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AN ENQUIRY INTO THE SOCIAL IDEAL OF FREE COMPETITION IN ANTI-TRUST LAW

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In his Powell Lectures on Philosophy at Indiana University,[1] Roscoe Pound summarized that the task of natural law is not to give us an ideal body of universal legislation but to give us a critique of the ideal element in the positive law. He reasoned that "even if absolute ideals could not be proved, it could ascertain and formulate the social ideal of the time and place and make it a measure for choosing starting points for reasoning, of interpretation, and of applying standards." [2] That is, as Dean Pound stated it, "We could have a natural law with a changing or a growing content." [3] The function of the ideal for a society at a given time then is to serve as the picture to which we refer our problems of adjusting relations and ordering conduct. Thus the ideals of the social order, made to serve for ideals of the legal order and carried into detail as an ideal element in law, gradually change with changes in the social order they portray.

In developing his thesis of social control through law,[4] Dean Pound notes that medieval society, like the society of the Greek city-state, had no place for free competitive self-assertion, and that the ideal of a society of freely competing independent individuals grew up slowly following the Sixteenth Century and the development of the modern economic order.[5] Following a proper

* Written while a student at University of Denver, College of Law.

[1] Published for Indiana University by Yale University Press in 1942 as "Social Control Through Law by Roscoe Pound."

[2] Pound, "Social Control Through Law," Yale University Press, New Haven Conn., 1942, Page 5.

[3] *Ibid.* p. 6. For a thoroughly absorbing variation on the theme "Natural Law as a function of time and standard of a given place," see Max M. Laserson's "Positive and Natural Law and Their Correlation" published in "Interpretations of Modern Legal Philosophies" edited by Paul Sayre, Oxford University Press, New York, 1947. Professor Laserson provides solid argument for the proposition that what is habitually referred to as natural law is in reality "socially adapted intuitive law." Professor Laserson suggests that positive law has the highest degree of motivating power when it coincides with common law consciousness, and he interchanges the concept of "common law consciousness" with the concept "socially adapted intuitive law," which as has been shown, he identifies as natural law.

[4] See Pound, *op. cit.* pages 7-12 for an enlightening presentation of the philosophical and sociological trends of the Twentieth Century, as revealed by the leading exponents of various theories.

[5] For a comprehensive historical survey of the philosophies of the 18th and 19th Centuries, with particular emphasis on the conflict of social ideals, see John Herman Randall, Jr., "The Making of the Modern Mind," Chapter XVII, Houghton Mifflin Co., Riverside Press, Cambridge, Mass. (Revised Edition, 1940) Professor Randall demonstrates that for the Industrial Revolution liberty stood primarily for economic liberalism, individualism, free competition and laisser faire.

development of the historical facts, Dean Pound observes that today "we are properly dissatisfied with the picture of the self-sufficient individual in an economically self-sufficient neighborhood and freely competing with his neighbors in an economic order based on free competitive acquisition." [6] Dean Pound then asserts that although this ideal governing the last century was easily adapted to the economy, "we know very well that it is not a true picture of the society of today."[7] Dean Pound concludes, "But we cannot see an exact picture of that society to take the place of the old picture." [8]

While it might be pointed out that federal legislation in the anti-trust field in the United States does not seem to sympathize with Dean Pound's generalized conclusions (of abandonment of the social ideal of freely competing individuals), it seems to this writer that the suggestion in itself presents a very serious problem. Could it be that the suggestion is not so much a conclusion based on historical fact as it is a prophecy? Is it that the social ideal of the United States is not able to see an exact picture of the society to take the place of the old picture; or is it that the social ideal of the "old picture" is not yet fully developed? Are we actually dissatisfied with the social ideal of freely competing individuals, or are we simply adapting that ideal (natural law with a growing content?) to a society whose economy is now based on mass production and requires an adjustment of the ideal? If this is the true picture, is it that in reality Dean Pound in ingeniously predicting that the present ideal will not function as we know it, that it cannot so function, and that we are soon to be in need of a new social ideal?

The reconciliation of liberty and order in the United States has been difficult and frustrating, but thanks in part to the taught-tradition of the lawyer and his conservative influence, that reconciliation has proceeded without abandoning fundamental concepts for some type of collectivist apathy. However, when the writer surveys the present state of anti-trust legislation (and interpretation), he is inclined to wonder if we are not approaching the collectivist ideal of mass mediocrity as rapidly and perhaps as fanatically as are our dedicated rivals. Do we, in the belief that exaggerated free-competition best insures the preservation of our fundamental concepts, actually promote the philosophical predisposition to abandon the energetic impulses and individual initiatives which gave birth to and nurtured those concepts? Does "natural law with a changing and growing content" now demand a modification of emphasis in our approach to anti-trust legislation?

