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The Problem of Trade Association Law

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THE PROBLEM OF TRADE ASSOCIATION LAW

THE law of trade associations bears witness to the growing coordination between legal, economic, and business thought on the problems of industry and commerce presented for adjudication.¹ In this field, the program of basing legal decisions, in large part, upon the facts gathered by agencies outside the borders of the law,² bids fair to achieve a noteworthy success perhaps unequalled in other matters.³

¹ Maple Flooring Manufacturers' Association, *et al. v. U. S.*, 268 U. S. 563 (1925); Cement Manufacturers' Protective Association *et al. v. U. S.* 268 U. S. 588 (1925); National Association of Window Glass Manufacturers *v. U. S.*, 263 U. S. 403 (1923); *U. S. v. Trenton Potteries Co.*, *et al.*, 273 U. S. 392 (1927); *cf.* dissenting opinions of Holmes & Brandeis, J. J., in American Column and Lumber Co., *et al. v. U. S.*, 257 U. S. 377, 412 *et seq.* (1921).

²"In the immediate past, the social facts required for the exercise of the judicial function of law-making have been arrived at by means which may fairly be called mechanical. It is not one of the least problems of the sociological jurist to discover a rational mode of advising the court of facts of which it is supposed to take judicial notice." Roscoe Pound, *Legislation as a Social Function*, Publications of the American Sociological Society, (December 1912) Vol. VII, 148, 161.

"Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond. In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression." Cardozo, *Growth of the Law* (1924) pp. 117-118.

"How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by

Here, the great interests involved, the large number of enterprises, the financial support accorded, the wide-spread influence of their conclusions in shaping the structure and functions of business activities, contribute to foster a more extensive development of these fact-finding bodies.^{3a} There is thus being fashioned a harmony of view for a constructive and progressive statesmanship of business and law in trade association matters. By means of such a comprehensive approach, the economic soundness of many trade association programs and practices has already become a prime factor in determining their legal validity.

It is not the purpose of this paper to enter into an exhaustive investigation of particular branches of a field of law which is only at the threshold of development. Each specific problem probed must be subjected to a special legal inquiry, based upon a careful observation and analysis of the realities of the subject matter under discussion. We shall merely point to the course of trade association law and the ends which it seeks to attain. It will perhaps be noted that, as evolved, the legal boundaries of competition do not, at the present day, necessarily exclude methods of efficiency and intelligence to any greater degree than they were deemed to include in the past, methods which were predatory, destructive, and unfair.⁴

The latest decisions evidence a judicial attitude founded on sympathy and understanding rather than on suspicion, hostility, and negativity. Where the result is so largely dependent upon the inferences to be drawn from voluminous records and a mass

provincial legal habits of mind ought, I should think, unite to effect some such advance." Learned Hand, J., *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 Fed. 95, 115 (S. D. N. Y. 1911).

³ Cf. Bikle, *Judicial Determination of Questions of Fact Affecting Constitutional Validity of Legislative Action*. (1924) 38 Harv. L. Rev. 6; Frankfurter, *Hours of Labor and Realism in Constitutional Law*, (1916), 29 Harv. L. Rev. 353.

^{3a} For the range and application of research activities such volumes as C. S. Duncan, *Commercial Research*, N. Y. 1920, and J. George Frederick, *Business Research and Statistics*, N. Y. 1922, will serve as valuable introductions. See also *Research and New England Prosperity*, Report of the Research Committee of the New England Council, Nov. 17, 1927, p. 6:

"Research is the application of the scientific technique, the scientific habit of mind, to business problems."

⁴ Cf. Stevens, *Unfair Competition* (1916), especially Introduction, p. 9, listing twelve classes of unfair methods of competition.

of evidentiary facts, this becomes of paramount importance. It transcends, even, in importance, the issue as to whether the Cement and Maple Flooring cases⁵ are distinguishable solely on the facts from the Hardwood and Linseed cases,⁶ or whether new law has been created⁷ despite the express ruling of the Supreme Court itself⁸ that the *ratio decidendi* of the earlier cases was not in any wise overruled or even modified. It is enough to note that commentators all are agreed that a new method of inquiry and a new evaluation of the social advantage of trade association enterprise has been adopted by the Supreme Court.

It would indeed be a shallow contention that the law of trade associations, as it stands today, is a mere arithmetic subtraction of the later cases from the earlier ones, the remainder being legally permissible. The legal, as well as business problems involved are far too complex for the application of a test so simple.

The problem of the law is to have translated to it the great mass of business and economic data, largely the labor of trained minds, as an aid in legal analysis. The impartial and expert inquiries and investigations, from a variety of clearing houses for business information, which collate, survey, and assess such recorded experience, can serve as trustworthy objective guides to law, as they have become to business. Reports from federal and state departments, universities and foundations, trade associations, business services, bank reviews, and trade periodicals are the sources of an extensive library⁹ for the diligent inquirer. The

⁵ Cement Manufacturers' Protective Association, *et al. v. U. S.*; Maple Flooring Manufacturers' Association, *et al. v. U. S.*, *supra*, note 1.

