Supreme Court was called upon to determine whether the 1918 consent decree had been complied with. The company's percentage of control of the industry at this time was 64 per cent. In its opinion the Court reaffirmed the dictum of the *Steel* case to the effect that mere size and unexercised power of control in the absence of unlawful conduct will not violate the antitrust laws.[78]

Then, in 1927, there was decided the now famous case of the *Trenton Potteries Company*,[79] involving a trade association of manufacturers and distributors of 82 per cent. of the sanitary pottery (used in bathrooms and lavatories) produced in the United States, organized to fix and maintain uniform prices. The association was held to be violative of the Sherman Act. The particular type of association considered here, a "loose" combination, apparently constitutes an exception to that class of combinations which is measured by the "rule of reason" set out in the *Standard Oil* case.[80] The question of reason-

73. Some two hundred customers testified that there was a strong competition in the steel business.
74. United States v. United States Steel Corp., 251 U. S. 417, 451 (1920).
75. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).
76. United States v. International Harvester Co., 274 U. S. 693 (1927).
77. United States v. International Harvester Co., 214 Fed. 987 (D. Minn. 1914), *appeal dismissed on motion of appellants*, 248 U. S. 587 (1918).
78. United States v. International Harvester Co., 274 U. S. 693, 708 (1927).
79. United States v. Trenton Potteries Co., 273 U. S. 392 (1927).
80. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).

ableness or unreasonableness of price-fixing combinations is immaterial for, as the Court points out:

> "Beginning with *United States v. Trans-Missouri Freight Association, supra; United States v. Joint Traffic Association,* 171 U. S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, *despite the reasonableness of the particular prices agreed upon.*" [81] (Italics supplied.)

The reason for so holding is given by the Court as follows:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." [82]

The final case to be considered was decided in 1936. This was *Sugar Institute, Inc. v. United States.*[83] The defendant was a trade association the members of which together refined nearly all imported raw sugar and supplied between 70 and 80 per cent. of the sugar consumed in the United States. They had entered into a "basic agreement" which required them to adhere to certain prices publicly announced, which prohibited quantity discounts, which set arbitrary uniform terms for cash discounts and which provided for various other like restrictions. These restrictions amounted to price-fixing in restraint of trade and were held to be illegal.

From the cases thus discussed an endeavor will be made to evaluate the present position of the Sherman Act with respect to the suit now in progress against the Aluminum Company. Before proceeding further, however, it is submitted that the railroad cases [84] and cases involving trade associations [85] should be looked upon as being of differ-

81. United States v. Trenton Potteries Co., 273 U. S. 392, 398 (1927).

82. *Id.* at 397.

83. 297 U. S. 553 (1936).

84. Principally, Northern Securities Co. v. United States, 193 U. S. 197 (1904); United States v. Union Pacific R. R., 226 U. S. 61 (1912); and the *Freight Association* cases, *supra* note 29.

85. Principally, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600 (1914); United States v. Trenton Potteries Co., 273 U. S. 392 (1927); Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936).

ent types than the other cases which follow "the rule of reason". They are reconcilable with the latter cases, but only if it is borne in mind that they stand upon a different footing and should be rationalized upon a different basis. Railroads, as has been mentioned before in discussing the railroad cases, should be considered as public utilities. It should likewise be noted that trade associations, when price-fixing agreements are involved, constitute a special class to which the "rule of reason" is not unqualifiedly applied. They are illegal *per se* and it makes no difference whether the prices fixed are reasonable or not. Whether one agrees with the Court's holding or not, it would appear that such is its view of the application of the Sherman Act, and by keeping these exceptions in mind it becomes possible to reconcile seemingly contradictory and paradoxical statements by the Court in the various cases which have arisen under the Act. Or, to put it differently, a combination of railroads or public utilities is of its very nature "unreasonable"; likewise, a trade association having for its purpose the fixing of prices is of its very nature "unreasonable" regardless of whether the prices fixed are reasonable or not. Such seems to be the effect of the cases.

Having thus distinguished the railroad and trade association cases from the others, the following division of topics will form the basis for a discussion which, it is hoped, will clarify the Supreme Court's interpretation of the Sherman Act. Consideration of the cases will be grouped under five topics or headings: A. Type of Corporation—a consideration of the legality of the various devices conceived of in an effort toward unified control of combinations; B. Size—the effect of the size of a corporation upon its legality; C. Purpose—the intent with which the corporation was formed; D. Predatory Practices; E. Control of the market—the economic concept of monopoly.

A. *Type of Combination*

Combinations may be generally divided into "loose" and "integrated" combinations. The former embrace such combinations as trade associations, pools and exchanges. As has been repeatedly stated, these are *per se* in violation of the Sherman Act when coupled with price fixing agreements. "Integrated" combinations are distinguished from the "loose" associations in which the component parts retain their individuality by the unification of control or ownership or both which is achieved by such methods and devices as trusts, holding companies, stock acquisitions and property purchases. In the case of these integrated combinations, there has as yet been no decision holding any particular one to be illegal *per se*. The holding company device has in some cases been held illegal,[86] but it is to be noted that there are other cases involving the holding company device in which the defendant was not guilty of a violation of the Sherman Act.[87] The same is true of the other forms of combinations which have resulted in "integrated" combinations. From a consideration of these cases it will become apparent that the form which the combination takes is in itself not a controlling factor in determining its legality.[88]

B. *Size*

The degree of predominance achieved by a "trust" or combination is not, in and of itself sufficient to predicate the legality or illegality of a combination under the Sherman Act. "Mere size", the courts have repeatedly held, "is no offence". A comparatively small (by this is meant less than 50 per cent.) degree of control of the total industry is not, on the other hand, a certain defence, since a partial restraint may be illegal and a monopoly may be relative. However, under certain circumstances, size may give rise to a prima facie presumption of illegality.[89] This presumption may, however, be rebutted.

