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## FEDERAL CONTROL OF LEAF TOBACCO MARKETING

By C. M. EUWER\*

The past two decades have witnessed unprecedented efforts by the federal government to improve the position of the farmer in the national economy. The predominant stimulus for action by the federal government in this direction has been provided by the recognition of the small part of the price paid by the consumer that goes to the producer. Recognition of this condition followed close on the heels of the abnormally low prices to the producer during the financial depression of the early 1930's.

The case of the tobacco farmer is illustrative of the conditions among the farm commodity growers which have induced the imposition of federal controls.<sup>1</sup> Even in normal years the tobacco farmer has received only about one fourth of the total amount received by domestic manufacturers from the sale of tobacco products. During the depression years of 1931 and 1932 the farm value of tobacco amounted to less than the profits of the manufacturers. The consequence of these conditions in the tobacco industry has been the enactment of several legislative measures during the middle 1930's designed to improve prices paid to the tobacco producer. In addition, the federal Department of Justice has recently concluded litigation under the Sherman Act against the tobacco manufacturers in an attempt to improve competitive conditions in the tobacco industry, and, in particular, to improve the bargaining position of the farmer in the sale of his tobacco to the manufacturer.<sup>2</sup>

The legislation designed to assist the tobacco producer in increasing price has now been in effect for about ten

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<sup>1</sup> See Table I.

<sup>2</sup> That the purpose of assisting the grower seems the chief reason for the suit is indicated by the statement of government counsel after victory by the government in the trial court. *New York Times* (Oct. 28, 1941) 25, col. 2. "Assistant Attorney General Edward H. Miller said tonight the conviction of the 'Big Three' tobacco companies and thirteen of their officials indicated that the jury thought the nations tobacco farmers had been getting too little for their tobacco as a result of this conspiracy."

years. Such a period would seem sufficiently long to permit observation of the results of the legislation and a fair appraisal of its effectiveness as a method of solution to the problem of increasing income to the tobacco farmer. Since the litigation under the Sherman Act was finally decided by the Supreme Court of the United States on June 12, 1946, it is perhaps too early to see clearly what the precise effects of that anti-trust case will be in terms of improved prices to the farmer. Nevertheless, the use of the Sherman Act in this connection invites analysis with respect to its usefulness as a weapon for aiding the tobacco producer in the elimination of some of the barriers to increased prices.

It is the purpose of this article to examine these efforts of the federal government with a view to determining whether they point the way to an effective permanent solution of the problem of adjustment of income from tobacco products between the producer and the manufacturer, particularly in the light of certain competitive conditions that exist in the tobacco industry.

#### THE TOBACCO INDUSTRY

A consideration of the problems in increasing the price to the grower of leaf tobacco must take into account the economic characteristics of the tobacco industry itself. The most important of the economic factors within the industry bearing directly on the price received by the producer are: (1) the major buyers of leaf tobacco are a few large and powerful domestic tobacco manufacturing corporations, (2) one of the consequences of a small number of buyers of a crop which has many producers is that a condition known to economists as "monopolistic competition" exists in the industry, and (3) a second consequence of the existence of a small number of powerful buyers is that the sale of tobacco is made by the farmer to the manufacturer through a buyer controlled method of marketing known as "loose leaf auction."

*The Buyers.* By far the greatest part of the tobacco crop in the United States is used for the manufacture of

cigarettes. Nine cigarette manufacturers produce almost 100% of the total cigarettes produced annually in this country. Of these nine manufacturers; three, the American Tobacco Company, the Liggett & Myers Tobacco Company, and the Reynolds Tobacco Company produce over 60% of the annual manufacture. Three other manufacturers, the Philip Morris Tobacco Company, the Brown and Williamson Tobacco Company, and the P. Lorillard Tobacco Company produce annually about 20% of the annual manufacture. The annual manufacture of the first six tobacco manufacturers amounts to between 80% and 95% of the annual cigarette manufacture.<sup>3</sup>

Of the crops used for cigarette manufacture, the domestic cigarette manufacturers are the principal buyers of leaf tobacco and their purchases of the annual crop are roughly in the same proportion as their percentage of annual cigarette manufacture. So, the American, Liggett & Myers, and the Reynolds companies purchase annually over 60% of the annual cigarette leaf crop. In addition to the manufacture of cigarettes, the same companies manufacture other tobacco products in which they similarly dominate the field and are the largest buyers of tobacco leaf.

The domination of the industry by a few corporations has resulted in the concentration of great power and wealth in those companies, particularly in the "Big Three," or American, Liggett & Myers, and Reynolds. As an illustration of their great economic power, the net assets of these three companies, in terms of the amount by which assets exceed current liabilities, rose from \$277,000,000 in 1912 to over \$551,000,000 in 1939. Their earnings rose from \$28,000,000 in 1912 to over \$75,000,000 in 1939.<sup>4</sup> In addition to their great wealth and holdings they have acquired highly efficient managements which have developed extensive buying, advertising, manufacturing and selling organizations.

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<sup>3</sup> See Table II.

<sup>4</sup> American Tobacco Co. v. U. S., 328 U. S. 781, 797 (1946).

*Monopolistic Competition.* The domination of the tobacco industry by a few large companies has broad implications in the light of certain recent studies in the field of economic theory.<sup>5</sup> Until recently it has been assumed that economic laws for the setting of industrial prices were divisible into two categories—on the one hand, where the price was set by monopolies, and, on the other hand, where the concepts of supply and demand determined price under “pure” or “free” market conditions. Actually few, if any, prices are susceptible of determination by such an easy classification, and most industrial product prices lie somewhere in the area between what they would have been under either “pure” competition or monopoly.<sup>6</sup> Price under the concept of “pure” competition is determined under the premise that the market includes a large number of buyers and sellers and that the product is homogeneous. In a market where these elements exist the price of the product is not affected by the policies that any one buyer or seller may adopt, and no isolated change by a seller in his output can materially affect the market.

The ideal conditions for “pure” competition do not exist in most industrial markets. Certain monopoly elements, established for example by such media as trade marks, brand names or advertising, affect price in many markets where price is ordinarily thought of as being determined by the laws of supply and demand. Recent economic studies point out that, where prices are affected by these factors they are determined by the laws of “monopolistic competition” rather than the laws of supply and demand under “pure” competition.

In the tobacco industry even stronger abnormal economic influences affect price. In markets, where, as in the tobacco industry, there are only a few buyers and many sellers, strong monopoly elements exist. In that kind of market it has been determined that the buying policy of

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<sup>5</sup> The basic work is CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (5th ed. 1946). A collection of the literature on the subject is contained in HANDLER, *CASES ON TRADE REGULATION* (1936) 331, n. 79.

<sup>6</sup> A study of the conditions in industry which have led to this development, as well as its consequences, is made by BURNS, *THE DECLINE OF COMPETITION* (1936), *passim*.

each of the buyers has a direct and immediate effect upon the market price, and because of that effect, future market prices will be affected since rival buyers must make adjustments in their own buying policies as a result. This type of market has the result that prices are set under a condition known to economists as "duopoly,"<sup>7</sup> which is considered a strong manifestation of "monopolistic competition."

The effect of "duopoly" is that each of the buyers formulates price policy with an eye to the effect of that policy on the rival buyers and on the market price. The result of such price policies is that the price set will approach a monopoly price, and, moreover, that each of the rival buyers acting separately upon his own knowledge of the effect of his price policy upon the market and upon other buyers may arrive at a price which is substantially identical.

The extent to which price under "duopoly" tends to be a monopoly price depends, in part, upon the other factors, and their gradations, that also affect price in addition to the factor of the existence of a small number of buyers in the market. In the tobacco market, which is generally recognized as a prime example of duopoly, there can be no doubt that these factors do affect price. It is as difficult to find "pure" duopoly as it is to find "pure" competition. Despite the existence of other factors in the market which may lessen the effect on price of a small number of buyers, it seems clear that duopoly is the dominant factor in setting prices in the tobacco industry.<sup>8</sup>

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<sup>7</sup> "Duopoly" is defined as a market where there are a large number of buyers and only two sellers. It is also used as a definition in the converse situation, where there are a large number of sellers and only two buyers. "Oligopoly" is the economic definition for a market where similar conditions exist and there are a small number, but more than two, sellers (or buyers). Since the conditions in the tobacco industry more nearly approach those of "duopoly" than the more inclusive but less exact "Oligopoly", the former term will be used to describe the condition of the tobacco market although from a technical economic sense the latter might more properly be used. HANDLER, *op. cit., supra*, n. 5; CHAMBERLAIN, *op. cit., supra*, n. 5, 30-53. Some writers have discussed the same general problems under the designation of "administered" prices. See, Means, *Industrial Prices and their Relative Inflexibility*, 74th Cong., 1st Sess., Sen. Doc. 13 (1935).

<sup>8</sup> COX, COMPETITION IN THE AMERICAN TOBACCO INDUSTRY (1933) 176, *et seq.*

*The Loose Leaf Auction Market.*<sup>9</sup> By far the largest percentage of the annual tobacco crop is sold by the farmer to the manufacturer through the loose leaf auction method of marketing. There are about 150 loose leaf markets, and they are distributed throughout the areas where tobacco is grown.<sup>10</sup> The term "market" designates a town where tobacco is sold. In the market there are warehouses within which tobacco is sold.<sup>11</sup> The warehouses are privately owned. Their business consists of marketing the tobacco of the producer to the manufacturer for a fee which is based on a percentage of the sale price. The policy of the market on sales and the dates of the opening and closing of the market season are determined by the local tobacco board of trade which is an association of the warehousemen of the locality and of the buyers.