In order to study the problem thoroughly, the entire field of anti-trust legislation (and interpretation) should be examined.

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[6] Pound, *op. cit.* p. 15.
[7] *Ibid.*
[8] *Ibid.*

This, of course, is impossible herein. But it is quite reasonable to examine at least one phase of the field and come to some conclusion in that phase. The writer has chosen one aspect of the Clayton Act for his microscopic observation and laboratory analysis. That aspect is brought to focus in the case of *Standard Oil of California v. United States*,[9] and it is with this case that Dean Pound's observations will be tested.

The *Standard Oil of California* case arose under Section 3 of the Clayton Act[10] which section is conveniently referred to as the exclusive dealing and tying arrangement section. Professor Louis B. Schwartz summarized the advent of the Clayton Act as follows:

> Monopoly survived the bite of the Sherman Act of 1890 in part because the courts held that the prohibition of "restraint of trade" covered only "unreasonable" restraints, and further that a restraint was not unreasonable if imposed for recognized business purposes and without obviously bad economic consequences. The Clayton Act of 1914 was supposed to put teeth in the old Sherman Act gums by specifically naming and prohibiting the worst restraints—price discrimination, exclusive dealing and merger of competing companies through acquisition of stock control.[11]

The passage of Section 3 was accompanied by a great deal of stormy debate and it would seem that out of that debate the Court could well determine the limits which Congress intended the law to encompass.[12] Whether this was so is another matter. The

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[9] Standard Oil Company of California v. United States, 337 U.S. 293 (1949).

[10] 38 Stat. 731 (1914); Title 15 U.S.C. Sec. 14 (1946). Section 3 of the Clayton Act provides that "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . or other commodities, whether patented or unpatented . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[11] Louis B. Schwartz, "Potential Impairment of Competition," 98 U. Pa. L. Rev. 10, 11 (1949).

[12] In making this assertion the writer is not unmindful of such an admonition as was given by the Court in Van Camp v. American Can Company (278 U.S. 245, to the effect that the Court will not look behind legislation which is clear on its face. It is felt that the admonition was not more than dicta, and that while it may have applied to the problem at hand (i.e. any line of commerce) it is not the method of the Court to disregard legislative purpose as revealed in the circumstances surrounding passage of a law.

But see Standard Fashion Co. v. Magrane Houston Co., 258 U.S. 346, in which case the section under consideration herein, Section 3 of the Clayton Act, was determined to be so plain and apparent that it was unnecessary to resort to reports of committees to ascertain its meaning.

House version [13] would have prohibited all tying clauses and exclusive-dealing arrangements, and had that version become law, there would be little doubt but that the arrangements would be "per se" illegal.[14] The Senate in turn would have confined tying arrangement prohibitions to patented articles alone,[15] but the compromise by conference resulted in a broad prohibition of both tying arrangements and exclusive dealing wherever their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [16] The compromise was seen by one writer as a maneuver by the protectors of the *status quo*,[17] and that writer asserts that the limitation "would seem to rule out justification by motive or intent and would seem to clearly refer to potential harm rather than actual effects." [18] Thus the all-important clause readily became the handmaiden of the apologists of the social ideal of exaggerated free competition, and at the same time it became the limitation on that social ideal for the "protectors of the *status quo*." It is significant then that Section 3 of the Clayton Act was not deemed by either side to command that exclusive dealing agreements and tying arrangements were illegal "per se."

Nor was such an absolutist interpretation given to Section 3 by the courts or the commissions [19] that considered it prior to *Standard Oil of California v. United States*. In the *General Motors* case, decided in 1935, the Court specifically developed the point that tying arrangements under the Act are not illegal *per se*. Moreover, when the *Standard Oil of California* case was before District Judge Yankwich in 1948, he prefaced his opinion with the statement,

> I begin with the assumption that the General Motors exclusive supply case is still the law. . . . At least under the Clayton Act, an agreement by a dealer that . . . he will not sell or offer to sell any products not manufactured or handled by the particular manufacturer, is not *per se* illegal. . . .[20]

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[13] The bill passed by the House on June 5, 1914 contained the all-inclusive prohibitions. (51 Congressional Record 9911, 1914).