C. *Purpose*

The element of purpose or intent may be of the utmost importance as becomes evident from a reading of the Act, especially when criminal proceedings are brought thereunder. This element is essential when "conspiracy" is charged. Likewise, under Section 2, which forbids "any attempt to monopolize", if no monopoly has resulted, the intent is necessarily to be proved.[90] However, it is the consensus of the authorities that if the effect of the contract, combination or conspiracy is to restrain trade unduly or to achieve a monopoly, the question of intent then becomes immaterial.[91] It has also been held that a monopolistic intent, since abandoned, is not punishable.[92] It may be concluded then, apart from "conspiracy in restraint of trade",

86. Northern Securities Co. v. United States, 193 U. S. 197 (1904).

87. United States v. United States Steel Corp., 251 U. S. 417 (1920).

88. In the *American Tobacco Company* case, the court declared that the *form* of combination is immaterial. United States v. American Tobacco Company, 221 U. S. 106, 180 (1911). However, there is an evident judicial prejudice in favor of the "integrated" as opposed to the "loose" combination. Hardy, *Loose and Consolidated Combinations under the Antitrust Laws* (1933) 21 GEO. L. J. 123.

89. Standard Oil Company of New Jersey v. United States, 221 U. S. 1 (1911).

90. See United States v. Quaker Oats Co., 232 Fed. 499 (D. Ill. 1916), *appeal dismissed,* 253 U. S. 499 (1920).

91. Mr. Justice Peckham in the *Joint Traffic Association* case, commenting upon the decision in the *Trans-Missouri* case, 171 U. S. 505 (1898), said: "An unlawful intent in entering into the agreement was held immaterial, but only for the reason that the agreement did in fact and by its terms restrain trade." United States v. Joint Traffic Association, 171 U. S. 505, 561 (1898).

92. United States v. United States Steel Corp., 251 U. S. 417 (1920).

"attempt to monopolize" and criminal prosecutions under the Act, that the effect and not the intent is the controlling consideration.

D. *Predatory Practices*

Predatory practices may be defined as any unlawful means or methods the effect of which is unduly to restrain trade, eliminate competition, effectuate a monopoly, or preserve a monopoly once achieved. To put it differently, they are *exclusive* tactics.[93] Predatory practices are always in violation of the Sherman Act and the courts will always issue injunctions against them. However, if there has been an abandonment of these practices before the bringing of suit, no injunction will issue.[94] In practically every case of violation of the Sherman Act, the Court has found evidence of predatory practices and in the words of one commentator, "The whole question, therefore, comes down to the question of interference with outsiders, that is, to one of methods." [95] While this can hardly be unqualifiedly subscribed to—the *whole* question certainly comes to more than just methods—nevertheless, the statement is true to the extent that the presence of predatory practices gives rise to a stronger than prima facie presumption of illegality and in numerous cases is the disturbing weight which throws the balance of justice one way or the other.

E. *Control of the Market*

The law has frowned on monopoly from the earliest times. The threefold reason why monopoly is contrary to the public interest is given in the old case of *Darcy v. Allein.*[96]

> "The price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases. . . . The 2d incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade, regards only his private benefit, and not the commonwealth. 3. It tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

Of course the monopoly granted in the case was a monopoly strictly so-called, that is, to quote Coke: [97]

93. The predatory practices indulged in by the Standard Oil Company have been listed, *supra* note 50. The list constitutes an excellent collection of virtually every type of predatory practice.

94. United States v. United States Steel Corp., 251 U. S. 417 (1920).

95. Raymond, *The Standard Oil and Tobacco Cases* (1911) 25 HARV. L. REV. 31, 56.

96. 11 Co. 84b, 86b, 77 Eng. Reprints 1260, 1263 (1602).

97. 3 Co. Inst. 181.

> ". . . an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindred in their lawfull trade."

Although the concept of monopoly has expanded considerably since Lord Coke's time, to the point where the term is so inclusive as to defeat any attempt at a precise nicety of definition, the statement of the reasons behind the public policy discouraging monopoly are essentially the same as those given in *Darcy v. Allein.* Naturally enough the public at large is most materially injured when, as the result of monopoly, consumers' prices are raised. It is an unquestioned attribute of monopoly that it have the power to fix prices. In the trade association cases we observed that price-fixing agreements are contrary to the policy expressed by the Sherman Act, and this is true whether the prices fixed are reasonable or not. These agreements fixing prices between competitors are contracts directly in restraint of trade, the parties by their own acts endeavoring to divest themselves of the means of competition, something which the law has always abhorred. It is likewise undoubted that a corporation, predominating in some particular industry, offends the policy of the law when it charges prices that are unreasonable. But what of the corporation or combination which completely, or almost completely, controls an industry? There is no doubt that its position gives it the power effectively to control the market. And yet, if in fact the combination does not exercise its power to the extent of fixing or attempting to fix prices that are unreasonable, can it be said that such unabused control of the market (for actually the exclusive power to fix prices amounts to control) is nontheless illegal? At the back of the problem, thus raised, there is a vast amount of tumult and shouting, bickering and quibbling, recrimination and cross-recrimination, arising from the battleground where legalists and economists are wrapt in conflict. And yet it is in reality a sham battle. The meaning of the term "monopoly" is the point around which the storm rages. To the economist, the term monopoly conveys the notion of market control. To the lawyer, the term monopoly has a different connotation. Monopoly has the element of illegality; without this there is no monopoly. The economist is concerned with the *existence* of power, the lawyer with its *exercise*. Yet the economists themselves are, apart from law, divided as to the advisability of allowing large combinations. Size to the point of control, when regulated, is looked upon by some as desirable, by others as most objectionable.[98] The concern of the courts is with the statute and its interpretation. The question is as to whether the statute is broad enough to permit an interpretation of it in accordance with the economic concept of monopoly. It is difficult to visualize such an expansion without a legislative *fiat*. The hold of the common law and of precedent is apparently too strong. The *Trenton Potteries* case, previously discussed, is considered by some as authority for the proposition that a combination which has a preponderating influence in a particular industry and has consequently the power to fix prices, i. e. controls the market, and agrees to fix prices, is *per se* in violation of the Sherman Act. This proposition is correct as applied to price-fixing agreements between competitors combining in a "loose" association, and it is immaterial whether the prices fixed are reasonable or not. But this is by no means the same as holding that every combination, "loose" or "integrated", which occupies a predominant position in the industry and consequently possesses power to control the market in that industry is illegal *per se,* regardless of whether this power is exercised arbitrarily and unreasonably.