The sale of the tobacco is made in these warehouses.<sup>12</sup> Before the grower brings the tobacco to the market, he grades it according to his ideas of quality by separating and placing together all leaves of a like quality. At the warehouse the tobacco of the grower is placed in open baskets, or "burdens," each basket containing all tobacco of the same quality according to the growers grading. The baskets of tobacco are arranged in long rows in the warehouse along with the tobacco of others growers. When the auction sale begins, representatives of the buyers, a representative of the warehouse and an auctioneer employed by the warehouse proceed along the row. An in-

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<sup>9</sup> The origins of the auction method are not clear. It is at least certain that it has been in existence for 95 years. Department of Commerce, Office of the National Recovery Administration, *The Tobacco Study*, (March 1936) 105.

<sup>10</sup> See Table III.

<sup>11</sup> The number of warehouses may vary from one in the *smaller markets* to twenty in Lexington and Louisville, Ky. See U. S. Department of Agriculture, Annual Report on Tobacco Statistics, December 1945, Table 6, p. 27.

<sup>12</sup> A brief description of the auction method is contained in the opinion of the Circuit Court of Appeals in *American Tobacco Co. v. U. S.*, 147 F. (2d) 93, 100 (C.C.A. 6th, 1944). More complete descriptions are contained in Brief for the Petitioner, Liggett & Myers Co. in the Supreme Court, in the same case at p. 15, and, also, in the brief for the Reynolds Co. in the same Court at p. 25. See also *Townsend v. Yeomans*, 301 U. S. 441, 445-446 (1937), and also the report of the Committee on Agriculture of the House of Representatives to accompany H. R. 826. H. Rep. No. 1102, 74th Cong. 1st Sess. (1933), reprinted at p. 115 in the Record in the Supreme Court of the United States in *Currin v. Wallace*, 306 U. S. 1 (1939).

dividual sale is made of each basket. The representative of the warehouse makes the opening bid, and the bids of the buyers are chanted by the auctioneer. The bids are made by gestures, the wink of an eye, or other movements known to the auctioneer. They are not made orally. The sales proceed very rapidly—at the rate of about 400 baskets an hour. The grower is given a short time to reject the bid if he feels that it is not high enough. The time within which the bid must be rejected varies according to the rules of the particular market. It may be as short as thirty minutes. If the bid is rejected, the grower may place his tobacco elsewhere in the warehouse where it is bid upon when the buying party reaches that part of the row. In the event that the farmer again wishes to reject the bid the rules of the market ordinarily require that the grower remove the tobacco to another warehouse. If the farmer accepts the bid, he is paid immediately.

The market as described has characteristics that operate to the detriment of the grower and place him in an unequal bargaining position.<sup>13</sup> While some of these conditions are subject to the controls of the federal government which are later discussed, many of them are still prevalent in the auction markets.<sup>14</sup> The more important of these characteristics are:

1. *No recognized standard of grading.* Each crop of tobacco varies widely in quality, and consequently in the amount that each of the types of that crop will bring on the market. In the absence of a standard grading system, a wide range of prices is possible in tobacco of identical

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<sup>13</sup> While this paper deals only with the federal controls exercised to improve the position of the farmer, it is interesting to note that no state has enacted comprehensive legislation dealing with recognized evils in tobacco marketing. In only one of them, for example, has any attempt been made to deal with the rapidity of sales. Maryland limits the number of sales per hour to 360 baskets. This figure is apparently taken from the old N. R. A. code. U. S. Dept. of Commerce, National Recovery Administration, *The Tobacco Study* (March, 1936) 105. Md. Code supp. (1947) Art. 48, Sec. 59D. See also, Research Report No. 10, Research Division, Maryland Legislative Council, *Tobacco Marketing in Maryland* (1942).

<sup>14</sup> Discussions of the conditions in the auction market for leaf tobacco are found in Scanlan and Tinley, *Business Analysis of the Tobacco Growers Association*, U. S. Dept. of Agriculture, Cir. No. 100 (Oct. 1929), 10; U. S. Federal Trade Commission, *The American Tobacco Company and the Imperial Tobacco Company*, Sen. Doc. No. 34, 69th Cong., 1st Sess. (1926) 20.



quality. This disparity of price for the same quality may exist between markets, and it may even exist within the same market. Buyers are under instructions to purchase a designated number of pounds at an average price. In the process of "averaging out" purchases, it is inevitable that the same quality of tobacco will bring varying prices. So also, the speed at which the auction is conducted, the difference in lighting conditions, and other factors affect the judgment of the bidder as to each offering of tobacco and contribute a wide range of price for tobacco of the same quality.

2. *Discrimination between sellers as a result of intimacy between warehousemen and buyers.* Large growers whose continued patronage is desired by the warehouse may induce favored treatment for them at the instance of the warehouse and at the expense of other growers. This favoritism is made possible by the close relationship that exists between the warehouse and the buyers.

3. *Short marketing season.* The tobacco marketing season for the major crops opens in Georgia about August 1 and moves progressively northward ending in Kentucky or Tennessee sometime in April or May.<sup>15</sup> As a consequence, the grower of each crop of tobacco has a comparatively short time within which to market his crop. The shortness of the season frequently causes a rush to market tobacco causing "glutted" markets, depressed prices, and congested markets making it difficult to find a warehouse which will handle the sale. The dates of the opening and the closing of the markets are largely controlled by the large manufacturers through their membership on the tobacco boards of trade.

The practical result is that the farmer must market his crop during the short time the loose leaf market is open or not at all. Tobacco, in the hands of the producer, is a perishable crop, for it can be stored only by a process known as "redrying," which requires expensive equipment not ordinarily available to the farmer. On the other hand, the manufacturers maintain large inventories—about

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<sup>15</sup> U. S. Dept. of Agriculture, *Annual Report on Tobacco Statistics 1945*, (Dec. 1945).

3 years supply—which is kept in condition by redrying equipment. The maintenance of large inventories makes the manufacturer independent of the necessity for purchasing a crop every year and is a prime weapon for successfully resisting a refusal of the producers to sell because of low prices.

4. *Rapidity of sales.* In most of the markets, sales are made at the average of about 400 baskets an hour. In some of them sales have been made at a rate of over 500 baskets an hour. Some of the tobacco trade associations which govern the policies of the markets with respect to sales require that there be a certain number of sales an hour. The result of this pressure on the buyers is that they must make a hasty appraisal of the quality of tobacco. Speed of sales contributes to the wide variations in prices paid for the same quality of tobacco.

5. *Inadequate lighting.* Color is one of the most important qualities in the judging of the value of tobacco. Since there is no uniformity of lighting conditions in the various warehouses, tobacco of the same quality may be sold at different prices. The hurried buyer can not guess at the possible good quality of tobacco, but must protect himself by bidding at a low figure.

6. *Small markets.* There are still a number of small markets which are not important enough to justify a separate set of buyer representatives of the manufacturing companies. In these markets, the companies purchase through local agents. Under such circumstances, it is possible for local buyers and warehousemen to combine for the purpose of depressing prices by jointly buying in tobacco for resale at a higher price.

7. *Unfair trade practices.* (a) *Subsidized trucking.* In most cases the producer must hire a trucker for the transport of his produce to market. In addition to the fee paid to the drayer by the farmer, a fee may be paid by the warehouse for delivery to that warehouse. Where the producer does not designate a specific warehouse it is common for the drayer to shop among the warehouses for the delivery of the tobacco to the warehouse offering the highest fee.

Drayers also have demanded a fee for the placing of the tobacco in a prominent place in the warehouse where it will be promptly sold. (b) Rebating. Warehousemen have occasionally engaged in the practice of giving rebates to prominent growers. (c) Reservation of floor space. Large growers have often been favored by the warehousemen by permitting them to reserve floor space.

The foregoing characteristics of the tobacco industry raise serious problems in connection with the approach to control the federal government has taken through legislation and anti-trust litigation.

#### FEDERAL LEGISLATION CONTROLLING TOBACCO MARKETING<sup>16</sup>

The interest of the federal government in the prices received by the grower for leaf tobacco began as a result of depressed leaf prices following the first World War,<sup>17</sup>

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<sup>16</sup> The only major tobacco legislation not covered in this section is that dealing with cooperatives.

The federal government has been active in the support of cooperatives for the marketing of commodities, including tobacco, and has enacted legislation for the purpose of aiding cooperatives by means of loans of funds, 12 U. S. C. A. (1929) 1441, *et seq.* The history of the tobacco cooperatives has been an interesting one, see Cox, *op. cit., supra*, n. 8, 165-175, also Scanlon and Tinley, *op. cit., supra*, n. 14, 88, particularly in view of the assertion of the companies at the anti-trust trial that the companies used the auction method of loose leaf marketing simply because it was the inherited method and because of its convenience to the grower.

Following the first World War the drop in leaf prices led to dissatisfaction with the method of marketing and caused the initiation of a number of cooperative associations. Of the seven associations which in 1923 handled 46% of the crop, only two were in existence in 1930, see BUSINESS WEEK, Oct. 15, 1930, 27. The only major cooperative still in existence is the Maryland Tobacco Growers Cooperative Association. The introduction of the loose leaf auction method of marketing in Maryland in 1939 has resulted in the practical elimination of the Maryland Cooperative as a major method of marketing of Maryland tobacco. This result was brought about by offering substantially higher prices on the loose leaf market until the effectiveness of the cooperative market as a successful competitor was eliminated. The large tobacco companies are the major bidders on both markets. In this connection it is interesting to note that the Maryland Cooperative offered facilities for "redrying" the members' tobacco and its indefinite storage. Maryland tobacco is considered a necessary component to cigarette mixtures because of its burning qualities. See, *Tobacco Marketing in Maryland, op. cit., supra*, n. 13, 22, *et seq.*

<sup>17</sup> The United States Warehouse Act, 7 U. S. C. A. (1916) 241, is an indication of the interest of the federal government prior to this time. The act provides for regulation of tobacco warehouses under the Secretary of Agriculture through licensing on the basis of financial responsibility, and regulation of amount of fees that may be charged by warehousemen for sales. The code is contained in 7 C. F. R., Sec. 1031, *et seq.*

and the agitation of the growers and their associations for elimination of the conditions in the industry which they believed to be the cause of the low prices. It was widely felt by the growers that the cause of low prices was collusion among the buyers with respect to their purchases of leaf. These complaints by the growers led to three investigations by the Federal Trade Commission and resulted in reports by that body to the Congress in 1920, 1922, and 1925.<sup>18</sup> While the conclusions of the Commission were unfavorable in tone to the manufacturers, the reports emphasized that the low prices received by the grower were not specifically caused by action of the manufacturers but that the causes were to be found in economic factors due to conditions prevailing after the war.<sup>19</sup> Although the reports did not immediately result in legislation, they served to highlight conditions in the industry and certain practices of the manufacturers.