[14] See for example the expression of Congressman Webb that any such contract in itself is in restraint of trade and tends to monopoly. (51 Congressional Record 9072, 1914).

[15] 51 Congressional Record 14276 (1914).

[16] See n. 10.

[17] Louis B. Schwartz, *op. cit.* p. 11.

[18] *Ibid.*

[19] Title 15 U.S.C., Sec. 21 gave enforcement authority to Section 14 (Section 3 of the Clayton Act) respectively in proper cases to the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and, of course, the Federal Trade Commission. Appeal to the United States Circuit Courts was provided.

See 15 U.S.C., Sections 45 and 46 for the jurisdiction and powers of the Federal Trade Commission.

[20] U. S. v. Standard Oil Co. of California, 78 F. Supp. 850, 857 (1948).

It is of further significance that the courts and commissions prior to the *Standard Oil of California* case did not consider a mere possibility that competition would be lessened a sufficient ground for holding the conduct complained of under Section 3 illegal. Thus in the *Standard Fashion* case the Court said:

> But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would, under the circumstances disclosed, probably lessen competition, or create an actual tendency to monopoly.[21]

Moreover, as one writer expressed it, "For 35 years practically all lawyers viewed the language of Section 3 of the Clayton Act as embodying a 'rule of reason'." [22] Unquestionably this was the view of Judge Augustus N. Hand in *Pictorial Review Company v. Curtis Publishing Co.*, when he stated, "It has not been established . . . that the defendant's contract referred to causes an unreasonable restraint of trade. . . . " [23]

In the light of this legislative history and this subsequent judicial and administrative understanding and interpretation,[24] the *Standard Oil of California* case came to the Court. The case arose [25] on a bill to enjoin the requirements contracts under which

[21] Standard Fashion Co. v. Magrane Houston Co. 258 U.S. 346. See also for an early consideration of the elements of the offense, Signode Steel Strapping Co. v. Federal Trade Commission, C.C.A. 1942, 132 F. 2d 48.

[22] H. Thomas Austern, "The Supreme Court and Section 3 of the Clayton Act" published in the 1950 edition of "Antitrust Law Symposium" by Commerce Clearing House, Inc. at pages 43, 44.

Only a month before the Standard Oil decision, a District Judge refused to hold requirements contracts illegal without application of a "rule of reason." In United States v. Linde Air Products Co., 83 F. Supp. 978, 981 (N.D. Ill. 1949) the court expressed the view which Mr. Austern felt was the then prevailing view: "Having, therefore, concluded that the contracts are not illegal *per se*, it remains for the Court to determine whether they otherwise constitute an unreasonable restraint . . ." Mr. Austern may well be taken as the counterpart to the apologist position taken earlier by Professor Schwartz. (See ante at page 255). Thus while Professor Schwartz speaks of this Standard Oil of California case in terms of "the distinctive standards of the Clayton Act," (*op. cit.* p. 11) Mr. Austern views with alarm the "degree of legal uncertainty" now necessarily an incident of doing business. (*op. cit.* p. 51).

[23] Pictorial Review Company v. Curtis Publishing Co., 255 Fed. 206, 210 (S.D. N.Y. 1917). See also United States v. Linde Air Products Co. *supra* for a 1949 interpretation by a Federal District Court in accord.

[24] The writer cautions that the background presented herein is by no means exhaustive. It does, however, fairly present a sufficient framework for the development of this thesis; it presents the background which points up the departure from tradition, which departure creates the problems with which we are concerned in testing Dean Pound's observations on the social ideal.

[25] Although the offense charged was restraint of trade in violation of Section 1 of the Sherman Act, and substantial lessening of competition and tendency to create monopoly of a line of commerce in violation of Section 3 of the Clayton Act, the decree below was upheld under the latter act alone. The Court decided it "need not go on to consider whether it might also be sustained by Section 1 of the Sherman Act." 337 U.S. 293, 314.