III

ALCOA—THE GROWTH OF AN INDUSTRY

When, on April 23, 1937, the United States filed a petition in equity in the District Court for the Southern District of New York, against the Aluminum Company of America, its officers and subsidiaries, charging them with violations of the Sherman Antitrust Law and praying for a dissolution of the company, a unique situation and one fraught with legal difficulties was presented to the courts. To illustrate the importance which is attached to this case by the government, a statement contained in an article [99] by the Honorable Robert Jackson, Assistant Attorney General of the United States, is noteworthy:

> "In April, commenting on the fact that the Aluminum Company suit not only puts the company on trial for monopoly, but also puts the existing antitrust laws on trial, Mr. Walter Lippman said: 'The restoration of competition is the only possible alternative to socialism, and it would be useless, as well as hypocritical, for any one to object to the collectivism of the New Deal and yet to cry out that an unmistakable economic monopoly should be tolerated by the law.' "

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98. See the discussions of Hamilton, Fetter, Burns, Berle, and Laidler, contained in HANDLER, THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932), for an excellent presentation of the ideas of the diverse schools of thought upon this question.

99. Jackson, *Enforcement of Anti-Trust Laws* (1937) 3 FED. B. A. J. 71, 73; same *sub nom. Should the Anti-Trust Laws be Revised?* (1937) 71 U. S. L. REV. 575, 577.

What, then, is this fearsome bogey, which has supplanted the Standard Oil Company and the Steel Trust as the target that is to test the effectiveness of antitrust weapons?

The rise of the Aluminum Company of America is an amazing story. It begins in the year 1886, when Charles Hall, then a young man of twenty-two and just graduated from Oberlin College, solved the problem of commercial production of aluminum.[100] Aluminum, an element nearly twice as abundant as iron, and exceeded in amount only by the elements silicon and oxygen, had defied all but the most complicated and expensive methods of reduction, so great is its affinity to oxygen. Hall, by use of electrochemical methods and the employment of cryolite,[101] succeeded in producing aluminum at a cost of about $2 a pound.[102] In 1888, Hall succeeded in interesting Captain Alfred E. Hunt, a metallurgist in iron and steel, in his process, and together they organized the Pittsburgh Reduction Company with an original capital of $20,000. In 1890, the Pittsburgh Reduction Company was recapitalized at $1,000,000.[103] The Pittsburgh Reduction Company began as a producer of raw aluminum, but the difficulties it faced in attempting to market it forced the company to expand into the business of fabricating aluminum products.[104] Once engaged in the fabricating business, it found it so profitable that by 1933 ingot production accounted for but 14 per cent. of the various kinds of aluminum sold, the rest being sheet, castings, wire, and fabricated products.

In 1907, the Pittsburgh Reduction Company, no longer a small reducing plant, but now engaged in mining bauxite, the ore from which aluminum comes, in extracting alumina, the compound of aluminum oxide from which aluminum is produced, in reducing the aluminum oxide to aluminum by electrolysis, and in manufacturing and selling finished aluminum products on a nation wide scale, fittingly enough changed its corporate title to the Aluminum Company of America. By various purchases and leases the company had obtained control over a wide extent of bauxite deposits and the water-power facilities so essential to the large scale production of aluminum. It had erected numerous reduction plants, rolling mills and foundries. This expan-

100. In the same year Paul L. T. Hérault, a Frenchman, independently arrived at essentially the same process, giving rise to an independent European Aluminum industry. Hérault's process was never patented in the United States.

101. Hall patent (No. 400,766) issued on April 2, 1889.

102. Previously aluminum had sold for twelve dollars a pound.

103. The Mellons, A. W., and R. B., became stockholders at this time.

104. In this connection see WALLACE, MARKET CONTROL IN THE ALUMINUM INDUSTRY (1937) 8-24. For an interesting account of how the Aluminum Company became engaged in the manufacture of cooking utensils see *The Aluminum Company of America* (1934) 10 FORTUNE, No. 3, pp. 46, 50.

sion has continued unabated, until at the present time this company, inaugurated with little fanfare and small capital, has reached the point where it is a large business with many and extensive holdings [105] and assets alleged to be of about $250,000,000.[106] According to the allegations of the government in the present case, the Aluminum Company controls:

> ". . . domestically produced virgin aluminum 100%; aluminum wire and cable, extruded and structural shapes, bars, rods, tubing, virtually 100%; aluminum alloys, more than 95%; aluminum sheets, more than 90%; aluminum pistons, approximately 80%; and aluminum kitchen utensils, approximately 50%".[107]

Truly, an economic monopoly!

Prior to June 1928, the Aluminum Company had extensive foreign interests, both in bauxite and waterpower facilities. In that month, however, there was created a legally independent corporation, Aluminium, Limited, a Canadian company, to which the legal title to nearly all of the Aluminum Company's foreign holdings was transferred. This was done by distributing pro rata in the ratio of 1 to 3 the shares of common (voting) stock in Aluminium, Limited, to the stockholders of the Aluminum Company. Thus the ownership [108] of the two companies remained the same. However, there has never been any interlocking directorate, the two corporations having had neither directors nor officers in common.

The gaps which have been left unfilled in the foregoing rather brief story of the development of the Aluminum Company will be filled in, to a large extent, by a consideration of the litigation in which the Company has been entangled, for the history of the Aluminum Company may be traced through the courts in the suits to which it has been a party. Generally speaking this litigation may be conveniently separated into three headings: A. patent litigation; B. private suits under the antitrust laws; and C. governmental proceedings under the antitrust laws. It is proposed to treat these suits in that order.

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105. Among these are domestic bauxite deposits at Bauxite, Arkansas, Hermitage, Georgia, and Eufaula, Alabama, and one foreign source in Dutch Guinea. The bauxite is reduced to alumina at East St. Louis, Illinois, and the company is constructing another alumina plant at Mobile, Alabama. There are four aluminum producing plants, at Niagara Falls, at Badin, North Carolina, at Alcoa, Tennessee, and at Massena, New York. In addition the Aluminum Company or its wholly or partly owned subsidiaries have numerous fabricating plants engaged in the manufacture of everything aluminum.

106. According to BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 21, the gross assets of the Aluminum Company as of January 1, 1930, amounted to $300,000,000.

107. Brief for the United States on the meaning of the Sherman Act, p. 7, United States v. Aluminum Company of America, Equity No. 85-73 (S. D. N. Y.).

108. The stock in both corporations is closely held, the majority being owned by the Mellon Estate, Arthur V. Davis, Roy A. Hunt and trustees of the Duke Endowment.