The first specific legislation was passed in 1929.<sup>20</sup> It provided, in effect, for the supplying of information to the Secretary of Agriculture as to the stocks of tobacco on hand by the major manufacturing companies. The effect of this act was merely informational and resulted in no specific controls affecting either practices in the industry or prices to the grower.

The first years of the New Deal brought two acts which were concerned with both marketing practices and leaf prices. A code of fair practices was issued for tobacco warehousemen under the National Industrial Recovery Act<sup>21</sup> and a subsidy acreage quoto system for growers was put into effect for tobacco under the Agricultural Adjustment Act of 1933.<sup>22</sup> Soon thereafter, in 1935, the Tobacco

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<sup>18</sup> U. S. Federal Trade Commission, *Report on the Tobacco Industry* (1920); U. S. Federal Trade Commission, *Prices of Tobacco Products* (1922); U. S. Federal Trade Commission, *The American Tobacco Company and The Imperial Tobacco Company*, Sen. Doc. No. 34, 69th Cong., 1st Sess. (1926). See discussion of these investigations in Cox, *op. cit.*, *supra*, n. 8, 161-167.

<sup>19</sup> Cox, *op. cit.*, *supra*, n. 8, 161.

<sup>20</sup> 7 U. S. C. A. (1929) Sec. 501.

<sup>21</sup> 48 Stat. 195 (1933) [repealed].

<sup>22</sup> 7 U. S. C. A. (1933) 601, *et seq.* The Kerr-Smith Act, 48 Stat. 1275 (1934) [repealed], was a companion act to the AAA of 1933 providing for taxes upon the sales of producers who did not participate in the program for reducing production.

Inspection Act of 1935<sup>23</sup> was passed by the Congress and became effective. This act established a system of uniform federal grading of leaf tobacco and provided for the placing of information in the hands of the grower which would enable the grower to exercise better judgment in the accepting or rejecting of bids on his leaf tobacco at auction.

The unconstitutionality of the National Industrial Recovery Act and the Agricultural Act of 1933 eliminated the two most important acts from the point of view of the tobacco grower.<sup>24</sup> In 1936 the Tobacco Control Act<sup>25</sup> was passed. It was designed to replace the Agricultural Adjustment Act of 1933 by establishing a quota system for growers based on interstate compact and a close cooperation between the compacting states and the federal Secretary of Agriculture. This act was never utilized because the Agricultural Adjustment Act of 1938<sup>26</sup> was passed before the Tobacco Control Act had received the state action necessary to make it effective. The Agricultural Adjustment

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<sup>23</sup> 7 U. S. C. A. (1935) Sec. 511, *et seq.* The constitutionality of the Act was sustained by the Supreme Court in *Currin v. Wallace*, *supra*, n. 12.

<sup>24</sup> The National Industrial Recovery Act was held unconstitutional in *Schechter v. United States*, 295 U. S. 495 (1935). The Agricultural Adjustment Act of 1933 was declared unconstitutional by the Supreme Court in *United States v. Butler*, 297 U. S. 511 (1936). The Kerr-Smith Act was declared unconstitutional in *Glenn v. Smith*, 91 F. (2d) 447 (C.C.A. 6th, 1937), *cert. denied*, 303 U. S. 657 (1938), and the act was repealed.

<sup>25</sup> 7 U. S. C. A. (1936) Sec. 515.

Following the decision in the *Butler* case, the Congress in an attempt to provide crop control without constitutional objection passed an act authorizing the states to enter into compacts with respect to the establishment of quotas and also for the regulation of marketing, *i. e.* Tobacco Control Act. Pursuant to the compact Virginia passed an act which was in accordance with the general conference agreement reached between the states as to the form and content of the State Act necessary to provide for the regulation and marketing of tobacco, see Va. Code Ann. (1942) Sec. 1399(1) *et seq.* The Act was, however, contingent upon the enactment of similar legislation in the other states where tobacco of the same type was grown. Kentucky (Ky. Rev. Stat. (1943) Sec. 248.010 *et seq.*) and North Carolina (N. C. Gen. Stat. (1944) Art. 42, Sec. 106-471 *et seq.*) eventually enacted legislation but it never became effective since it, too, was dependent on the enactment of legislation in states growing the same type of tobacco. Inaction by the states of South Carolina, Georgia, Ohio, Connecticut, and Pennsylvania has prevented the legislation from becoming effective. Although the acts have never been repealed, their purpose has been largely effectuated by the AAA of 1938, 7 U. S. C. A. (1938) Sec. 1281, *et seq.* The compact device is plainly an awkward one if the same effect can be produced by an act of Congress which does not run into the constitutional objections.

<sup>26</sup> 7 U. S. C. A. (1938) Sec. 1281, *et seq.* The constitutionality of the Act was sustained by the Supreme Court in *Mulford v. Smith*, 307 U. S. 38 (1939).

Act of 1938 adopted the quota device of its predecessor, the AAA of 1933, without the objectionable constitutional feature of the processing tax and subsidies to the grower for crop reduction.

With the exception of the Price Control Act of 1942,<sup>27</sup> which is no longer in effect for leaf tobacco, these legislative measures are the only acts of the Congress which have been directly concerned with leaf tobacco. Of these statutes, the Tobacco Inspection Act and the Agricultural Adjustment Act of 1938 constitute the principal legislative measures with respect to leaf marketing.

*The Tobacco Inspection Act.* The Tobacco Inspection Act provides for the inspection and grading of leaf tobacco before sale. In addition, it provides for placing information in the hands of the grower which will better enable him to exercise judgment as to whether to reject or accept bids for his tobacco in sales by auction.

As has been discussed<sup>28</sup> certain practices of the market without a uniform inspection system operate to the disadvantage of the grower with respect to his bargaining position. Leaf tobacco is sold very rapidly. The average is often more than one basket every ten seconds, or about 400 baskets an hour. Under such conditions it is very difficult even for expert buyers to properly appraise the tobacco being sold and give an accurate bid that is near the actual worth of the tobacco. Different lighting conditions and the policies of the companies in "averaging out" sales also contribute to the wide range of prices offered for tobacco of the same quality. The result is that, even in the same market, the same quality of tobacco is sold at different prices.

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<sup>27</sup> 56 Stat. 23, 50 App. U. S. C. A. (1942) Sec. 901 (Supp. V, 1946).

Pursuant to the provisions of the act the Administrator issued price regulations limiting the amount that could be paid for leaf tobacco. For most of the crops of tobacco, this limitation was in the form of a maximum price per grade. The grades for this purpose were the grades established by the Secretary of Agriculture under the Tobacco Inspection Act, *supra*, n. 23. The administrator also issued regulations covering the amount that could be charged by dealers for their services in the sale of leaf tobacco. Regulations issued by the administrator in respect to leaf tobacco were numerous and are not here cited. A fair example in respect to burley tobacco is Maximum Price Regulation 283, 7 F. R. 10224, as amended April 12, 1943. The general effects of the control may be seen in Table IV.

<sup>28</sup> *Circa*, n. 13.

In the second place, under the rules of the markets, the grower must exercise his right to reject the bid within a very short time. In some cases this right must be exercised within thirty minutes. Without some means of information as to the market price for his grades of tobacco, the seller must compete in the sale with buyers who are completely informed by their company as to the current market prices, and who are experts in judging the grades of tobacco. The only ways the farmer can gather information as to the current market price is by examining the price received for other tobacco in the warehouse (and this must be done quickly for the tobacco on which bids have been accepted is removed from the floor immediately after the sale) and compare it with his own as to quality, or through discussion with his friends.

The Act provides for correcting these conditions by two procedures: (1) Grading of all tobacco in markets which are designated by the Secretary of Agriculture, and (2) Posting in the warehouse information received by the government as to the average market price for each of the grades of tobacco for both daily and weekly average prices.

(1) The Act provides for the designation by the Secretary of Agriculture of markets where the sales of tobacco are made in interstate commerce. Following the designation the Act provides for a local referendum to be held by the growers who have sold in that market during the past marketing season. The issue determined by the referendum is whether or not free government grading service is desired. Following favorable action by the growers in the referendum, federal tobacco inspectors are sent to the market, who grade each basket of tobacco into one of the grades established by the Secretary of Agriculture. The inspectors sample each of the baskets and mark the government grade on the label accompanying each basket.

(2) At the same time the agents of the government post in the warehouse the average price received for each of the government grades in the same market the day before, and also publish weekly summaries with respect to the prices received in the market for each of the government

grades. At the time of the auction the seller is then in possession of information as to the grade of his tobacco and the price which he should receive for it. With this information the buyer can determine whether the bid made for his tobacco is in accordance with the prices prevailing in the market.