⁶ American Column & Lumber Co., *et al. v. U. S.*, *supra*, note 1; *U. S. v. American Linseed Oil Co.*, *et al.*, 262 U. S. 371, 389 (1923). *Cf.* Roberts, *The Present Legal Status of Trade Associations and their Problems*, Proceedings of the Academy of Political Science, Vol. XVI, No. 4 (Jan. 1926), p. 15, *et seq.*, in which the author distinguishes the two sets of cases on seven general grounds.

⁷ *Cf.* discussion, *Maple Flooring Association v. U. S.*, *supra*, note 1, 584, 585-6, presenting variety of grounds for difference in result in trade association cases.

⁸ *Cf.* Oliphant, *Trade Associations and the Law* (1926) 26 Col. L. Rev. 381; Probst, *The Failure of the Sherman Anti-Trust Act* (1926) 75 U. Pa. L. Rev. 122; and a contrariety of commentary assigning a number of grounds for the difference in result, contained in discussions in *American Economic Review*, Vol. 16, No. 1, Supp., (March, 1926) p. 203, *et seq.*

⁹ The Department of Commerce of the United States has published a booklet, entitled "Market Research Agencies," Domestic Commerce

value of a vast intelligence service has appealed to the practical minds of business leaders and has already begun to command the sound judgment of the courts. To such systematic and scientific research and studies in the trends and features of a changing business, in all its complex aspects, neither business nor law could long remain impassive.

In law, as well as in business, a knowledge of the facts is an essential prerequisite for intelligent action. Law, as well as business, must take cognizance of actualities. It must therefore be acquainted with the precise conditions confronting practical business executives.

"The conflicting opinions of the Justices in the recent series of cases involving trade associations are not due to any differences in their reading of the Sherman Law *in vacuo*. The differences are attributable to the economic data which they deemed relevant to their judgment and the use which they made of them."¹⁰

The rulings of the courts in trade association causes have necessarily invoked the aid gained from such research. The Supreme Court has repeatedly announced that each case arising under the anti-trust laws "must be determined upon the particular facts disclosed by the record."¹¹ Further, "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."¹²

It follows as an obvious result from these far reaching canons of judgment that a painstaking consideration of the facts is an absolutely essential measure in applying the standards of conduct expressed in the statutes and decisions as general principles of law. Such a policy of individual examination of each case necessarily dictates the correlation between economic, business and

Series No. 6 (1927), detailing the names and activities of more than 500 separate agencies engaged in the subject of market study alone.

¹⁰ Frankfurter and Landis, *The Business of the Supreme Court of the United States*, (1927) 40 Harv. L. Rev. 1110, 1120.

¹¹ *Maple Flooring Manufacturers' Association, et al. v. U. S.*, *supra*, note 1, 579.

¹² *Chicago Board of Trade v. U. S.*, 246 U. S., 231, 238 (1918).

legal thought concerning the determination of what practices must be deemed unsound business activities.¹³

But judgments, by the law, as to the validity of activities under consideration involve, further, the rigid application of certain definite legal rules, such as, for example, absolute prohibitions against agreements, among independent competitive units, either to fix prices¹⁴ or to combine in an aggressive course of conduct, like an organized boycott, designed to snuff out competition.¹⁵ In such matters, the law is proceeding upon a recorded experience, which has compelled a strict adherence to its commands. The circumstances of industrial history of the past have rendered necessary such a policy to preserve the fundamental safeguards of the protective features of our anti-trust statutes. It follows, that, in administration, these laws must not be frustrated altogether or so construed as seriously to "hamper the courts of the United States in carrying into effect the prohibition of Congress against combinations in restraint of interstate trade."¹⁶ In general, therefore, the presence of such generic evidentiary features as penal provisions requiring the deposit of funds to insure obedience to agreements concerning a trade association reporting plan,¹⁷ "reports of the minutest details of their business to their rivals,"¹⁸ or the announcement of future prices^{18a} and "significant suggestions as

¹³ "The whole trust problem can be approached satisfactorily only by approaching it on the economic as well as the legal side. Activities in both these fields as disclosed in the report there given register an advance in an understanding of the matter." Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1924, pp. 2 and 3.

¹⁴ Cf. *U. S. v. Trenton Potteries, et al.*; *American Column & Lumber Co., et al. v. U. S.*; *supra*, note 1; *U. S. v. American Linseed Oil Co., et al.*, *supra*, note 6.

¹⁵ *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600 (1914).

¹⁶ Dissenting opinion of Pitney, J., in *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208, 220 (1921).

¹⁷ *U. S. v. American Linseed Oil Co., et al.*, *supra*, note 6, 389.

¹⁸ *American Column & Lumber Co., et al. v. U. S.*, *supra*, note 1, 410; cf. *U. S. v. American Linseed Oil Co., et al.*, *supra*, note 6.