A. *Patent Litigation*

For the first fifteen years of its existence, the Pittsburgh Reduction Company was engaged in continuous litigation with the Cowles Electric Smelting and Aluminum Corporation over the exclusive right to produce aluminum by the electrolytic process. Charles Hall, as we have seen, had been granted a patent for his process. Before associating with Captain Alfred E. Hunt, Hall had endeavored to interest the Cowles people in his process. An optional agreement was even entered into but the Cowles Company allowed the option to lapse. When the Pittsburgh Reduction Company commenced operations, external heating applied to the crucible (which was the method followed by Hall originally, in order to keep the solvent melted) was abandoned in favor of internal heating by means of an electric current. Charles S. Bradley had received a patent [109] for a reduction process using electric current for internal heating. The Cowles Company began producing virgin aluminum shortly after the Pittsburgh Reduction Company, although the existence of the Bradley process was unknown to them until 1892 and they did not obtain title to it until 1897 after considerable litigation. With the entry of the Cowles company into the manufacture of virgin aluminum a brief price war ensued lowering the price of aluminum $0.50 a pound. A bill was brought by the Aluminum Company against the Cowles company for patent infringement and a perpetual injunction issued in 1893.[110] The Cowles company was forced to shut down. In 1903 permission for a rehearing was finally obtained.[111] However, before a rehearing could take place, the Hall process as now operated was held to be an infringement of the Bradley patent,[112] which the Cowles company had recently acquired after considerable litigation.[113] Damages to the extent of about $3,000,000 were assessed against the Pittsburgh Reduction Company. However, damages of $292,000 which had been assessed in the previous infringement proceeding in which the Pittsburgh Reduction Company had obtained a permanent injunction against the Cowles Company [114] had never been paid by the latter. By virtue of some substantial money settlement the Pittsburgh Reduction Company obtained the use of the

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109. Patent No. 468,148.

110. Pittsburgh Reduction Co. v. Cowles Electric S. & A. Co., 55 Fed. 301 (C. C. N. D. Ohio, 1893), *rehearing denied*, 64 Fed. 125 (C. C. N. D. Ohio, 1894).

111. Pittsburgh Reduction Co. v. Cowles Electric S. & A. Co., 121 Fed. 556 (C. C. N. D. Ohio, 1903).

112. Cowles Electric S. & A. Co. v. Pittsburgh Reduction Co., 125 Fed. 926 (C. C. A. 2d, 1903), *rev'g*, 111 Fed. 742 (C. C. W. D. N. Y. 1901).

113. Cowles Electric S. & A. Co. v. Lowrey, 79 Fed. 331 (C. C. A. 6th, 1897), *rev'g*, 68 Fed. 354 (C. C. N. D. Ohio, 1895).

114. Pittsburgh Reduction Co. v. Cowles Electric S. & A. Co., 55 Fed. 301 (C. C. N. D. Ohio, 1893), *rehearing denied*, 64 Fed. 125 (C. C. N. D. Ohio, 1894).

Bradley patent until its expiration, working under a license and paying royalties. In turn, the Cowles company agreed not to manufacture pure aluminum. Thus the result was that the Pittsburgh Reduction Company obtained a patent monopoly (no more inexpensive or feasible process of making aluminum available commercially has been discovered) which was to extend until 1909,[115] two years subsequent to the expiration of the Hall patent. The exclusive effect of the patent monopoly resulted from the fact that the processes were complementary to each other. It is interesting to contemplate what might have been the effect if a cross-licensing agreement had been entered into rather than the type of settlement which was in fact made. The prospect of two competitors, at a time when the industry was in its infancy, is an intriguing one.

B. *Private Suits*

The most persistent competitor of the Aluminum Company of America in the manufacture of duralumin, a light and strong alloy of aluminum, and of other aluminum products has been the Baush Machine Tool Company, which together with its president, Mr. Haskell, has waged a lengthy warfare in the courts [116] against the Aluminum Company, claiming damages under the Sherman Act. Duralumin, the important aluminum alloy, was invented by one Welm, a German, and patented in the United States. During the World War, this patent was confiscated by the Government as the property of a German national and later turned over to the Chemical Foundation. Both the Aluminum Company of America and the Baush Machine Tool Company obtained licenses under the patent. Since the Aluminum Company was the sole American producer of virgin aluminum, which the Baush company needed for its business, the latter had to purchase its raw metal supply from them or else from foreign producers at substantially the same prices. Moreover, it was in competition with the Aluminum Company as a producer of the alloy and other products. In 1919, the Baush Company brought suit against the Aluminum Company in the District Court for the District of Massachusetts which remained pending, though never tried,[117] until another and similar suit was instituted in the District Court in Connecticut in 1931. The

115. Professor Wallace, *op. cit. supra* note 104, at 101, speaks of the tremendous advantage the enjoyment of this patent monopoly for such length of time gave the Aluminum Company over potential competitors.

116. It is worthy of note that in these suits the Baush Co. and Mr. Haskell were represented by the firm of Cummings & Lockwood, of Stamford, Conn., as counsel. Mr. Homer Stille Cummings was the United States Attorney General under whom the present suit against the Aluminum Company was instituted.

117. A second suit was instituted in Massachusetts in 1928, but after several postponements was dropped.

gist of the complaint as given by Chase J., in the Circuit Court of Appeals of the Second Circuit during one phase of the litigation was as follows:

> "(1) That the defendant has monopolized interstate trade in virgin aluminum by unlawfully combining and agreeing with the foreign producers [118] that they will all charge substantially the same prices for virgin aluminum in this country; (2) that it so combined and agreed with Aluminium, Limited, that Aluminium, Limited, would not compete with it in the United States by selling virgin aluminum here; (3) that it did itself, and with its domestic subsidiaries, monopolize and restrain interstate trade in virgin aluminum; and (4) that it did, or attempted to, in concert with its domestic subsidiaries, monopolize interstate trade in substantial part by keeping the price of virgin aluminum high and the price of products manufactured from it low so that it was impossible for the defendant (*plaintiff?*) to compete with it in the manufacture of aluminum products, in that the cost of defendant's raw material plus the cost of manufacture and sale exceeded the price at which its product could be sold in competition with similar products so manufactured and sold by the defendant." [119]

These are substantially the same charges as are made by the Government in the suit now in progress.