*Effect of the Inspection Act on leaf prices.* It is difficult to isolate the effect the Inspection Act has had on leaf prices. In the first place, there are factors other than the Act that affect the market price. In addition to the normal factors affecting price there are certain artificial factors in the form of other legislative attempts to raise the price to the farmer—for example, the Agricultural Adjustment Act of 1938. Further, it was not until about 1941-1942<sup>29</sup> that inspection coverage became general as to all markets. At the time coverage became general leaf tobacco prices began to move upward but this effect is undoubtedly largely due to other factors; the major one being increased demand due to the war. No comparison is possible between those markets having government inspection and those which did not, even assuming that both were selling the same type of tobacco. The reason for this is that it is impossible to tell what grades of tobacco are being sold on the market that does not have government grading since the market would have no grading system comparable to the government system.

General acceptance of the compulsory grading system<sup>30</sup> by the farmers through favorable voting on the referendum provision of the act indicates their belief that the system has assisted them in receiving better prices than they could have received without such an act. Probably the effect of the act is that it decreases the range of prices within a grade so that prices received for each grade are about the same, but it is doubtful that it increases the average prices for leaf tobacco which would have prevailed had the act not been passed.

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<sup>29</sup> See Table III.

<sup>30</sup> *Ibid.*



*The Agricultural Adjustment Act of 1938.*<sup>31</sup> The Agricultural Adjustment Act of 1938 is the successor to the ill fated AAA, and like its predecessor is designed to increase income to the producer through the much controverted device of control of the supply of tobacco through crop control. The 1938 Act applies only to a limited number of commodities, of which tobacco is one. The Act contains provisions with respect to crop quota controls of the various crops of tobacco and makes the imposition of crop controls for each growing year dependent on the size of the inventories of the major companies.

The purpose of the Act is to increase tobacco leaf prices by giving the producer increased bargaining power by limiting the supply of leaf tobacco and decreasing the size of the inventories in the hands of the major companies. As has been discussed<sup>32</sup> the size of the inventories of the tobacco manufacturers has always been a potent factor in the superior bargaining position of the manufacturing companies. By maintaining large inventories, usually about three years supply, the manufacturing companies are able to minimize the danger of a refusal by the growers to sell because of low prices. Coupled with large inventories is the fact that tobacco in the hands of the producer is a perishable crop. These factors combine effectively to strip the farmer of his major weapons for price increases.

Under the Act the Secretary of Agriculture is empowered to declare a national marketing quota for any crop when he finds that the "total supply of tobacco" exceeds the "reserve supply level". These are terms of art and are specifically defined. "Total supply of tobacco" is defined as being the quantity of tobacco on hand at the beginning of the marketing year plus the estimated production during the calendar year in which the marketing year begins. The "reserve supply level" is defined as the normal years domestic consumption (to be determined by finding the average quantity consumed during the past ten years) plus exports plus 175 percent of a normal years domestic con-

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<sup>31</sup> *Supra*, n. 26.

<sup>32</sup> *Circa*, n. 15.

sumption and 65 percent of a normal years exports. An additional 5% is added to the total. The effect of these provisions is to limit the supply by quotas when the inventories of the large companies reach a figure roughly twice the average amount of tobacco consumed annually for the past ten years.

After the finding by the Secretary that a national marketing quota is justified, a referendum is held among the farmers of the crop subject to the quota. If two thirds of the farmers subject to the quota vote in approval, the Secretary announces the quota and it is effective thereafter.

Under the Act the Secretary then allocates the quota among the several states on the basis of the production of tobacco in those states during the five years immediately preceding the year for which the quota is to be effective. Local committees apportion the state quota among the producers within the state on the basis of past acreage, and other considerations of lesser importance.

A penalty is provided for the marketing of any tobacco in excess of the quota. In the case of flue cured, Maryland and Burley the penalty is 10¢ per pound, and in the case of all other tobaccos is 5¢ per pound. If the tobacco is marketed through a warehouse, which is, of course, the usual case, the penalty is paid by the warehouseman, who is allowed to deduct an amount equivalent to the penalty from the price paid to the producer. If the transfer is made other than through a warehouse, the penalty is paid by the transferee, who may deduct it from the price paid to the producer in the case that the transfer is made by sale.

*Effect of the AAA of 1938 on leaf prices.* As in the case of the Tobacco Inspection Act it is difficult to isolate the effect of the AAA of 1938 on prices to the producer. These difficulties exist because of the same factors, both artificial and natural, bearing on the price as were considered in the discussion of the Tobacco Inspection Act. Further, the first effects of the AAA of 1938 would have become apparent during 1940-1945.<sup>33</sup> This period can, of course, af-

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<sup>33</sup> Table IV.

ford no reliable index to the effect of the Act since the period is substantially affected by the increased demand for tobacco products due to war conditions.

It is notable that during the war tobacco remained the only commodity subject to the control of the act on which crop controls remained in effect.<sup>34</sup> While the controls remained in effect, wartime demand skyrocketed, and as a consequence the manufacturers for the first time apparently felt that their carefully accumulated inventories were imperiled.<sup>35</sup> The fear of reduction of this potent weapon caused agitation by the manufacturers for the lifting of crop controls,<sup>36</sup> which was met by counter proposals for the continuance of crop controls on tobacco even if total supply became less than the reserve supply level under the Act.<sup>37</sup> This condition was never reached and as a result the crop controls remained in effect.

The companies' solicitude for the inviolability of their accumulated inventories causes speculation as to the cause of the tobacco "shortages" during the war. Whether this "shortage" was caused by the refusal of the major companies to release their backlogs of inventories for current production and risk their permanent loss as a result of the proposed legislation or their reduction to the levels provided in the Act is a subject for future investigation.

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<sup>34</sup>N. Y. Times (Oct. 12, 1943) 1, col. 4, *Tobacco Alone on Crop Cut List in 1944 Program*.

<sup>35</sup>It should be noted that increased consumption of tobacco in the war years does not affect the lifting of crop controls under the act except to the extent it raises the *average* consumption for the period on which determination of the "reserve supply level" is based.

<sup>36</sup>In *Tobacco*, 42 Time (Oct. 25, 1943) 80, it was said: "Behind the shortage talk some officials saw a shrewd attempt by the manufacturers to knock out crop control of tobacco, probably the only crop which will be restricted next year. By and large, growers back crop control even now, fearing a swamped market and depressed prices in the post war years, and there is grave doubt whether knocking off all quotas would naturally increase planting. Acreage allotments have been steadily upped for three years, including a 20% hop for next year, but manpower and fertilizer shortages have kept planting below quotas." Also see, N. Y. Times (Oct. 13, 1943) 25, col. 3, "*Cigarette Famine in 20 months due to Tobacco Crop Curb is Seen.*"

<sup>37</sup>N. Y. Times (Oct. 12, 1943) 1, col. 4, "The demand for tobacco has been so large in relation to the supply that, under the existing law, there was no longer any legal grounds for the imposition of marketing quotas on the flue cured and burley quotas. Under such circumstances a simple resolution authorizing the imposition of quotas without regard to the demand and supply situation was introduced into Congress."

In any event, wartime history makes it reasonably clear that the act has failed to reduce materially the inventories of the major companies. As in the case of the Tobacco Inspection Act farmers have voted favorably on referendums making the Act effective, which indicates their belief that it increases price. The extent to which it does tend to such increases is not measurable, but it seems clear that in view of the economic conditions in the market the tendency will never be strong enough to cause price increases against the will of the buyers.

*Existing federal legislation as a means of increasing leaf prices.* It appears obvious that existing federal legislation is based upon the supposition that "pure" competition exists in the tobacco industry. Under such an approach the hypothesis of the government apparently is that the function of legislation is to insure the preservation of the freedom of the market by regulating those practices which interfere with its freedom. The supposition is, in the case of the Tobacco Inspection Act, that by giving the producer market information which is the equivalent of that in the possession of the buyer will place the seller in an equal bargaining position with the buyer so that the price paid will be the "free" market price determined by the familiar laws of supply and demand. So also, in the case of the Agricultural Adjustment Act of 1938, it is supposed that the inevitable consequence of lowering the supply while the demand remains constant is an increase in price. The immutability of these economic laws may be at least questioned in the tobacco industry where it is generally agreed that other economic factors resulting in "monopolistic competition" of which "duopoly" is a manifestation are controlling.

In a duopoly market the bargaining position of the producer is not appreciably improved where he is given better market information. The "ceiling" price for each grade is nevertheless set by the buyers under the economic factors applying under "duopoly" rather than free market conditions. So also, control of supply does not necessarily mean increased price in the "duopoly" market. Even if

the price is increased, the increase is due to the action of the buyers under "duopoly" conditions rather than the effect of a limitation of the supply on a free market. Where the power remains in the buyers to set the price rather than the economic laws affecting a free market, a limitation of supply might not result in an increased price to the producer at all but could well result in an industrial policy maintaining the margin of net profit to the manufacturer through a decrease in production and increased price to the retailer and dealer.

It seems clear that the basic fallacy of existing federal legislation on the subject of tobacco marketing is in the assumption that the tobacco market will react to the same stimuli that affect price in a "pure" competitive market. Until recognition is made in legislation that the conditions under which a "duopoly" market operate are fundamentally different from those in a free market, it appears that legislation on the subject of tobacco marketing will do little to increase the price of leaf tobacco to the producer.