^{18a} Even here, which is one of the most troublesome questions left open for future adjudication, the "specific job contracts" of the Cement case demonstrate that in special cases, this feature is not absolutely controlling. The social interest of protection against fraud outweighed, in this particular, the dangers of administration to which we have adverted.

to both future prices and production,"¹⁹ can so easily be made the vehicles for group pressure in keeping in line those who have entered into unlawful agreements, that to permit such activities would render ineffective, efforts, on the part of government officers, to enforce the provisions of the laws.

But even with these considerations in mind, the major portion of trade association activities is now being regarded by the law with a view toward their constructive possibilities and the economic and social advantages of their cooperative functions,²⁰ in promoting economy, efficiency, and stability in the processes of manufacturing and distribution. The emphasis in legal inquiry has shifted from a search for a technical violation of law to the presence of substantial economic benefits. Such cooperative enterprises are heralded by business leaders as the outstanding media for the solution of business maladjustments by efforts within the ranks of business itself, rather than by governmental dictation from without.²¹ Their agenda includes measures which can be accomplished solely by the organized, joint effort of a large number of those engaged within an industry. They involve problems in which the solution can be arrived at only by virtue of funding common experience and sharing expenditures pro rata, where the financial burden would otherwise be too great for a manufacturer or merchant of moderate means acting alone.²² Further, from mutual effort in trade associations, business units can secure the advantages of large scale consolidation, and yet preserve individual independence, initiative, and leadership.²³

¹⁹ American Column & Lumber Co., *et al. v. U. S.*, *supra*, note 1, 399; Cement Manufacturers Association *v. U. S.*, *supra*, note 1, 594 *et seq.*, 602 *et seq.*

²⁰ Cf. Oliver Wendell Holmes, *Collected Legal Papers* (1920) 184.

²¹ Cf. Address of Edwin B. Parker, Chairman of Board of U. S. Chamber of Commerce, at West Baden Springs, Ind., Oct. 17, 1927.

²² "Probably the most compelling reason for maintaining proper trade associations lies in the fact that through them small business is given facilities more or less equivalent to those which big business can accumulate for itself." Herbert Hoover, *Twelfth Annual Report of the Secretary of Commerce*, (1924) p. 24.

²³ "One of our constant national problems is how to obtain these benevolent results of such cooperation without creating dominations of groups that would stifle equality of opportunity; to obtain them without loss of individual initiative; to obtain them and still maintain that competition among individuals which is the sustaining impulse toward progress. I do not believe these things are incompatible." Address of Secretary Hoover to Trade Association Conference, April 12, 1922.

The lines of legal approval must thus be drawn to compromise the pressing claims of fixed legal principles, necessity for administrative effectiveness, and proof of economic advantages. However, in the evaluation of the economic benefit of trade association activities, the concrete circumstances which gave rise to such activity, and the effectiveness of the practices adopted, are elements to be carefully weighed in determining whether they are reasonably adapted to eliminate the evils at which they were aimed. A purely quantitative test of the restrictive feature of the arrangement is inconclusive.

What is the effect of these new conditions on the law? In other papers, the authors have pointed to the factors which are affecting the formulation of legal decisions in such trade association matters as credit²⁴ and patent interchange.²⁵ In like manner, in an inquiry into such trade association problems as statistics, arbitration, cost accounting, export trade, cooperative advertising, to mention the more important, an understanding of the related business background is an indispensable ingredient of intelligent investigation. To have value, each subject must be analyzed comprehensively, with a thorough appreciation of the present day business thought and practice in mind. It should not require extended argument to establish that a judgment by the law entirely out of line with present day business requirements is akin to the proverbial playing of Hamlet without the principal character.²⁶

Business and economic factors and legal policy are mutually interdependent.

“There are few more fascinating pursuits than the study of the effect which economic and legal institutions

²⁴ Podell and Kirsh, *Credit Bureau Functions of Trade Associations: The Legal Aspects.* (May, 1927) 1 St. John's L. Rev. 101.

²⁵ Podell and Kirsh, *Patent Pools and the Anti-Trust Laws,* American Bar Association Journal, Aug., 1927.

²⁶ “The law of * * * ‘unfair competition,’ ‘restraint of trade,’ ‘monopoly’ and related subjects has been much discussed, but little attention has been devoted in this country to a study of the thing of which all these particular subjects are commonly but phases,—the doing of business.” Edward A. Adler, 28 Harv. L. Rev. 135 (1914).