After a trial in which a jury found for the Aluminum Company, an appeal was taken and the judgment entered was reversed and a new trial ordered because of error in the exclusion of evidence.[120] On retrial, the Baush Company prevailed, the damages of $956,300 assessed by the jury being trebled,[121] and attorney's fees awarded in the sum of $300,000 together with $500 court costs. Upon appeal the verdict was reversed, chiefly on matters of procedure.[122] There has been no subsequent litigation, the case having been settled out of court.

Mr. Haskell, president of the Baush company, smarting from a number of setbacks at the hands of the Aluminum Company in various dealings with it arising out of his position as a competitor, brought suit in 1925 against the executors of James B. Duke, the Tobacco King. Mr. Duke had money to invest and likewise a very valuable source of waterpower on the Saguenay River in Quebec. He became interested

118. These are principally: British Aluminum Company, Limited; L'Aluminium Francais (French); Aluminium Industrie (Swiss); and Vereinigte Aluminum Werke Aktiengesellschaft (German).

119. See Baush Machine Tool Co. v. Aluminum Co. of America, 79 F. (2d) 217, 219 (C. C. A. 2d, 1935).

120. Baush Machine Tool Co. v. Aluminum Company of America, 72 F. (2d) 236 (C. C. A. 2d, 1934), *cert. denied,* 293 U. S. 589 (1934).

121. 38 STAT. 731 (1914), 15 U. S. C. A. § 15 (1927).

122. Baush Machine Tool Co. v. Aluminum Co. of America, 79 F. (2d) 217 (C. C. A. 2d, 1935).

in the aluminum business and had numerous conferences with Mr. Haskell relating to the establishment of an aluminum manufacturing business on the Saguenay development. Mr. Haskell, of course, hoped thus to free himself of dependence on the Aluminum Company for his supply of virgin aluminum, so necessary to the manufacture of duralumin. After a considerable time spent by Mr. Haskell, in investigating the feasibility of such an enterprise, Mr. Duke sold his power site to the Aluminum Company.[123] Mr. Haskell sued the executors of Mr. Duke, since deceased, for treble damages under the Sherman Act. The lower court allowed damages to the sum of $8,000,000 but refused to treble them, holding such damages to be punitive and hence not surviving the deceased.[124] Both parties appealed and the judgment was reversed, the circuit court of appeals holding that there was insufficient evidence to sustain the finding of any contract such as that alleged by Mr. Haskell.[125] The net result of all this litigation extending over a period of sixteen years leaves the Aluminum Company as firmly intrenched as ever, and although it received a monetary recompense in the settlement out of court, the Baush company is in no better position than before, having, in fact, discontinued the manufacture of duralumin.[126]

C. *Governmental Proceedings*

In 1911, during another "trust-busting" era, the federal government filed a petition against the Aluminum Company for violation of the Sherman Act. The Aluminum Company or its subsidiaries had in three contracts with independent concerns, dealing with the purchase or sale of bauxite and alumina, incorporated into the contracts restrictive agreements which resulted in the Aluminum Company retaining its monopoly over the manufacture of aluminum.[127] Another re-

123. According to Wallace, *op. cit. supra* note 104, at 136, the Duke interests received $16,000,000 par value of the preferred stocks of the new Aluminum Company of America, equivalent to one-ninth of the issue, and 15 per cent. of the no-par common.

124. Haskell v. Perkins, 28 F. (2d) 222 (D. N. J. 1928).

125. Perkins v. Haskell, 31 F. (2d) 53 (C. C. A. 3d, 1929), *cert. denied*, 279 U. S. 872 (1929).

126. Note, *The Aluminum Industry: An Anti-Trust Experience* (1937) 37 COL. L. REV. 269, 288, n. 97.

127. These agreements were as follows: In 1905 with the General Chemical Company which covenanted not to convert into aluminum the bauxite sold to it by the General Bauxite Company formerly owned by the General Chemical Company, but which the Aluminum Company now controlled.

In 1909, a like agreement with the Norton Company, from whom the Aluminum Company had purchased another Bauxite company, the Republic Mining and Manufacturing Company.

In 1907, a contract for the purchase of alumina for from five to ten years from the Pennsylvania Salt Manufacturing Company, the latter covenanting not to manufacture aluminum nor to sell alumina to anyone else for the manufacture of aluminum during the term of the contract.

strictive agreement had been entered into in a contract for purchase by the Aluminum Company of shares of stock in the Aluminum Goods Manufacturing Company, by which the vendors agreed not to compete with the Aluminum Company in the territory east of Denver for a period of twenty years.

The Aluminum Company had also entered into an agreement through its subsidiary, Northern Aluminum Limited, with a French aluminum company [128] for a division of markets, reserving rights of sale in the United States to itself.

Besides these allegedly illegal practices, the Government also charged that the Aluminum Company restricted and controlled the price and output of its products and had engaged in various types of unfair practices in restraint of trade, thus obtaining and securing its monopolistic position.

By a consent decree [129] issued on June 7, 1912, an end was put to the case before it was under way. This decree declared null and void the restrictive provisions in the four contracts just spoken of, with the General Chemical Company, the Norton Company, the Pennsylvania Salt Manufacturing Company and the Aluminum Goods Manufacturing Company. The agreement with the French concern to divide markets and to restrict importation was also nullified. The decree likewise enjoined against a number of unfair practices such as price control, output control, and abuse of the power of control over raw materials to the injury of competitors. This consent decree, aside from enjoining against acts which are quite clearly illegal, was otherwise ineffective,[130] leaving the Aluminum Company not in the least dislodged from its entrenched position. It provided, in effect, for a recognition of a monopoly status, controlled, however, to the extent of the injunctions of the decree.

About eight years after the issuance of the consent decree, Section 7 of the Clayton Act [131] was invoked against the Aluminum Company by the Federal Trade Commission, and its application upheld by a decision of the circuit court of appeals [132] requiring the Aluminum Company of America to divest itself of a two-thirds stock interest which it had acquired in the Aluminum Rolling Mills, on the ground that such acquisition of assets in a competing company tends substantially to lessen competition. The interesting sidelight to this case

128. Société Anonyme pour l'Industrie de l'Aluminum of Neuhausen.

129. DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES (G. P. O. 1918) 341.

130. The restrictive agreements enjoined against had been terminated prior to issuance of the decree.

131. 38 STAT. 731 (1914), 15 U. S. C. A. § 18 (1934).