A second comment on the existing system of federal control of tobacco marketing may be directed to the fact that, in addition to failing to recognize the underlying issues, the system is not even comprehensive in its coverage of the acknowledged evils in practices in the market affecting the bargaining position of the producer and the prices he receives for his produce. The present coverage of the statutes extends only to the provisions discussed dealing with uniform federal inspection and, secondly, with control of manufacturers inventories through supply limitations. It seems clear that the commerce clause of the Constitution provides a constitutional basis for the extension of existing legislation to make provision for control of those other practices adversely affecting the bargaining position of the producer and leaf prices.<sup>38</sup>

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<sup>38</sup>The fact that comprehensive legislation has not been enacted by the States makes the need for federal action even more clear. For the most part state legislation has been confined to regulation of warehouses and the fees which warehousemen may exact for sales. As an example of such legislation see *Townsend v. Yeomans*, *supra*, n. 12. Such regulation is largely a duplication of similar federal regulation, see *supra*, n. 17.

## SHERMAN ACT LITIGATION AFFECTING TOBACCO MARKETING

Perhaps more than in any other industry, the practices of the tobacco industry have been subject to the surveillance of the agencies of the federal government charged with responsibility for the enforcement of the Sherman Act.<sup>38a</sup> Investigation of these practices has led to a major anti-trust action under the Sherman Act against the industry in each of the last two generations.<sup>39</sup> To those concerned with the problems of leaf marketing the first of these actions, which ended in 1911, has little more than historical significance. That action was a civil suit brought by the government against the old tobacco trust and resulted in its dissolution. Under the guidance of the court, the industry was continued through the formation of new companies and the continuance of some of the old members of the trust.

In that litigation, the leaf buying practices of the trust did not constitute a major issue of the case. There the vice of the trust was that because of its size, which had come about by design of those in control through predatory practices and other means of acquiring control, it exercised monopolistic control of the industry. The decree of the court had for its purpose, by dissolution of the old trust into a number of companies, the "restoration" of "competition" in the industry.

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<sup>38a</sup> 15 U. S. C. A. (1890) 1, *et seq.*

<sup>39</sup> *United States v. American Tobacco Co.*, 221 U. S. 106 (1911). The most complete treatment of the case is in Cox, *supra*, n. 8. The best short treatment of the background and issues of the case is HANDLER, *Industrial Mergers and the Anti-Trust Laws*, (1932) 32 Col. L. Rev. 179, 197, *et seq.*

In the period from 1890 to 1910 the American Tobacco Company, originally a consolidation of five cigarette companies, extended its control throughout the entire industry, until it was unchallenged in the manufacture of tobacco products and related activities. Its dominance came about by various forms of corporate combinations and predatory practices for the purpose of driving competitors out of business, including price wars and agreements not to compete. The intention to monopolize was clear and the court ordered its dissolution in a civil suit brought by the government under the Sherman Act. The decrees of dissolution were prepared by the court after hearings in which all the interested parties expressed their views on the proposed decree. The trust was dissolved and 14 successor companies formed, among them the major defendants in the 1940 case. Although the decree was bitterly attacked by the independent companies through their attorneys the court nevertheless approved it. In the twenty years subsequent to the decree the tremendous growth of cigarette consumption resulted in the dominance of the "Big Three" of the industry.

That the decree in the 1911 suit did not effectively restore competitive conditions in the industry gradually became apparent through the investigations of government agencies<sup>40</sup> and independent scholars,<sup>41</sup> and eventually led to another action<sup>42</sup> against the industry under the Sherman Act. This last litigation came to its conclusion with the decision of the Supreme Court in *American Tobacco Company v. U. S.*<sup>43</sup> on June 12, 1946 affirming the judgment of the lower court and, by so doing, upholding the conviction of the major segments of the tobacco industry.

*American Tobacco Co. v. U. S.* This important litigation against the tobacco industry was brought by the government by means of a criminal information.<sup>44</sup> The defendants were named to be the American Tobacco Company, the Reynolds Tobacco Company, the Liggett & Myers Tobacco Company, the P. Lorillard Tobacco Company, the Imperial Tobacco Company, the British American Tobacco Company, the Philip Morris Tobacco Company, the Universal Leaf Tobacco Company, and subsidiaries and officers of those companies. All of the defendants except American, Reynolds, and Liggett & Myers and the individual officers of those companies were served pursuant to a stipulation permitting them to enter a plea of *nolo contendere* upon the condition that they would be fined if those who stood trial were convicted.<sup>45</sup>

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<sup>40</sup> \* \* \* *Supra*, n. 18.

<sup>41</sup> COX, *op. cit.*, *supra*, n. 8, *passim*; JONES, THE TRUST PROBLEM IN THE UNITED STATES (1924) 452-474; SEAGER and GULICK, TRUST AND CORPORATION PROBLEMS (1929) 173-191; STEVENS, INDUSTRIAL COMBINATIONS AND TRUSTS (1914) 472-516.

<sup>42</sup> N. Y. Times (July 25, 1940) 19, col. 8, "The Department of Justice said its investigation convinced it that a 1911 civil suit by which the American Tobacco companies business was divided among the Big Four and divorced from the British concerns named in today's charges did not suffice to restore free competition and that the Sherman Act is today being violated in numerous respects by the companies and individuals."

<sup>43</sup> *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

<sup>44</sup> The criminal information constitutes a novel method for bringing anti-trust litigation and this case is apparently the first in which it has been used. Note, *Information and Indictment Under the Sherman Act* (1945), 54 Yale L. J. 707.

<sup>45</sup> Following the action of the Supreme Court sustaining the lower court these defendants were fined a total of \$42,000. See BUSINESS WEEK, October 5, 1946, 54.

*The information.* The information<sup>46</sup> against the defendants was in four counts. These alleged, in summary, (1) A conspiracy to restrain trade and commerce in leaf tobacco and tobacco products, (2) monopolization, (3) attempt to monopolize, and (4) conspiracy to monopolize. The first of the counts was laid under Section 1<sup>47</sup> of the Sherman Act, and the other three were laid under Section 2<sup>48</sup> of the Sherman Act.

Each of the counts alleged that the crime was committed by the same methods, means, and practices. The focal points of the information, and, indeed, of the entire case, were that the defendants agreed on the price that they would pay for leaf tobacco and, secondly, that they agreed on the price of tobacco products to the dealers and retailers. With respect to the leaf prices each of the counts alleged that the crime was committed by (1) concertedly obtaining control of the system under which leaf tobacco was sold and exercising that control in a manner designed to deprive tobacco growers of bargaining power, and (2) agreeing upon and manipulating leaf prices and formulating their grades, buying instructions, and products to avoid competition among themselves and to restrain competition from others, particularly 10¢ cigarettes.

*Trial in the District Court.* During the trial the government in supporting the allegations with respect to leaf

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<sup>46</sup> Brief for the Respondent, *supra*, n. 43, 6 *et seq.*

<sup>47</sup> *Supra*, n. 38a:

"Every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall make any such contract or engage in any such combination or conspiracy . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

<sup>48</sup> *Ibid.*, Sec. 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, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."



buying introduced evidence indicating that the following practices were prevalent in the industry:<sup>49</sup>

(1) *Identical leaf price instructions to buyers.* Evidence as to this practice was almost entirely circumstantial.<sup>50</sup> The companies admitted that each issued price instructions to their buyers for each grade of tobacco, but there was no direct evidence that these prices were fixed in concert or by agreement among the companies. The government contended that the fact that they were made by agreement could be inferred from certain practices in the market. In the first place, it contended, it was evident that a leaf price "ceiling" fixed by the companies exists in the auction market as to each of the grades of tobacco. Evidence showed that a bid made at this alleged "ceiling" brought about an immediate sale to the buyer making the bid even though it was the first bid. Further support was found in the fact that a "ceiling" bid at any time on a basket of tobacco not then under auction resulted in its immediate sale to the buyer making the bid.

In addition, the government contended that the inference that identical price instructions to buyers were issued was reflected in the grading system practices of the defendants. Each of the defendants was found to have formulated minutely different grades for the tobacco that they used in their products. In the market these grades are not competitive among the buyers. Even though the defendants did not compete as to these grades, there was evidence that the buyer representatives of non-competing defendants bid on those grades in order to force the price to their rivals up to the agreed "ceiling" price.

The government contended that a variation of that practice also supported the inference of identical price instructions. Evidence was introduced showing that a

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<sup>49</sup> Brief for the Respondent, *op. cit.*, *supra*, n. 43, 7.

<sup>50</sup> Evidence showed that immediately prior to the opening of the loose leaf marketing season, which opened in Georgia, each of the defendant companies sent the heads of their leaf buying departments to Valdosta, Georgia, one of the Georgia markets, at the same time. The same meeting occurs in Lexington before the opening of the burley market. No price agreement among these representatives was proved. Transcript of Record, *supra*, n. 43, 5776.

company which had purchased all the tobacco it desired on the particular market nevertheless continued to bid for the purpose of forcing rival companies up to the ceiling.

(2) *Percentage buying.* Another practice of the companies found by the government to have consequences that resulted in violation of the act is that of "percentage buying." Evidence showed that each of the buyers of the companies received instructions as to the percentage of the tobacco in each market that they were to purchase for their principal. The companies admit that such instructions are given, but differ with the government in the inference to be drawn from them. The companies contended that it was merely for the purpose of assuring that they receive sufficient tobacco to meet their production requirements. The government contended that such an arrangement smacked of market sharing, especially upon the showing by the government that the companies were able to purchase their predetermined share of the market within their price determination no matter what the size of the crop for any given year.

(3) *Buyer Control of the Market.* The government introduced evidence tending to show that none of the companies would purchase on a market unless all of their major competitors were also represented. It was further shown by evidence that the manufacturers controlled the sales policies of the markets and the dates of the opening and closing of the markets through their membership on the various organizations establishing these policies. The growers have no representation on such organizations. The government contended that the fact that the warehousemen do have representation in these organizations is no protection to the farmer since the investment and the livelihood of the warehousemen is dependent on the continued patronage of the large buyers.