A failure to appreciate this leads again to “one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.” Dissenting opinion of Holmes, J., *Hyde v. U. S.*, 225 U. S. 347, 391 (1912).

have upon each other. A new economic institution makes its appearance, grows, waxes strong. It encounters legal restraints, perhaps arising out of tradition, or based on a chance legal precedent, or perhaps representing a hostile economic interest. The tug of war begins. If the economic institution is vital and draws sustenance from important springs of human endeavor, the legal restraints will begin to show signs of strain. Precedents will be distinguished principles encroached upon by exceptions, and the symmetrical pattern of the law distorted. Perhaps a new equilibrium will be found, or perhaps the legal restraints will snap and fall asunder. Perhaps again they will prove the more tenacious of the two, and the economic institution will perish, throttled by the dead hand of the law."²⁷

In its practical consequences, the struggle for mastery between these various forces portrays that the barrier set up by legal prohibitions, is, at the present time, the most formidable repressive influence in stunting the extension of trade association enterprise. It limits the general scope of activities, and discourages specific practices.

The present relation between commerce and legal development in adapting, adjusting, and adding new content to the legal standards of conduct, under stress of new industrial and commercial necessities, is by no means a task different from that to be found in other epochs in the history of the relation of law to industry.²⁸ In the process of balancing the various dominant social interests, practical convenience demanded by business requirements, is playing an ever-increasing role. The social need dictates the promotion, not the destruction or rendering ineffective, of the means upon which industrial prosperity depends. Authoritative writers establish that mercantile practice has always been one of the main sources of a flexible body of law.

"Above all else, commerce was the force that made for recognition of new interests and developed adequate means

²⁷ Gerard C. Henderson, *Statistical Activities of Trade Associations*, *American Economic Review*, Vol. 16, No. 1, Supp., (March, 1926) p. 219.

²⁸ "It has been remarked many times that our common law, by which we are so largely governed, may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization." Bruce Wyman, *Control of the Market*, (New York, 1911) p. 1.

of securing them. Moreover, the immediate path of progress was chiefly the development of a new body of law for traders and for commercial transactions."²⁹

As stated by Williston:³⁰

"In truth, usage is one of the agencies by which the law has been gradually formed and still is not only added to, but otherwise amended."

About a century and a half ago, Lord Mansfield performed the outstanding service of weaving the customs among merchants into the body of the common law.

"The construction of that system became the accession of Lord Mansfield to the Chief Justiceship of the Kings Bench in 1756, and the result of his administration of the law in the court for 30 years was to build up a system of law as part of the Common Law, embodying and giving form to the existing customs of merchants."³¹

The subject here under consideration is but the contemporary continuation of the same process. The assimilation of the customs of the law merchant into renovated legal concepts has been eloquently stated by Professor Burdick:³²

"Lord Mansfield's habit, of applying the principles of the law merchant to the decision of cases brought in the common law courts, has been valued for a century and a half by English and American judges. The result has been an extensive amalgamation of the rules of the law merchant with those of the common law. These two bodies of rules no longer stand apart, as they did three centuries ago. Each has been modified by the other and, to a great extent, has lost its separate identity."

Of particular significance, as a closely related process, is the growth of the law of agreements in restraint of trade.³³ "Reasonableness," stated Mr. Justice Stone, in the recent Trenton

²⁹ Roscoe Pound, *Commerce & Legal Progress*, American Legal News, Vol. XXVIII, October, 1917, p. 22.

³⁰ 2 Williston, *Contracts*, (1920) § 655, p. 1270.

³¹ Scrutton, *General Survey of the History of the Law Merchants*, 3 *Select Essays in Anglo-American Legal History*, 7, 13.

³² Burdick, *Contributions of the Law Merchant to the Common Law*, *Ibid.* 34, 47.

³³ See, Podell and Kirsh, *Credit Bureau Functions of Trade Associations: The Legal Aspects*, (1927) *supra*, note 24, authorities collated in note 8 of that article.

Potteries case, "is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines."³⁴ There is an abundance of authority to be drawn from decisions and commentators that the law is thus being brought into consonance with changing business conditions.³⁵

At the present time, opinion among business executives is fast crystallizing into a substantial unanimity that the introduction of scientific knowledge and the advantages of cooperative enterprise have proved their utility in every day affairs.³⁶ It seems, however, a mistaken notion that the lag between business and legal doctrine in trade association matters is greater than it really is. The opinions of Mr. Justice Stone, in which he speaks for a majority of the Supreme Court of the United States, relying upon and incorporating authorities from the realm of economics, are a refutation of such unwarranted assertions, and indicate clearly the recognition by the courts of the underlying phenomena of the dynamic currents and consequences summarized in the phrase, the "new competition."³⁷

In the epochal Maple Flooring case,³⁸ Mr. Justice Stone said:

"It is the consensus of opinion of economists and of many of the most important agencies of government that

³⁴ U. S. v. Trenton Potteries, *et al.*, *supra*, note 1, 397.

³⁵ "I pass to another field where the dominance of the method of sociology may be reckoned as assured. * * * I take as an illustration, modern decisions which have liberalized the common law rule condemning contracts in restraint of trade. The courts have here allowed themselves a freedom of action which in many branches of the law they might be reluctant to avow." Cardozo, *Nature of the Judicial Process*. (1921) 94, 95.