132. Aluminum Co. of America v. Federal Trade Comm., 284 Fed. 401 (C. C. A. 3d, 1922), *cert denied*, 261 U. S. 616 (1923).

is the subsequent acquisition by the Aluminum Company, not of 66 2/3 per cent. of the stock interest in the Aluminum Rolling Mills, but of 100 per cent. by legitimate means. The Aluminum Rolling Mills was indebted to the Aluminum Company to the extent of $600,000 for purchases of aluminum ingot. After a compliance with the court order by selling its two-thirds stock interest in the Aluminum Rolling Mills to the holder of the one-third interest, the Cleveland Metal Products Company, for a nominal sum, the Aluminum Company brought suit on the notes evidencing the indebtedness and bid in the property at an execution sale. This second case brought the Government a nominal victory under Section 7 of the Clayton Act, but in the end the Aluminum Company got what it wanted.

In 1925, the Federal Trade Commission again opened fire on the Aluminum Company invoking Section 2 of the Clayton Act [133] and Section 5 of the Federal Trade Commission Act.[134] The complaint [135] alleged discrimination between purchasers in the matter of prices charged, a violation of Section 2 of the Clayton Act, and in addition, such unfair methods of competition as arbitrarily fixing a price differential between virgin and scrap aluminum, requiring by the terms of its contracts that purchasers of virgin aluminum sell back their scrap at fixed prices, charging its agents and subsidiaries less than it charged its competitors, refusing arbitrarily to sell sheet or ingot aluminum to its competitors, making incomplete deliveries to its competitors and delivering to its competitors sheet or ingot aluminum of a quality inferior to that required—all violations of Section 5 of the Federal Trade Commission Act. The Aluminum Company filed its answer and after proceedings which stretched out over a period of five years, the Commission in 1930 dismissed the complaint "for the reason that the charges of the complaint are not sustained by the testimony and evidence".[136]

It is to be noted, therefore, that against the Aluminum Company of America, the Sherman Act, the Clayton Act and the Federal Trade Commission Act have proven singularly unavailing. The 1912 consent decree to all intents and purposes aimed at mere regulation and accomplished nothing toward elimination of the monopolistic conditions in the American aluminum industry. It was a barren victory for the Government. The Federal Trade Commission has said of this consent decree that it is "obviously insufficient to restore competitive

133. 38 STAT. 730 (1914), 15 U. S. C. A. § 13 (1934).
134. 38 STAT. 719 (1914), 15 U. S. C. A. § 45 (1934).
135. In the Matter of Aluminum Company, Docket No. 1335 (Fed. Trade Comm. 1925).
136. In the Matter of Aluminum Co. of America, Docket No. 1335 (Fed. Trade Comm. 1930).

conditions in harmony with the antitrust laws".[137] The *Rolling Mills* case,[138] the only other suit in which the Government prevailed, was a hollow victory. As has been described, the decision was circumvented with comparative ease, and the Aluminum Company finally obtained even more than it had attempted at first. It now remains to be seen whether the present prosecution under the Sherman Act will be as unproductive (from the standpoint of the Government, of course) as similar proceedings have been in the past.

IV

Aluminum Hailed into Court Again

Two years will soon have passed since the filing of the present suit by the Government against the Aluminum Company of America. To date, there have been three decisions in the federal courts, from the district court to the Supreme Court, on a question of venue which was raised at the outset. The petition was filed on the equity side in the District Court for the Southern District of New York, on April 23, 1937, alleging that the Aluminum Company, together with sixty-two additional defendants, subsidiaries, officers and directors of said company were guilty of monopolizing and conspiring to restrain and monopolize trade and commerce in aluminum and related commodities. The petition, moreover, set forth devices designed and used to curtail not only imports of aluminum and aluminum products by American firms, but also exports to the United States by foreign firms. It is also alleged that the Aluminum Company has a 90 to 100 per cent. monopoly of aluminum and aluminum products, as a result of which it has the power to fix arbitrary and unreasonable rates. The petition prays, to quote the summary of the prayer for relief in the words of Thompson, C. J.:

> ". . . that the Aluminum Company of America be dissolved; that its properties be rearranged under several separate and independent corporations; that receivers be appointed; and that the stockholders of Aluminum Company of America and of Aluminium Limited divest themselves of their stock in one or the other of these corporations".[139]

Six days after the filing of the petition, the Aluminum Company filed a petition in the District Court for the Western District of Penn-

137. 3 Rep. Fed. Trade Comm. on the House Furnishings Industry (1924) xxxii.
138. Aluminum Co. of America v. Federal Trade Comm., 284 Fed. 401 (C. C. A. 3d, 1922), *cert. denied,* 261 U. S. 616 (1923).
139. United States v. Aluminum Co. of America, 20 F. Supp. 608, 611 (W. D. Pa. 1937). A discussion of the issues presented by this petition may be found in Note, *Problems of Anti-Trust Prosecution: The Alcoa Suit* (1939) 48 Yale L. J. 677.

sylvania in the old case which had been settled by the consent decree of 1912, seeking an injunction against the Attorney General and his assistants, restraining them from prosecuting the suit filed in New York on the ground that the parties, issues, subject matter and the relief sought were substantially the same as in the 1912 suit in Pennsylvania, and that consequently the District Court sitting in Pennsylvania had jurisdiction over the case. A temporary restraining order issued, a date was set for hearing, and on the return day an Assistant Attorney General and a Special Assistant Attorney to the Attorney General appeared specially, moved to quash service of the subpœnas, set aside the return thereon, dismiss the defendants' petition and vacate the restraining order. The motion was denied, and after hearing a preliminary injunction issued.[140]

Then the Attorney General filed an expediting certificate in the District Court for the Western District of Pennsylvania and a special three judge Expedition Court was formed in accordance with the statute.[141] This court reversed the holding of the district court, dismissed the Aluminum Company's petition, quashed service of process upon government counsel, vacated the preliminary injunction, and denied injunctive relief to the Aluminum Company.[142] This was decided in September, and in December, an appeal having been taken to the United States Supreme Court, that Court affirmed the decree of the Expediting Court.[143]

This question settled and answers filed, hearings were commenced in the District Court for the Southern District of New York before the Honorable Francis G. Caffey, D. J., early in 1938 and are still in progress. The case is of great importance not only because of the previous history of the Aluminum Company of America and its unique character, but also, and particularly so, because of the contemporary antitrust agitation and modern political and economic speculation.