(4) *Practices of the companies in connection with the "war" against 10¢ cigarettes.* Government evidence showed that during the early 1930's certain brands of 10¢ cigarettes began to be widely sold and that, as a result, the sales of the large 15¢ cigarette manufacturers fell off. As a result

of this condition the companies entered into a price "war" to eliminate the competition of the 10¢ cigarette. While the major part of this "war" was waged by the weapons of price to the dealer and retailer certain practices of the companies in respect to leaf buying assisted in eliminating the 10¢ cigarette competition. The companies were alleged to have fixed high "ceilings" for the less expensive tobaccos used by the 10¢ manufacturers. The manufacturers of the 15¢ cigarette then entered into competition with the 10¢ manufacturers for the purchase of this tobacco. In this way, it was contended, the large companies increased the cost of their competitors and also deprived them of the leaf they needed for manufacture. The government pointed out that no satisfactory explanation has ever been made by the large companies as to the ultimate disposition of this inferior tobacco.

*Verdict of the Jury.* This evidence, in respect to leaf practices, when submitted to the jury along with practices of the companies in connection with sales of tobacco products, was found by the jury to support the contentions of the government and resulted in the conviction of the defendant companies and most of the individual defendants on three of the counts.<sup>51</sup>

*Circuit Court of Appeals.* The convicted defendants immediately brought the proceedings necessary for appeal to the Circuit Court of Appeals. The case was there heard and opinion rendered on December 8, 1944.<sup>52</sup> In the Circuit Court of Appeals, one of the major issues was whether there was sufficient evidence to support the verdict of the jury as to the finding of guilty on each count. In its opinion the Circuit Court of Appeals reviewed all of the leaf practice evidence which has been discussed with the exception

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<sup>51</sup> Each of the corporate and the individual defendants was fined the maximum amount possible under the statute, or \$15,000. The trial court held that the count of the information dealing with attempting to monopolize was merged with the finding of guilty on the count dealing with the offense of monopolizing so that the defendants were guilty of three counts. The total of the fines levied in the case against the "Big Three" and their officers was \$255,000. Their annual net profits for the year preceding that in which the suit was brought were over \$75,000,000.

<sup>52</sup> *American Tobacco Co. v. U. S.*, 147 F. (2d) 93 (C.C.A. 6th, 1944).

of the control<sup>53</sup> of the buyers over the associations that control the loose leaf market. Without mention of this practice, the court held that the other leaf practices in conjunction with the practices of the defendants in respect to the sales of tobacco products were sufficient to support the verdicts of the jury in the lower court.

*Supreme Court of the United States.* The defendants, having been unsuccessful in the Circuit Court of Appeals, petitioned the Supreme Court of the United States for a writ of *certiorari* to review the proceedings in the lower courts. The writ was granted<sup>54</sup> but was limited to "whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act." While the court emphasized the limitation on the scope of review by a subsequent refusal<sup>55</sup> to enlarge the scope of review, the briefs of the defendants and the government devoted a considerable part of their briefs to a discussion of the leaf buying practices of the defendants.<sup>56</sup> This proved to be foresight as the Supreme Court in its opinion rendered on June 12, 1946<sup>57</sup> devoted a part of the opinion to the leaf practices which were found to have contributed to a plan found violative of the act.

Mr. Justice Burton, speaking for the court, in discussing the issue of exclusion found that "Although there is no issue of fact or question as to the sufficiency of the evidence to be discussed here, nevertheless, it is necessary to summarize the principal facts of that conspiracy to monopolize certain trade, which was charged in the fourth count."<sup>58</sup> To that end the Court recounted<sup>59</sup> the identical leaf buying practices discussed in the Circuit Court of Appeals; often, indeed, in the same language. On the sole issue of the case, that of exclusion, it sustained the conviction upheld in the court below.

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<sup>53</sup> *Ibid.*, 101 *et seq.*

<sup>54</sup> *American Tobacco Co. v. U. S.*, 324 U. S. 836 (1945).

<sup>55</sup> *Reynolds Tobacco Co. v. U. S.*, 324 U. S. 891 (1945).

<sup>56</sup> See: Brief for the Respondent, 9-15; Brief for the Petitioner Reynolds Co., 25-26; Brief for the Petitioner American Tobacco Co., 56-60; Brief for the Petitioner Liggett & Myers Co., 13-48 (out of a brief of 80 pages), all in *American Tobacco Co. v. U. S.*, *supra*, n. 43.

<sup>57</sup> *Supra*, n. 43.

<sup>58</sup> *Ibid.*, 789.

<sup>59</sup> *Ibid.*, 789, *et seq.*

*Effect of the anti-trust litigation on leaf prices.* The successful prosecution by the government raises the question of the effect of the litigation on future leaf tobacco prices and the effectiveness of this type of litigation as a weapon for obtaining increased prices. Action by the government under the Sherman Act presupposes that without the impediments in the leaf market placed there as a result of combination among the buyers, a free competitive market would exist. The removal of these obstacles should then result in higher prices to the producer. The same paradox in the approach of the federal government under the Sherman Act may be observed as in the federal legislation now applicable to the loose leaf market. Of course, a duopoly market is not a free market but tends to be a monopolistic market where the traditional economic laws are not controlling, and the removal of these obstructions would not necessarily tend to increase the price. Price would still be determined by duopoly.

Oddly, the defense in the Tobacco case made no issue of the fact that duopoly conditions in the market might have caused identical prices without collusion among the buyers.<sup>60</sup> Because this fundamental issue was not raised it may be that the important question remains open of whether duopoly price, set without agreement, is a violation of the Sherman Act. The argument that the issue is as yet undetermined must, however, provide small comfort to duopolistic industries, for the refusal of the Supreme Court to review all issues in the case leaves the government in a position where it may insist that conspiracy may be inferred from a duopolistic price without regard to the method by which it is determined.

That such duopoly conditions might have caused the result found violative of the Sherman Act seems to have

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<sup>60</sup>The issue seems to have been clearly raised in only one instance throughout the entire proceedings. Reply Brief of the Petitioner, *op. cit.*, *supra*, n. 43, 6 *et seq.*, "The real question is whether in an industry such as this, the anti-trust laws are violated by uniformity of conduct, where normal business factors cause each company, acting individually, to adopt practices and policies that are, in many instances, similar to those of its competitors." The failure to argue the issue more vigorously might be caused by the belief that such an admission on the part of the companies would be an entering wedge for the government to insist on a more rigorous type of regulation for the industry than the anti-trust laws.

been at least implicitly recognized by the government in the form in which the suit was brought. Had the government brought a civil suit for the purpose of enjoining the acts complained of,<sup>61</sup> successful prosecution would have ended in an equity decree. The government undoubtedly would have been required to assist in the drafting of a decree which would have "restored" competitive conditions in the market and which would have set up the framework for prevention of the recurrence of those conditions resulting in violation of the Sherman Act. The difficulties of drafting a Canute like decree which would stay the operation of economic forces within the industry must have been apparent to the officials responsible for the initiation of the proceedings. It follows that the selection of a criminal proceeding would permit the government to eschew responsibility for the drafting of a decree which would be certain to be ineffective. Further, in the event of successful prosecution, the onus of making the adjustments necessary for free competition would then be placed on the industry. Freed of the responsibility for the enforcement of an ineffectual decree, the government would then be in a position to insist upon adjustments in the industry under the threat of future anti-trust prosecutions.

Such, in effect, is the position in which the government now finds itself. More importantly for the leaf grower, the responsibility for making the changes necessary to eliminate the economic conditions leading to violation of the Act is placed with the manufacturer. The interest of the manufacturer in making such changes may, of course, be seriously questioned.

What changes, then, will be brought about by the litigation? The necessity for action by the companies to improve the conditions of the market cannot be said to be impelled by the penalties provided by the Sherman Act for they obviously provide no real deterrent to the commission of

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<sup>61</sup> Although at the time of the conclusion of the case the press indicated that the government planned to bring a civil action, no official action has been taken since. See N. Y. Times (Oct. 28, 1941) 25, col. 5. A civil action for dissolution of the industry would have been confronted with the problems discussed, *infra*, *circa*, n. 63, and would, apparently, have enjoyed no greater success.

similar offenses. Whatever the impelling cause, it seems certain that the manufacturers will make some gesture, even if only for public relations purposes, towards elimination of objectionable features of leaf marketing and the restoration of "free" market conditions. Some lip service to the result of the case seems required although both the government and the industry must recognize that no action can have a significant effect on leaf prices unless that action deals with duopoly. The real elimination of duopoly for the industry would require the substantial increase of the number of buyers in the market, and, hence of the manufacturers of tobacco products. The annual profits of the present tobacco manufacturers seem sufficient insurance against any voluntary step in that direction by the companies.

In the fixing of revised marketing policies under the case the manufacturers are without the guidance of a decree and without the expectation of other assistance from the government in formulating such policies.<sup>62</sup> Apparently the only guide to the companies are the opinions in the circuit court of appeals and in the Supreme Court. The management of the defendants may take the view that these opinions indicate the minimum scope of reform as far as marketing practices are concerned. If such an approach is adopted, the future will probably witness some alteration of identical leaf price and market sharing practices. If such a course is adopted, the failure of the courts to stress the other controls exercised by the defendants over the market may prove a serious omission.

A change in the identical leaf prices may take the form of a "ceiling" expressed in terms of a range rather than a set figure. To change the appearance of market sharing each manufacturer may set a requirement for each market based on "production" commitments rather than a set percentage. Under duopoly conditions, the Sherman Act

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<sup>62</sup> In many cases in the past, informal discussion with officials of the anti-trust division of the Department of Justice has resulted in agreement on a course of action that may be safely pursued by a company whose position theretofore was uncertain in respect to possible future prosecution under the Sherman Act. It would seem that that avenue is foreclosed to the Tobacco industry.

prosecution may have the paradoxical result of forcing the defendants to agree on a course of action to avoid future prosecutions through giving the appearance of a competitive market while their original conviction may not have been the result of agreement or concert but because of economic conditions beyond their control.