³⁶ "Only knowledge, based on ascertained facts, provides a sure foundation for the adequate regulation of business affairs in the complex organism which today serves the material needs of the community. Such knowledge is essential to the effective operation of economic forces." *Trade Associations: Their Economic Significance and Legal Status*, National Industrial Conference Board, (New York, 1925) p. 114.

³⁷ Cheney, *The New Competition*, *Nation's Business*, Vol. XIV, No. 6 (June, 1926).

³⁸ *Maple Flooring Manufacturers' Association, et al. v. U. S.*, *supra*, note 1, 582-584; see also language of the court in *Cement Manufacturers' Association, et al. v. U. S.*, *supra*, note 1, at 606.

the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. * * * Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. * * *

“It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligency of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated.”

The stabilization of price levels, arising from economic laws and not from artificial agreements, and the elimination of industrial waste and inefficiency, with their attendant evil consequences, could not long be the subject, at the same time, of economic approval and legal condemnation.

In its practical effects, the importance of the decisions already entered in the law reports, goes far beyond the exact decision entered, despite the limitation by the courts of the precise holding.³⁹ This is inevitable in view of the paucity of case law on the subject. The general principles of law as applied to the practices presented in the decided cases, are aids in forecasting the determination of future causes, analogous to those adjudicated.

In striking contrast to the mere handful of decisions on trade association subjects in the literature of the law, is the overwhelming mass of material dealing with the same subject matter in the world of business.⁴⁰ In numberless trade association questions,

³⁹ Cf. language of Stone, J., in *Maple Flooring Manufacturers' Association, et al. v. U. S.*, *supra*, note 1, at 586.

⁴⁰ For reference to a collection of the names of the various fact-finding agencies, see *supra*, note 9.

the legal aspects have not been presented to the courts; our sole tests are the empirical conclusions of business alone. In business papers, trade journals, trade and commercial organization conventions, magazines, and reports, are to be found the results of specialized or case studies of business problems. The growth of special business libraries⁴¹ has been stimulated by the intense interest in the subject. They point to the conclusion that in the law of the future, reliance will be placed as much on the indices of business writings as on the Index to Legal Periodicals and Shepard's citations. One has but to compare the contents of such texts as Cooke on Combinations,⁴² or Thornton, "A Treatise on the Sherman Anti-Trust Act,"⁴³ with the more recent Jones, "Trade Association Activities and the Law,"⁴⁴ to note the difference in method of presentation of the legal questions.

There is a copious literature which describes the dynamic economic currents and their far reaching effects, resulting in a reshaping of the entire business structure during the past several years.⁴⁵ These phenomena have their counterpart in the law. They add to the number and details of agreements reasonably adapted to promote and foster a different competition⁴⁶ from that to be found in 1890 and even in 1914, when the major anti-trust laws were enacted.

It is of the utmost importance to bear in mind that the law is dealing with eminently practical business situations. It must therefore be cognizant of the wholesome "new competition" as

⁴¹ Cf. Business Books; 1920-1927, Published by the Business Branch of the Newark Public Library (New York, 1927).

⁴² Frederick H. Cooke, *The Law of Combinations, Monopolies and Labor Unions* (Chicago, 1909).

⁴³ Cincinnati, 1913.

⁴⁴ New York, 1922.

⁴⁵ Cf. Cheney, *The New Competition*, *supra*, note 37; *The Answer to the New Competition*, *Nation's Business*, Vol. XV, No. 11 (October, 1927). Address of Dr. Julius Klein before Associated Business Papers, *U. S. Daily*, October 19th, 1927; Virgil Jordan, *Stabilizing National Prosperity*, *Yale Review*, October, 1927.

⁴⁶ Referring to the Court's construction of the words "restraint of trade" in *Standard Oil Co. of N. J., et al. v. U. S.*, 221 U. S. 1 (1911), the Court in *U. S. v. American Tobacco Co.*, 221 U. S. 106, (1911) said at p. 179:

"It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

conceived and practiced by business today. The last quarter of the 19th century was characterized by the concentration of capital and the enormous growth of powerful business units, dealing, in the main, with one or more related commodities. These gigantic enterprises grew to their enormous proportions, aided by competitive practices and acts of economic oppression, which were later rendered unlawful by legislation.⁴⁷

Stripped of these powers by governmental intervention, and with a growing emphasis upon plans of economy and efficiency arising from technical research, there has gradually followed an extension of scientific methods to manufacturing and to every other phase of business enterprise.^{47a} Actual competition has been shifting from the mere intra-industrial rivalry between different units in the same industry, to inter-commodity competition, and to inter-industrial competition, which involves a contest between industries for as large a portion as each can obtain of the national income, through making its own product of greater desirability to the consumer than that of its competitor. These phenomena are patent and well nigh universal.