The first and principal allegations and those upon which presumably the government depends for the granting of its prayer for dissolution are listed under Heading I, which is summarized by counsel for the United States, as follows:

> "Heading I deals with the Aluminum Company's monopolistic position in the trade and industry. The various percentages of the interstate trade in aluminum and aluminum products which the company controls are set forth, namely: domestically

140. United States v. Aluminum Co. of America, 19 F. Supp. 374 (W. D. Pa. 1937).

141. 36 STAT. 1167 (1911), 15 U. S. C. A. §28 (1934).

142. United States v. Aluminum Co. of America, 20 F. Supp. 608 (W. D. Pa. 1937).

143. Aluminum Co. of America v. United States, 302 U. S. 230 (1937).

produced virgin aluminum, 100%; aluminum wire and cable, extruded and structural shapes, bars, rods, tubing, virtually 100%; aluminum alloys, more than 95%; aluminum sheets, more than 90%; aluminum pistons, approximately 80%; and aluminum kitchen utensils, approximately 50%. Its holdings of bauxite deposits are alleged to constitute more than 90% of those in the United States suitable for the commercial production of aluminum. The concluding allegations are that this monopolistic control gives the company the power to fix arbitrary discriminatory and unreasonable prices and to exclude competitors; that such control has the direct and immediate effect of suppressing and preventing substantial competition which would otherwise arise; and that these acts and circumstances constitute a violation of section 2 of the Sherman Act.

"*These allegations raise the legal question whether a company which possesses and exercises this degree of control over interstate commerce in certain commodities is monopolizing a part of interstate commerce in violation of Section 2 irrespective of any showing as to its purpose to monopolize (except in so far as this purpose is to be implied under the doctrine that a person is presumed to intend the necessary consequences of his acts), and irrespective of any showing as to predatory practices or as to the exaction of unreasonable prices.*" [144] (Italics supplied.)

The other allegations are of various contracts in restraint of trade, stock and property acquisitions, and coercive tactics in restraint of trade. Substantiation of these allegations depend in large measure upon sufficiency of proof and matters of evidence, and as may be observed from reading the opening statements for the Government, involve many matters which have formed the basis for previous antitrust proceedings against the Aluminum Company. Inasmuch, therefore, as they involve matters of fact, it would be useless to speculate at this time upon whether or not any or all of them may be substantiated. Instead it would be wiser to consider the provocative question raised by the Government in Heading I mentioned above, the legal question as to whether or not a company occupying such a preponderant position in a particular industry as to give it the power to control prices is illegal and a monopoly *per se,* regardless of purpose, predatory practices or reasonableness of prices.[145]

144. Brief for United States on meaning of Sherman Act (filed Sept. 21, 1938) pp. 7-8, United States v. Aluminum Co. of America, Equity No. 85-73 (S. D. N. Y. 1937).

145. That this is the important legal question raised by the Government in this case may be further shown by the statement of Mr. Walter Rice, of counsel for the Government, in his opening statement where he says: "There may be a bare question of law presented in this case as to whether or not the one hundred per cent. monopoly enjoyed by the Aluminum Company of America is illegal *per se,* in and of itself, irrespective of the manner in which the monopoly was attained." United States v. Aluminum Co. of America, Equity No. 85-73 (S. D. N. Y. 1937), Opening Statement for the Government, June 1, 1938, p. 3.

In view of the previous decisions of the United States Supreme Court which have been discussed, it would appear that from a legal standpoint this proposition would be extremely difficult to maintain, regardless of how true the statement may be from an economic standpoint. The Aluminum Company is of course unique. It was protected by a patent monopoly for nineteen years. It expanded considerably during those nineteen years both vertically and horizontally, so much so that at the time its patents expired it was so firmly entrenched, held such extensive sources of raw materials, such important water-power facilities and manufacturing plants as to make it extremely unwise for any one without a bottomless pocketbook to enter into competition with it, particularly in the production of virgin aluminum.[146] It was forced by necessity during its early years of struggle to enter the fabricating business. All of these considerations but serve to illustrate the difficulties facing the Government. The consent decree of 1912 may well serve to be a stumbling block, since in that suit the Government conceded that the existence of the aluminum monopoly was lawful.[147] The *Standard Oil* case and its "rule of reason", the *United States Steel* case, holding that intent to monopolize and predatory practices discontinued and abandoned cannot, because they need not, be enjoined, and other federal cases may well serve to overthrow the novel proposition advanced by the Government. The various points raised in the discussion at the end of Part II of this article would seem to indicate that at least under the Sherman Act and the interpretation so far given to it, the courts would be extremely loath to accede to a doctrine of monopoly *per se*. It has been accorded recognition, it is true in the railroad cases. It has been explained that this is due to the fact that railroads are in a special class of industry, operating under a franchise from the state. Where "loose" combinations are involved and there is a price-fixing agreement, the doctrine of monopoly *per se* is applicable as in the *Trenton Potteries* case. This case, however, seems distinguishable from the instant case on so many grounds that an extension of the doctrines there enunciated to apply to this case seems scarcely probable. The question as to whether or not such a doctrine as that of monopoly *per se.*, i. e. based on mere power to control the market, is economically more sound is another question. If so, then perhaps the difficulty lies with the present laws or the interpretation of them!

146. One company made an abortive attempt. The Southern Aluminium Company, a French concern, started to build a plant for the production of virgin aluminum at Badin, North Carolina. Unfortunately the combination of the World War and heavy expense caused it to sell out the uncompleted plant to the Aluminum Company of America which finished it and now operates it.

147. Thompson, J., in United States v. Aluminum Co. of America, 20 F. Supp. 608, 611 (W. D. Pa. 1937).

As to the relief prayed for by the petition, dissolution seems quite unlikely to be achieved unless, of course, the Government can establish its contention that the Aluminum Company is a monopoly *per se,* since, it would appear, that this is not a combination of competing units. Any wrongful acquisitions by the company may, however, be disjoined. The question of public policy is an important consideration in dissolution proceedings. However, since the problem of dissolution is probably dependent upon the showing of facts in the case at bar, it would seem rather futile to speculate upon it here.