the Standard Oil Company of California supplied independent filling station operators with petroleum products (and in some cases, automobile tires, batteries and accessories) in a seven state western area. The Court found that the company was the largest seller of gasoline in the area; that in 1946 its combined sales amounted to 23% of the total taxable gallonage sold there in that year; that sales under exclusive dealing contracts constituted 6.7% of the total sales; that retail service station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage; that the remaining retail sales were divided between more than seventy small companies; and that in 1948 only 1.6% of retail outlets were what are known as "split-pump" stations. The Court further found that exclusive supply contracts with Standard had been entered into, as of March 12, 1947, by the operators of 5,937 independent stations, or 16% of the retail gasoline outlets in the Western Area, which purchased from Standard in 1947, $57,646,233 worth of gasoline and $8,200,089.21 worth of other products. Although it was not specifically relied upon by the Court, it was pointed out that some 8,000 contracts and agreements of various types were in issue; and although the Court seemed to ignore it later, it was shown that Standard's share of tire and battery sales never exceeded 2% of the total sales in the Western Area.[26]

It was once said of Socrates that, while his opponents might occasionally best him in argument, they could never do so if they allowed him to frame the proposition. It seems to the writer that the Court was cognizant of the method of Socrates in the *Standard* case, for their very statement of the question forecast doom to the company. The Court said,

> The issue . . . is whether the requirement of showing that the effect of the agreements "may be to substantially lessen competition" may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.[27]

This followed a quotation of the lower court's opinion to the effect that the practices herein injuriously affect "an appreciable segment of interstate commerce." [28] It soon developed that in light of what the Court considered as "substantial," it probably mattered little which approach the Court adopted. The Court continued,

> It is clear . . . that . . . the showing that Standard's requirements contracts affected a gross business

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[26] 337 U.S. 293, 295-296.
[27] *Ibid.* at 299.
[28] *Ibid.* at 299 quoting from 78 F. Supp. 850, 874.

> of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened.[29]

The Court having turned the term "substantial effect" around to mean "effect upon a substantial amount of business," then wound up the bundle and tied it with another semantical twist by converting "proof of a probability" of lessening competition first to an inference, as shown above, and then into a "bare inference" that competition might be lessened.[30] The Court then added for good measure that the courts are ill-suited for resolving the problems if evidence be required to support the bare inference,[31] and that there can be no proof that the use of requirements contracts have actually reduced competition.[32] Finally, as if in justification, the Court reasoned that even if it be assumed that Standard did not dominate the market and even if the contracts did not improve Standard's competitive position, "it is possible that Standard's position would have deteriorated but for the adoption of that system." [33] Sensing perhaps that philosophical idealism underlies the whole problem, the Court argued that, after all, "it is the theory of the anti-trust laws that the long-run advantage of the community depends upon the removal of restraints upon competition." [34] Thus inescapably we are brought face to face with the social ideal of exaggerated free competition as a guiding star of present anti-trust legislation and judicial interpretation, with which Dean Pound claimed we are properly dissatisfied.[35]

What's to be said of the Court's attitude in the *Standard* case? What's to commend the rejection of consideration of sound economic facts which would prove absence of relative domination in the field? Is it perhaps that 6.7% control is a substantial lessening of competition? If the Court finds itself incapable of mastering the complex economic facts, and if this be not subject to reproach, should the Court handle the problem at all or should it commend the problem to Congress for clarification of standards? If the Court does assume to decide the issue on the basis of the statute as is, what is the justification for twisting the requirement

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[29] *Ibid* at 305.

[30] The series of judicial twists culminates in this coup de grace on page 309 of the opinion.

[31] In rejecting a plethora of evidence tendered, the Court also set forth and rejected three other approaches to the problem: (1) Accepting evidence that competition has flourished despite use of the contracts (here the Court *merely referred* to Pick Mfg. Co. v. General Motors Corp. without analysis of the judicial method employed; (2) determining whether or not the contracts would be in conformity with the length of their term to the reasonable requirement of the field of commerce in which they were used; and (3) the company's degree of market control.

[32] 337 U.S. 293, 310.

[33] *Ibid* at 309.

[34] *Ibid.*

[35] *Supra.*

around so that now all that need be shown is a not insubstantial effect? What's to be said for requiring only a bare inference where prior anti-trust legislation sought a probability? What's to be said of the social philosophy which the Court finds as underlying all anti-trust legislation—what's to be said for the social ideal of exaggerated free competition?