The menace of overproduction, resulting from mass production and surplus manufacturing capacity, has vigorously invoked the necessity for campaigns of trade extension, huge advertising projects, and directions to sales executives for programs of an increased volume of sales. Intensive sales promotions have been stimulated by rapid changes in the distribution system, exemplified by direct selling and installment buying. This expansion in production, coupled with the intense competition carried on by various competing industries at the same time, has contributed to the con-

⁴⁷ "It was a step taken by Congress to meet what the public had found to be a growing and intolerable evil in combinations between many who had capital employed in a branch of trade, industry, or transportation, to obtain control of it, regulate prices, and make unlimited profits." William Howard Taft, *The Anti-Trust Laws and the Supreme Court*. (1914).

^{47a} "It is now proposed to carry this same attitude of scientific research into the field of commercial organization. What the industrial engineers are doing for production, research experts must begin to do for other phases of business problems. The scientific attitude is to include all business activities. A program of this sort, means that the attitude of research, of careful, scientific analysis, is to be held by the merchant and is to be carried by the manufacturer over into his sales department." Duncan, *Commercial Research*, p. 12, (New York, 1920).

sequential lowering of price levels. Add to this, the shift in consumers' habits evidenced, for example, by hand-to-mouth buying, group buying, and buyers' strikes, and the reason for the narrowing of profit margins, past the point even of adequate return on enterprise and investment, can be readily understood. "How to secure a reasonable profit on every sale—rather than how to secure the greatest volume of sales—is the basic problem of sales management."⁴⁸ In the absence therefore, of a rational relation between selling prices and costs, and between production and prospective demand, an acceleration of sales could not avert a period of "prosperity but no profits."⁴⁹

The solutions advanced by economic and business leaders include a further extension of scientific methods to all branches of management, distribution, and consumption, and especially call for further studies in statistical technique, cost accounting, and problems of distribution.⁵⁰

It is not necessary to establish beyond contradiction that these guides be unerring or not wholly objective in accordance with the demands of strict scientific principles; it is sufficient to accept them as serviceable barometers of business conditions. As such, they have been pronounced to be potent factors in stabilizing business and eliminating the evils following as an aftermath of violent fluctuations in the business cycle.⁵¹ It has perhaps been sufficiently indicated that the new spirit infused into business, to eliminate waste,⁵² extravagance, and overproduction, has been so faithfully infused under the motivating power of securing adequate returns for engaging in business enterprise. What were

⁴⁸ Charles F. Abbott, Address before Associated Business Papers, October 17, 1927.

⁴⁹ Brown, Prosperity but no Profits, *Nation's Business*, Vol. XV, No. 9 (August, 1927).

⁵⁰ Committee Reports on National Distribution held under auspices of Chamber of Commerce of U. S., 1925. The Department of Commerce has recently undertaken a Census of Distribution.

⁵¹ "These are but samples of the quantitative problems which become crucial in an effort either to test a given theory or to do constructive work. Such problems can be solved only by appeal to statistics." Wesley C. Mitchell, *Business Cycles: The Problem and Its Setting*, National Bureau of Economic Research, New York, (1927) p. 53.

⁵² *Cf. re:* simplified practice and standardization of the Department of Commerce, the statement of the Director of the Bureau of Standards, U. S. Daily, Nov. 22, 1927.

formerly regarded as academic methods are now being harnessed to intensely practical ends. The notion formerly prevalent, of keeping all business a business secret, has been departed from with the appreciation of the benefits to be followed by the acceptance of these new ideas.

Business makes a demand on the law to permit these new instrumentalities, disclosed by careful research and proved in the laboratory of business experimentation, to function usefully, effectively, and practicably. It requires of the law to aid, when not inconsistent with legal policy, in the development of concrete, timely, accurate, and serviceable tools, which have passed the test of economic and business utility. Whether the legal problem arises in the extension of statistical reporting, or from the further study of the elements of cost-accounting, or in any of the diverse aspects of distribution, there is equal insistence that the law does not compel a fire-proofing of these activities beyond limits necessary to effectuate the purposes for which the anti-trust laws were enacted.

We have referred to the fact-finding agencies and their promise in molding the future development of the law in closer harmony with modern business needs. We shall enumerate certain of these rather to suggest the generic task in which they are engaging, than to catalogue them in directory form. That they have had a wide influence upon the development of business is attested by the statement of Dr. Julius Klein, Director of the Bureau of Foreign and Domestic Commerce.⁵³

“One of the outstanding reasons for such successes as have been achieved during the past six years by American industry and commerce is the highly effective contact which has been maintained with this front, the constant check that has been kept upon the operations of those persistent ‘foes,’ waste and inefficiency, by the vigilant services of our trade papers and trade associations, and the improvement in governmental fact-finding agencies.”

The most important agency to carry out the program here discussed, because of its intimate relation to the administration of the anti-trust laws, seems to be the Federal Trade Commission. Already, notable achievements, on its part, have been performed.

⁵³ Address before Associated Business Papers, note 45, *supra*.