The prayer of the Government that the stockholders of the Aluminum Company of America and of Aluminium, Limited, divest themselves of their stock in one or the other of these corporations, presents some difficulties. Because on the surface, at least, they are separate corporations, without any officers or directors in common, it is quite improbable that the two corporations would be held to be a combination with unified control without a great deal of evidence being adduced to prove a common control. It is not illegal for separate corporate entities to have the same stockholders. The decree of dissolution in the *Northern Securities* case had the effect of leaving two competing corporations with the ownership of stock in the two in the same hands. Such was also the effect of the dissolution of the Standard Oil Company. In considering the dissolution decree proposed in the *American Tobacco Company* case, the Court adverted to the decrees issued in the *Northern Securities* and *Standard Oil* cases, drawing as a conclusion from them the fact that "common ownership" was not forbidden, that the Court would not have approved of the arrangements made in those cases unless it was satisfied that "common ownership" was not illegal.[148]

However, a careful student in answering the question, "what is a public utility?", once wrote "as to what the Supreme Court *has* passed on I can look it up: as to what it may be newly asked to pass on I shall wait and see".[149] It would seem, therefore, that before answering the novel questions raised in the case against the Aluminum Company, one way or the other, it would be well to await the pronouncement of the Court. A great deal depends upon the resolution of the various problems afforded by the case. The status of our present antitrust weapons will be more sharply defined by a decision of the questions now raised. To boldy prognosticate would be folly. But if the Court should accede to the novel propositions set forth by the Government, it will be interesting to see how previous decisions are reconciled—if they are or can be.

148. United States v. American Tobacco Co., 191 Fed. 371, 388 (1911).
149. Robinson, *The Public Utility: A Problem in Social Engineering* (1928) 14 CORN. L. Q. 1, 9.

V

POSTSCRIPT

The problem confronting our Government today is the achievement of a workable control over monopoly. To state the problem more narrowly, to particularize, detail or qualify is to belie the verity of its magnitude and generality.

If the Government wins its case against the Aluminum Company in the traditional manner that antitrust cases have been won before—i. e. by a showing of fairly well defined predatory practices—one may well ask what has been accomplished. If we have our eye on the larger problem, which is really what matters, we may be forced to conclude that there has been much ado about nothing. A few business men may be frightened and the Supreme Court may be acclaimed for taking a somewhat more realistic view of what are to be regarded as predatory practices, but such gain will lose its utility almost as readily as the newspaper which chronicles the decision.

If the Government should prevail on its contention that a hundred per cent. monopoly is illegal *per se*—and that must at least be counted a possibility, though only a possibility—a new day will have dawned, and there will be rejoicing in the breast of one but lately member of the Supreme Court.[150] Then lawyers and economists will have begun to talk the same language. The Court will have come to restate the meaning of monopoly in terms of market economics, and we may start afresh from a new definition. If this happens, the Sherman Act will be an effective instrument for the first time in the nearly half century of its unhappy life. If this happens, none is likely to say again that the Sherman Act was never "intended to mean anything save a big noise to gull the gullible".[151]

But whether this case is won or lost, legislation is in the offing. What will be its nature? Will it be a mere tinkering with the antitrust laws?[152] Not unless Congress fumbles. One thing is sure—monopoly and monopolistic practices will be more clearly defined. The Administration has apparently learned valuable lessons from previous attempts at regulating business. It is seeking at least to avoid the accusation of approaching the problem in slap-dash fashion. It is too

150. It was Mr. Justice Brandeis who said that "the essence of restraint is power" and that "power may arise merely out of position". Dissent in American Column and Lumber Co. v. United States, 257 U. S. 377, 414 (1921).

151. Beard, *The Trust Problem* (1938) 96 NEW REPUBLIC 182.

152. The Attorney General has suggested that far more is needed: "In short, the anti-trust laws need clarification and restatement. They need to be adapted to our modern problems more realistically and intelligently, and they need behind them the drive of adequately financed enforcement machinery." Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. L. REV. 23, 27.

early to evaluate the work of the Temporary National Economic Committee. Upon what it finds, upon what it recommends and upon what the Congress can make out of it all in the way of legislation will depend the shape of things to come. Doubtless, either the existing antitrust laws will be clarified as carefully as legislative science can do it or the Sherman Law will be repealed and we shall probably see a new antitrust law in the drafting of which both lawyers and economists will do their level best to see that their two disciplines are brought somewhere near each other.

But it is more than doubtful whether new and better antitrust legislation will serve the public to much greater advantage than does our present law. The gradual process of judicial inclusion and exclusion seems almost inescapable—even though we recognize "bigness" as an evil in itself. How big is big? What percentage of control of a given industry is bad? We shall still have to deal with each particular industry, and each is different from the other. Some mighty troublesome line drawing will have to be done.

There are those in high places who have suggested that the public utility concept must be expanded.[153] Perhaps that can be done. But, so far as the Federal Government may regulate, it is of course limited to industries engaged in interstate commerce.[154] That puts much of it up to the states and there seem to be almost insurmountable difficulties in the way of satisfactory federal-state coöperation.[155] So it appears that really effective regulation must wait upon a Constitutional Amendment.

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153. The Attorney General: "Indeed, there are those who are persuaded that economic groups that in one way or another have arrived at a position of dominance in any essential line of activity are likely candidates for regulatory treatment—and that this is especially true with reference to so-called natural monopolies or lines of business dealing with national resources." *Ibid.*

S. E. C. Commissioner Jerome Frank: "The category, public utility, is not a closed one. It has grown ever larger in the course of our history. Any time that the competitive element in an industry is found to be socially disvaluable and is wiped out, then that industry becomes a public utility. The Supreme Court, over a long period, gave decisions to the effect that, constitutionally, our legislative bodies could so deal with but a few selected industries. But in the *Nebbia* case, decided in 1933, it reversed that attitude, and there now seems to be no constitutional obstacle to prevent the legislatures of the several states from enacting laws making any industry a public utility." FRANK, SAVE AMERICA FIRST (1938) 312.

154. See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937) 147 *et seq.*

155. See CLARK, THE RISE OF A NEW FEDERALISM (1938) cc. 1 and 2.