Law review writers have taken various positions. So also have the four dissenting judges in the case. That the *Standard* case represents a battleground in American social idealogical thinking is indicated in dissenting Justice Douglas' opening remarks. He said, "The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly." [36] Mr. Justice Douglas felt that the Court had opened the door for the big companies to substitute an agency relationship for what he thought was a relatively harmless exclusive supply relationship.[37] Of course, apologists for the Court are quick to point out that even this is favorable to current theories of free competition since under an agency relationship the companies would be subject to greater liabilities (such as in tort and under social security legislation). Professor Schwartz, for example, justified the position taken by showing that it somehow seems just that the companies should not have the advantage of the same degree of control under legalized exclusive contracts in avoidance of those greater liabilities.[38] From the standpoint of the primary thesis of this study, it is important also that even Mr. Justice Douglas did not dispute the social ideal of exaggerated free competition. Moreover, in contradiction to Dean Pound's observations, Mr. Justice Douglas would support the writer's assertion that perhaps we have not yet achieved the social ideal, for he stated, "The full force of the Anti-Trust Laws has not been felt on our economy." [39] Is Dean Pound reporting what has already occurred or is he prophesying that the social ideal cannot work?

While Mr. Justice Douglas' views were shared by Mr. Justice Jackson, the latter judge had even more reasons for disagreement with the Court. He felt that since the government had not established that either the actual or the probable effect of the accused arrangement was to substantially lessen competition or tend to create a monopoly, Section 3 of the Clayton Act has not been transgressed in law.[40] This, of course, was no mere disagreement, but a charge that the Court had constructed a piece of legislation of its own. Mr. Justice Jackson in fact accused the Court of holding the contracts illegal *per se*,[41] which is a most monstrous devia-

[36] 337 U.S. 293, 315.

[37] Compare Justice Douglas' position here with his disagreement with the Court's conservative position in the Columbia Steel case (334 U.S. 495) and in the Paramount case (334 U.S. 131).

[38] Schwartz, *op. cit.* p. 15 ff.

[39] 337 U.S. 293, 316.

[40] *Ibid* at page 321.

[41] *Ibid* at page 323.

tion, since as has been shown this is precisely what the legislature did not intend.[42] Of course, Mr. Justice Jackson felt that to substantially lessen competition means an entirely different thing than to share a substantial amount of business activity. Moreover, Mr. Justice Jackson perhaps was concerned with the possibility of a need for a re-evaluation of our social ideal, for it seems to this writer that the Justice was questioning the wisdom of the whole approach to anti-trust legislation and interpretation. He could not understand a philosophy which "applied the lash of anti-trust laws to the backs of businessmen to make them compete," and then applied the same lash whenever they hit upon a successful method of accomplishing that competition.[43] It is significant that this argument followed Mr. Justice Douglas' expressions that in fact the exclusive contracts were the boon of the existence of the independent station operators.[44] Thus we have here not only a disagreement on constitutional interpretation, but in fact the seeds of philosophical contradiction. Does the social ideal now require a distinction between the different levels of business activity? Is it that the present ideal of free competition is adequate; is it that the ideal is totally inadequate and doomed to failure as Dean Pound would imply; or is it that some middle of the road policy would now be in order? Should not the different levels of business actively be considered subject to anti-trust legislation solely within the sphere of their own activity? Then, of course, if this is the solution, the initiative lies with the Congress, not the Court, for after all the Act does say "in any line of commerce." [45]

While it is little comfort to the businessman, his chagrin with the Court's decision in the *Standard Oil* case is shared by the majority of law review writers who have been able to control their tempers long enough to offer opinions. Some suggestions, too, are offered. William Lockhart and Howard R. Sacks are among those who suggest that the Court should be urged to flatly

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[42] See the discussion of the legislative circumstances surrounding passage of the Act, *supra.*

[43] 337 U.S. 293, 324. William Simon of the Illinois Bar puts the plight of the American businessman thus: "American businessmen who are faced with the decision of whether to engage in vigorous competition with their competitors, or to follow what some economists call a 'live and let live policy' of consciously refraining from competition may make that decision with the assurance that, whichever course they follow, they may well be sued." (William Simon, "Meeting Price Competition," published in "Antitrust Law Symposium" 1950 edition printed by Commerce Clearing House, Inc. The criticism appear at page 53 of the Symposium.)

[44] One law review writer, however, felt that Justice Jackson was not at all concerned about the independent dealers. See Schwartz, *op. cit.* p. 16.

[45] Title 15 U.S.C., Sec. 14. The pertinent portions of the section are set forth above in note 10.