The records of the Economic Division Staff of the Federal Trade Commission demonstrate the important results that have followed from a critical research into special subjects. In this work, it is practically a continuation of the Bureau of Corporations in making both general and specific inquiries relating to restraints of trade, monopolies, unfair business practices, business methods, and business organizations. The results of these inquiries are contained in various special reports and in the annual reports of the Federal Trade Commission. The general economic work which forms such a vital part of the commission's activities is fundamental for the proper presentation to the President, to Congress, and to the public, of the facts and conditions relating to the organization, practices, and results of industrial and commercial enterprises. These records are of basic importance not only with respect to the broad problem of the maintenance of fair and free competition in industry and preventing assertions of monopoly power, but are also of great value in the fields of industrial organization and marketing methods, both for an inventory of past events and for corrective measures for the future.

It is of great importance to note that several acts of Congress have resulted from such inquiries, while in other cases, they have had significant relation to judicial proceedings or to administrative policies. A few examples, illustrative of a greater work carried on, will be sufficiently informative. The Webb-Pomerene act relating to export associations was passed in consequence of a report on cooperation in American export trade; the Packers and Stockyards act was the result of a report on the meat-packing industry, and the decree in the Harvester case was reopened in consequence of a report on the causes of the higher prices in farm implements. Of particular significance to the present discussion, is the decision on the Grain Futures Act,⁵⁴ in which the Supreme Court relied on and collected the reports of the Federal Trade Commission relating to the grain trade. At the present time, the Commission has under way investigations concerning operations of open price associations and a comprehensive survey of the problems of resale price maintenance, from which valuable reports should follow. That its work in these matters is being encouraged by business itself appears clearly from the

⁵⁴ *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 12 *et seq.* (1923).

recent statement of the Federal Trade Commission for the month of September, 1927,⁵⁵ where it is said:

“Business men are sensing the value of the economic investigations now being conducted by the Federal Trade Commission, are cooperating in furnishing data and otherwise lending their assistance to make these inquiries a success.”

At the same time, changes in the rules of procedure and the extension of the trade practice conference idea, announced by the Federal Trade Commission in several recent statements, and approved by the United States Chamber of Commerce,⁵⁶ are indicative of the intelligent solution of difficult business situations by self-government within industry itself.

By helpful guidance, rather than by the cumbersome method of criminal or civil prosecution, the Department of Justice has also cooperated with business in this era of better understanding. While an executive branch of the government can scarcely grant a final immunity in advance, it can nevertheless pursue the helpful policy announced by the Assistant to the Attorney General, William J. Donovan, in a recent address:⁵⁷

“On the legal side the Department of Justice has made clear that it considers it to be its duty to examine into all proposals of organization and methods, to meet at the threshold those problems that the business man desires to solve without violation of the law.”

Of vital importance has been the pioneer service of the Department of Commerce, under the executive direction of Secretary Hoover, in promoting the legitimate and desirable scope of trade association activity. It is of interest to note that a new edition of “Trade Association Activities,” announced for publication within the immediate future, will contain an up-to-date summary of the essentials of trade association thought and practice. Likewise, the valuable services performed by this Department can be found in the annual reports of the Secretary of Commerce, and

⁵⁵ United States Daily, October 31, 1927.

⁵⁶ Address of Edwin B. Parker, *supra*, note 21.

⁵⁷ Address on Anti-trust Laws and Foreign Trade, delivered before the National Paint, Oil and Varnish Association at Atlantic City, October 28, 1927; U. S. Daily, October 31, 1927.

in the Commerce Year Books, both of which refer to the work of the Bureaus and Divisions of the Department. What is of special promise is the extension of the census to problems of distribution, following the reports of the National Conference on Distribution⁵⁸ and the activity of the Chamber of Commerce of the United States in its studies of distribution.⁵⁹

A suggestive enumeration of the activities of the federal government in collecting and disseminating business information can be found in the instructive article by Francis Walker, Chief Economist of the Federal Trade Commission, entitled, "The Government's Function in Collecting Business Information."⁶⁰

The trade associations, themselves, both by their own investigations and by means of special studies by universities, and other research specialists, have built up a special source of literature on a wide range of subjects of interest to trade associations. Many of these records have been transmitted to the Department of Commerce and the Chamber of Commerce of the United States, and it is to be hoped that some representative body will be established as a permanent central clearing house for such trade association information, to which the law may look for guidance.

The recent announcement by the Chamber of Commerce of the United States, of the creation of a separate department for trade association problems, is one of great significance in the entire movement. This will coordinate the valuable work already performed by its Departments of Manufactures and Domestic Distribution, and Organization Service Bureau. It is but the logical extension of the idea already practiced for several years in the National School for Commercial and Trade Organization Executives, held at Northwestern University, under the joint auspices of the Chamber of Commerce of the United States, the American Association of Trade Association Executives, National Association of Commercial Organization Secretaries, and Northwestern University, at which seminars in trade association problems are discussed in the manner of such centers of research as the Institute of Politics.

⁵⁸ See *supra*, note 50.