In any event, it seems clear that the litigation will not effect an increase in price nor will it even substantially effect a change in the practices resulting in the conviction of the defendants. More importantly, the case reemphasizes the futility of attempts to control the tobacco industry by Sherman Act litigation. The tobacco trust dissolution has served only to replace monopoly with duopoly. The instant tobacco case seems likely to prove even more sterile in producing significant changes in competitive conditions within the industry. The only possibility for "restoration" of competitive conditions in the industry within the framework of the Sherman Act would seem to be a civil litigation for dissolution. In view of the failure of the tobacco trust dissolution decree, and of the inherent difficulties of "atomization" of the industry, as later discussed, this, too, affords at best an uncertain remedy.

*The Means of Effective Control.* The future of effective control in the tobacco as well as in those other industries where "duopolistic" conditions exist calls for recognition on the part of government that these markets do not respond to the conventional economic stimuli. For the tobacco industry, the conclusion to be drawn is that under present market conditions no control based upon the assumption of a free market can effect substantial price increases to the farmer. For effective control, then, it seems clear that one of two fundamentally divergent approaches from an economic conceptual standpoint must be made. The first of these approaches would involve increasing the number of buyers in the market until a free market was substituted for present "duopoly" conditions. Such an approach, once a free market is established, depends for control only on the economic laws applicable to free markets. The second would be based upon a frank recognition



that the industry is monopolistic and should be treated as a "public utility" to be operated under price and other controls by the federal government.

The adoption of the first of these possible solutions requires the elimination of difficult problems inherent in the creation and maintenance of a market with a sufficient number of buyers to replace tobacco "duopoly" with a free market. A brief examination of some of these difficulties indicates that the possibilities of success for such a project are somewhat remote.

*Increase in the number of buyers.* The creation of a substantially increased number of buyers in the tobacco market could conceivably be brought about either by the dissolution of the present companies and the creation of a number of independent successor units (as was attempted by the 1911 decree), or by the attraction of a number of new tobacco manufacturers into the industry as presently constituted. Of the two, the second would obviously be the more difficult and offer the lesser chance of success. The power of the leading tobacco manufacturers and their hold upon the consumer public through years of extensive advertising concentrated on brand names is so strong that it seems unlikely that any sufficient amount of capital could be attracted into new ventures<sup>63</sup> in the field of tobacco manufacturing. It is doubtful that government assistance through capital aids to new tobacco manufacturing ventures or heavy taxation of the present tobacco manufacturers would neither be successful in drawing new manufacturers into the field nor politically expedient.

Reorganization of the industry to increase the number of buyers by dissolution of the present manufacturing industry and its rebirth in the form of a number of smaller units present difficulties of the greatest magnitude. "Atomization," through the dissolution of the present industry into a sufficient number of units to eliminate "duopoly," would require the consideration<sup>64</sup> of such vital problems as (1) the determination of the number, size and structure of the

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<sup>63</sup> Cox, *op. cit.*, *supra*, n. 8, 320.

<sup>64</sup> Hale, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, (1940) 40 Col. L. Rev. 616.

successor units, (2) a disposition of the problem of "brand" names, (3) an appropriate procedure for effecting such a dissolution, and (4) a machinery for preserving the freedom of the market once it is achieved.

*Number, size and structure of the successor units.* Initially it seems clear that a plan for remaking the industry by increasing the number of manufacturing units must comprehend the entire industry and not merely a segment. Such a plan would necessarily include a consideration of the desirability of reconstituting the manufacturers of lower priced cigarettes as well as the minor defendant tobacco manufacturers in the tobacco case. The danger of omitting a segment of the manufacturing industry or of permitting present companies to remain, without substantial change, in the remade industry is that it would open the door for such companies to exploit the market through their experience as a going concern while the balance of the industry was in the period of readjustment to "atomized" conditions. Such an exploitation could well result in the continuation of "duopoly" through the replacement of the present "Big Three" by other, and now much smaller, manufacturing concerns. Assuming that the entire industry is included in the plan the difficult problems of the number and size of successor units must be considered.

The problems of number and size are obviously inter-related. Economists give no clear answer to the question of the number of companies necessary as buyers to eliminate "duopoly". The indication is that the number must be large. The selection of any number will always bear the implicit danger that if the number selected is not large enough "duopoly" will recur in the remade industry. A determination of the size of the successor units requires a nice balancing between the danger of the recurrence of "duopoly" and the necessity for a size adequate for efficient mass production. The problems are of especial difficulty in the tobacco industry. The history of the industry is clear that the most economical size for a manufacturing enterprise in the tobacco industry is very large,<sup>65</sup> partly

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<sup>65</sup> Cox, *op. cit.*, *supra*, n. 8, 320.

because of the advantages of production in a large factory under mass production methods, and partly because of the necessity for large scale advertising.

*Brand names.* An increase of the number of buyer manufacturing companies would, of course, necessitate the creation of a number of new manufacturing companies. Irrespective of the number or size of the successor companies it seems clear that new companies would be at a competitive disadvantage if the old companies were allowed to retain their present brand names. To date no court in effecting a dissolution has undertaken to destroy brand names. Aside from constitutional doubts under the First, Fourth and Fourteenth Amendments, the practical problems of such a destruction would be enormous. In addition, attempts to divide brands in previous dissolutions have not proved effective.<sup>66</sup>

*Procedure for dissolution.*† Dissolution of a "duopolistic" industry has never been attempted under the Sherman Act. The provisions of that act as authority for the dissolution of an industry by equity decree have never been extended beyond "atomization" of a single organization which had acquired monopolistic control of its field. Even assuming that the act might be extended to include the dissolution of the "Big Three" in a proper case, the power to dissolve the manufacturers of the minor competing brands of 15¢ cigarettes seems lacking. *A fortiori*, it would be difficult to contend that the provisions of the act were broad enough to include power to reconstitute non-offenders such as the manufacturers of the 10¢ cigarette. The dissolution of merely a segment of the industry under the Sherman Act presents dangers that have already been discussed. To be effective, it seems clear that the entire industry must be included in any reconstitution plan.

An alternative to the use of the Sherman Act for the purpose of the dissolution of the present manufacturing companies into the industrial components necessary to eliminate duopoly might be presented through special legislation. Even assuming that constitutional doubts could

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<sup>66</sup>Muhse, *Disintegration of the Tobacco Combination*, (1913) 28 Pol. Sci. Q. 249, 268, 275 *et seq.*; Hale, *loc. cit.*, *supra*, n. 64.

be resolved in favor of such a statute, it seems remote as a matter of political expediency.

*Preservation of a "free" market.* The burden of preserving a reconstituted tobacco industry presumably would fall on the Sherman Act and its enforcement through the courts by the administrative agencies of the government charged with responsibility for its enforcement. It is not within the scope of this paper to discuss the efficacy of Sherman Act litigation as a device for economic control. Nevertheless, in view of its history it seems open to serious question whether the tobacco industry can ever be efficiently controlled by Sherman Act litigation. It is conceivable that a constant vigilance over the industry by an adequately staffed and well budgeted federal prosecuting agency<sup>67</sup> could maintain the freedom of a market which had been achieved through dissolution. The normal difficulties of such a surveillance are increased substantially in the tobacco industry since it is clear that the most efficient size in that industry is large and pressure is constantly exerted for increase in the size and the power of individual units.

A close analysis of the problems involved in the recreation of the industry through dissolution and an attempt to create competitive conditions in the market leads to the conviction that such an approach offers no assurance that competitive conditions can ever be "restored" to an industry in which such conditions have been unknown for two generations. Further, any such approach seems certain to result in chaotic leaf market conditions which might well result in worsening present conditions as to leaf prices.

On the other hand, it is submitted that the "public utility" approach would avoid most of the problems of reconstitution of the industry through dissolution, and, further, from the standpoint of the leaf grower at least, would eliminate the ultimate problem of uncertainty of

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<sup>67</sup> Hamilton and Till, *Anti-Trust—The Reach after New Weapons* (1940) 26 Washington U. L. Q. 1. A more extensive discussion is contained in Hamilton and Till, *Anti-Trust in Action*, National Temporary Economic Committee, 76th Cong., 3rd Sess. (1941). See also Final Report and Recommendations of the Temporary National Economic Committee, 77th Cong., 1st Sess., Sen. Doc. No. 35 (1941) 35.

the outcome as to leaf price. A fair share of the proceeds of sale of tobacco products to the consumer can be secured for the farmer without chaos through a frank recognition by the federal government that the tobacco industry is monopolistic and, as in the case of "public utilities," should be subject to such federal controls as are necessary to insure fair leaf prices to the producer.<sup>68</sup> A conclusion to control tobacco leaf prices requires difficult decisions. Not the least of these is the political problem of overcoming a natural repugnance to the extension of further federal control over business.

The problems, however great, do not appear to be greater than those faced and reasonably well solved in the case of other industries under federal control. Any less complete attempt at control in the industry would involve difficulties at least as great with no assurance of success. For the leaf grower, it must be concluded that no other approach can offer a definite assurance of permanently increased leaf prices. Such a conclusion leaves open the problem of control of prices of tobacco products to the consumer although it seems clear that regulation would have to be extended to include product prices to avoid the passing on of price increases as the result of leaf price regulation to the consumer. It leaves open, too, the even greater

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<sup>68</sup> Handler, Book Review, *Competition in the American Tobacco Industry* (1934) 48 Harv. L. Rev. 159; Handler, "A Study of the Construction and Enforcement of the Federal Anti Trust Laws," Monograph No. 38, Temporary National Economic Committee, 76th Cong., 3rd Sess. (1941) 99-104; Dickinson, *The Anti-Trust Laws and the Self Regulation of Industry*, (1932) 18 A. B. A. J. 600; Jackson, *Monopolies and the Courts*, 86 U. of Pa. L. R. 231; Marchison, *Significance of the American Tobacco Company Case* (1948) 26 N. C. L. Rec. 139.