See Van Camp and Sons v. American Can Co., 278 U.S. 245, (1929), 49 S. Ct. 112, for the Supreme Court's interpretation that the phrase "in any line of commerce" is clear on its face and means exactly what it says.

overrule the *Standard* decision.[46] Or again several writers suggest the simple expedient of taking advantage of a change of the Court to re-urge the question. Richard W. McLaren of the New York and Illinois Bars attacks the confusion that the case has caused, which seemed all the more pathetic to him since the decision, by inviting big business to avoid the restrictions through agency arrangements, utterly fails to accomplish the purpose which was the only justification for the confusion in the first place.[47] (In case the reader is inclined to discount the authority of the *Standard* decision, it would be well to point out that to date there is no disposition on the part of the lower federal courts to question the "share of commerce" test.[48] *United States v. American Can Company*,[49] and *United States v. Richfield Oil Corporation* [50] are offered as examples.) Professor Oppenheim of the George Washington University School of Law was concerned with the rejection of factual data and analysis, and suggests the creation of Industrial Advisory Committees to accept the responsibility of *amicus curiae*. He further suggests exploitation of the Trade Practice Conferences of the Federal Trade Commission and coordination of a wide variety of authoritative information and analysis on interrelated legal and economic issues.[51] Certainly no one would object to the method of a reasonable abandonment of the rule of reason if the reasoning reveals its unreasonableness.

Then, of course, nearly all of the writers point out what seems to this writer to be the most important aspect of the case from a philosophical point of view, namely, that the Court inferentially made a distinction between big business and small business. That the Court seemed to be classifying business activity on two levels is further shown by the importance which the Court placed on the "widespread adoption of such contracts by Standard's competitors." [52] The writer feels justified in concluding that this predisposition, however accidental or unconscious, evidences that the deeper significance of the *Standard Oil of California* case

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[46] William B. Lockhart and Howard R. Sacks, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 Harvard Law Review 913, 941 (1952). This is by far the most exacting and persuasive analysis of the exclusive arrangements question which the writer has found. The research is thoroughly legalistic and the approach is soundly economic.

[47] Richard W. McLaren, "Related Problems of Requirements Contracts and Acquisition in Vertical Integration Under the Anti-Trust Laws," 45 Ill. Law Review 141, 170. Mr. McLaren, sensibly, would hope for clarification from Congress.

[48] The phrase does not refer to any "percentage" test, since it can hardly be asserted that 2% or even 6.7% is a substantial relative share. There is little doubt that the test is some amount of monetary size in itself.

[49] United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949).

[50] United States v. Richfield Oil Corporation, 99 F. Supp. 280 (S.D. Cal. 1951).

[51] S. Chesterfield Oppenheim, "A New Look at Antitrust Enforcement Trends," published in "Antitrust Law Symposium," 1950 edition, p. 69, printed by Commerce Clearing House, Inc.

[52] 337 U.S. 293, 314.

is in the re-evaluation of the social ideal of exaggerated free competition. Thus to the degree that the re-evaluation is smoldering perhaps Dean Pound is justified in asserting that we are dissatisfied with our social ideal of the present day.[53] And to that degree also perhaps that social ideal either has or will fail. The writer submits, however, that a proper division of the economy into the several levels of business activity can preserve the social ideal of free competition while at the same time it can stimulate rather than destroy the energetic impulses and individual initiatives which always have insured the preservation of our fundamental American concepts.

INCOME TAX ON ALIMONY

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Lawyers engaged in domestic relations and tax cases have been confronted with doubt and uncertainty as to the taxability of alimony received during the period for which an interlocutory decree is effective. Another tax problem concerning the same period is the right of the husband and wife to file a joint return if, at the end of the taxable year, a final decree of divorce has not been entered.

The case of *Alice Humphreys Evans v. Commissioner of Internal Revenue*,[1] held that alimony received by the wife prior to the entry of a final decree of divorce in the State of Colorado is not taxable to the wife and, likewise, not deductible by the husband.

Section 22(k) of the Internal Revenue Code prescribes the circumstances under which alimony and separate maintenance payments are includable in the gross income of the wife. To qualify under section 22(k) the payments must be received by the wife under the following circumstances:

(a) The payments must be received by a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance.
(b) They must be periodic payments received subsequent to such divorce.
(c) They must be in discharge of legal obligation imposed upon or incurred by such husband.
(d) The legal obligation must be imposed or incurred because of the marital or family relationship.
(e) Such obligation must be imposed or incurred under such decree or under a written instrument incident to such divorce or separation.

[53] For Dean Pound's latest contribution to the field of social jurisprudence, the reader is referred to the August, 1952 edition of the American Bar Association Journal in which the problem of the function of the law school is considered.

[1] 19 T. C., No. 126 (March 20, 1953).