⁵⁹ *Ibid.*

⁶⁰ Proceedings of the Academy of Political Science, Vol. 11, No. 4, (January, 1926) p. 57, *et seq.*

We have referred to these diverse agencies, all functioning at the present time, more to note the great spread of the movement rather than to enumerate a detailed application. From these varied sources, the prophecy may be hazarded that the correlation of business, economic, and legal thought will be further advanced. In the decisions of the next decade, there will be felt the profound influence of the conclusions of these numerous fact-finding agencies, of which the courts did not have full advantage in the past.

The legal conception of a fair and free competition is not departed from in granting sanction to the cooperative functions of trade associations, having as their purpose, and resulting in, introduction of economies, advancement of creative endeavor, improvement of the product, lowering of the price, or promoting the standards of competitive conduct. Such rules of law are in consonance with the reasonable construction of the anti-trust laws announced in the Standard Oil and Tobacco cases,⁶¹ which the Supreme Court has followed without restriction since their pronouncement, and harmonize, likewise, with the logic of economic and business events.

In the recent Trenton Potteries case,⁶² which is the last expression of the Supreme Court on trade association activity, the Supreme Court reaffirmed the rule that an agreement among competitive units to fix prices, irrespective of whether the resulting prices were reasonable or unreasonable, constituted a violation of the anti-trust laws. The reasoning of Mr. Justice Stone embodies a convincing argument that the recognized purpose of the anti-trust laws still controls in their interpretation:

“Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained and competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.”⁶³

⁶¹ *Supra*, note 46.

⁶² *Supra*, note 1.

⁶³ *Supra*, note 1.

For similar reasons, agreements to limit production have likewise been condemned.^{63a} Such further generic illegal arrangements in restraint of trade, as the allotment of territory, found in the Addyston Pipe case,⁶⁴ have not been modified by any of the later trade association decisions. Likewise, the vice of organized boycotting, by destroying the freedom of opportunity of business competitors in the pursuit of their trades and transgressing the safeguards against the brutalities of oppression by strong combinations, was unequivocally condemned as illegal in the Eastern States Lumber case⁶⁵ and *Binderup v. Pathe Exchange*.⁶⁶ Between the limits here pointed out, trade association activities are being judged by the flexible and progressive standards of legal conduct which, when resulting in injury to the public welfare, as defined by precedents, are held to be acts violative of the anti trust laws.

With such an important role in prospect, a word of caution relative to the duties and responsibilities imposed upon privately-supported agencies would not seem amiss. The possibility that their services may be used to effectuate the wrongful purposes of those financing them, and the dangers of inaccuracy or misinformation, present the necessity for a cautious discretion as to when the material submitted is undesirable as a basis for legal decisions. It would seem that in order to avoid liability, either civil or criminal, the collection and dissemination of such vital information should be restricted to those who are qualified both by competence and experience for duties so important. That the Supreme Court has already indicated the limits of lawful endeavor in these matters, namely, that they should be subject to the general doctrines of negligence, fraud or other wilful injury, familiar both in tort and criminal law, can be noted by the ruling in the

^{63a} While an agreement among competitive units to limit production is generally held to be violative of the Federal Anti-Trust Laws, it is of especial significance to note that in *National Association of Window Glass Manufacturers v. U. S.*, *supra*, note 1, 411 the "particular facts" may determine the question of illegality. But it would seem to be only in the most unusual cases, that this exception could be relied on in support of the alleged validity of such an agreement.

⁶⁴ *U. S. v. Addyston Pipe & Steel Co., et al.*, 175 U. S. 211 (1899).

⁶⁵ *Eastern States Retail Lumber Dealers' Association v. U. S.*, *supra*, note 15.

⁶⁶ *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291 (1923).

Maple Flooring case, that such information must be gathered and disseminated "openly and fairly."⁶⁷

Two utterances by business leaders, in this age of rapid economic transformation, should be studied with reflection:

"The only way to avoid economic tragedy is to start studying the intricate questions of regulation and the new competition now and having some sort of facts ready when the time comes for revision. * * * Only experts can find the facts—economists, business men, lawyers, industrial technicians, and legislators. They should represent business, "the public," labor, but must be experts."⁶⁸

"It is to be hoped that within these walls, research in these fields will not only inspire business men to adopt standards acceptable to the public conscience but it will also furnish the information upon which wise laws may be drafted and wise decisions made. Many business associations need the benefit of such research today."⁶⁹

It is in this spirit that trade associations look to a living and active law for judgment on their activities.

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⁶⁷ *Maple Flooring Manufacturers' Association v. U. S.*, *supra*, note 1, 586.

⁶⁸ Cheney, *The Answer to the New Competition*, *supra*, note 45, p. 81.

⁶⁹ Owen D. Young, principal address delivered at the Dedication of the George F. Baker Foundation of the Graduate School of Business Administration, Harvard University, *Harv. Bus. Rev.*, July, 1927, 390.