The suggestion is made by Professor Means that it may be possible to exercise the required degree of control over monopolistic industries through institutional arrangements in the making of the "right" "key" decisions. This concept is advanced as a substitute for "economic dictatorship" expressed in terms of government ownership and operation. Professor Means' concept presupposes that competition will inevitable result when certain obstructive economic influences are regulated. While this may be true in certain industries, its effective application to an industry where the entire economic fabric is permeated with "duopoly" is extremely doubtful. The history of federal attempts at control make it difficult to conceive of economic features in tobacco leaf marketing which, isolated and controlled, would alter the structure of the industry sufficiently to make it competitive. Until a reliable guide to those features has been furnished, it is not believed that it establishes an effective approach to a method of leaf price regulation. Means, *Industrial Prices and Their Relative Inflexibility*, Sen. Doc. 13, 74th Cong., 1st Sess. (1935).

problems of the need for similar controls in other industries where monopolistic competition flourishes, and the basic problem of the feasibility of retaining competition as the instrument of control in some industries while abandoning it in others.

TABLE I

FLUE CURED TOBACCO: FARM VALUE AND PROFITS OF THE BIG FOUR TOBACCO MANUFACTURERS, 1923-1937\*

Year	Farm Value (Million dollars)	Profits Available for Divi- dends "Big Four" Tobacco Manufacturers (Million dollars)
1923	121	56
1924	94	61.7
1925	115	68.4
1926	140	70.5
1927	147	73.6
1928	128	76.4
1929	135	85.7
1930	103	105.2
1931	56	110.6
1932	43	104.6
1933	112	57.7
1934	152	68.5
1935	162	68.1
1936	152	77.2
1937	197	77.5

\* From Table 17, p. 84, Transcript of Record in the Supreme Court of the United States of *Mulford v. Smith*, 307 U. S. 38 (1939).

TABLE II

PERCENTAGE OF TOTAL U. S. PRODUCTION OF SMALL CIGARETTES 1931-1939\*

	1931	1932	1933	1934	1935	1936	1937	1938	1939
American .....	39.5	36.6	33.0	26.1	24.0	22.5	21.5	22.7	22.9
Liggett .....	22.7	23.0	28.1	27.4	26.0	24.6	23.6	22.9	21.6
Reynolds .....	28.4	21.8	22.8	26.0	28.1	29.5	28.1	25.3	23.6
Lorillard .....	6.5	5.2	4.7	4.1	3.8	4.3	4.7	5.1	5.8
Brown & Williamson	0.2	6.9	5.5	8.3	9.6	9.6	9.9	9.9	10.6
Philip Morris .....	0.9	1.4	0.8	2.0	3.1	4.1	5.4	5.7	7.1
Stephans .....	0.1	0.1	0.2	0.5	1.4	1.9	2.5	3.1	3.3
Axton Fisher .....	0.7	3.1	4.4	4.4	3.0	2.2	2.4	2.7	2.4
Larus .....	0.2	1.0	0.2	0.6	0.7	0.8	1.0	1.3	1.3

\* From *American Tobacco Co. v. U. S.*, 328 U. S. 781, 794 (1946).

TABLE III

NUMBER OF LOOSE-LEAF MARKETS IN THE UNITED STATES BY CLASSES, AND NUMBER DESIGNATED FOR AND HAVING INSPECTION UNDER THE INSPECTION ACT OF AUGUST 23, 1935, 1936-37 TO 1946-47.

Marketing year	Flue-cured <sup>1</sup>			Fire-cured		
	Total auction markets operating	Total markets designated for inspection	Total markets actually under inspection	Total auction markets operating	Total markets designated for inspection	Total markets actually under inspection
	Number	Number	Number	Number	Number	Number
1936-37	74	<sup>2</sup> 6	3	15	13	13
1937-38	75	<sup>2</sup> 7	4	15	13	13
1938-39	75	<sup>2</sup> 8	5	14	13	12
1939-40	75	12	<sup>2</sup> 12	12	14	12
1940-41	75	14	14	12	14	12
1941-42	75	26	26	12	14	12
1942-43	75	75	42	12	14	12
1943-44	75	75	40	12	14	12
1944-45	76	75	46	11	14	11
1945-46	78	76	53	10	14	10
1946-47	79	78	<sup>3</sup> 79	10	14	10
		<i>Burley</i>		<i>Dark air-cured</i>		
1936-37	39	4	4	8	2	1
1937-38	40	5	5	9	2	2
1938-39	41	12	12	9	3	3
1939-40	41	15	15	9	3	3
1940-41	42	16	16	8	3	3
1941-42	42	42	42	8	7	7
1942-43	42	42	42	8	8	8
1943-44	42	42	42	8	8	8
1944-45	45	45	45	9	9	9
1945-46	47	46	<sup>3</sup> 47	10	10	10
1946-47	48	48	48	10	10	10
		<i>Maryland</i> <sup>4</sup>				
1936-37	—	—	—			
1937-38	—	—	—			
1938-39	2	—	—			
1939-40	4	—	—			
1940-41	4	—	—			
1941-42	4	—	—			
1942-43	4	—	—			
1943-44	4	—	—			
1944-45	4	—	—			
1945-46	4	—	—			
1946-47	4	—	—			

<sup>1</sup> All flue-cured markets operating, and not previously designated for the inspection service, were designated for the service on June 26, 1942. Qualified inspectors have not been available to cover all markets; however, the service has been extended to some additional markets each season. During the 1946-47 crop year all flue-cured markets were inspected for the first time.

<sup>2</sup> Three markets, Darlington, Lake City and Pamplico, S. C. designated July 1, 1936, but service not inaugurated until the 1939 season.

<sup>3</sup> Under the Tobacco Inspection Act it is necessary that a market operate for one season before being eligible for a referendum. Inspection was furnished on a cost basis on one market.

<sup>4</sup> Sold in the year following production. No Maryland markets designated to date (12/12/46).

TABLE IV

TYPES OF LEAF TOBACCO UNDER PRICE CONTROL, FIRST AND LAST YEAR CROP WAS UNDER PRICE CONTROL, CEILING PRICE PER POUND AT GROWERS LEVEL AND SEASON AVERAGE PRICE PER POUND RECEIVED BY GROWERS\*

	Crop which was first under price control	Last crop under price control	Ceiling price per pound for crops of—					Season average price per pound received by growers for crops of—									
			1942	1943	1944	1945	1946	1937	1938	1939	1940	1941	1942	1943	1944	1945 <sup>1</sup>	1946 <sup>1</sup>
			Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents
Flue-cured, Types 11-14.....	1942	1945	Flexible	41.0	43.0	44.0	44.0	23.0	22.2	14.9	16.4	28.1	38.4	40.2	42.4	43.7	48.5
Burley, Type 31.....	1942	1945	38.0	41.0	41.0	41.0	20.1	19.0	17.3	16.2	29.2	41.8	45.6	44.0	39.4		
Maryland, Type 32.....	1943	1944	—	62.0	57.0	—	—	17.2	18.5	21.1	33.0	30.0	56.5	45.3	55.5	56.8	
Connecticut Shade Grown, Type 61.....	1942	1944	135.0	135.0	135.0	—	—	98.0	60.0	60.0	83.0	113.0	150.0	185.0	220.0	220.0	
Georgia-Florida Shade Grown, Type 62.....	1943	1944	—	123.0	123.0	—	—	68.0	71.5	73.0	70.0	73.0	104.0	138.0	144.0	150.0	
Domestic Cigar Filler and Binder Tobacco:																	
Type 41.....	1943	1944	—	17.0	17.0	—	—	10.4	13.6	12.9	13.3	13.2	13.7	18.6	19.7	34.0	
Types 42-44.....	1943	1944	—	16.0	16.0	—	—	8.8	8.8	8.4	7.7	9.3	11.5	18.3	18.3	34.0	
Type 51.....	1943	1944	—	40.0	40.0	—	—	15.5	15.0	22.0	21.0	22.0	26.0	40.0	39.0	60.0	
Type 52.....	1943	1944	—	40.0	40.0	—	—	16.4	15.0	24.0	21.7	24.0	26.4	37.7	37.3	56.3	
Type 53.....	1943	1944	—	22.0	22.0	—	—	10.1	11.0	10.9	12.0	12.9	13.8	19.7	22.0	35.3	
Type 54.....	1943	1944	—	18.0	18.0	—	—	10.5	7.0	10.8	8.5	9.6	16.2	22.5	24.0	37.7	
Type 55.....	1943	1944	—	23.0	23.0	—	—	12.2	8.2	13.8	11.7	14.6	16.4	25.5	26.8	45.6	

\* Instances where the season average price exceeded the ceiling price per pound may be explained by the fact that for those types on which ceiling prices were fixed for grades, (as in Burley, for which specific ceiling prices were fixed for each of 89 Federal grades) those prices were factored to a theoretical average ceiling price per pound, based on normal grade composition of the crop. Deviations of a season average price from the theoretical ceiling price depended upon variation of grade composition of a particular crop from normal. Ceiling prices as stated above are to be considered as indications rather than hard and fast ceilings, in that most were subject to qualifying factors which could cause variations from the stated figures, as in the case of the 1944 flue-cured crop, for which ceiling prices were 39 cents per pound for unfied tobacco, 43.5 cents per pound for tied tobacco and 5 cents per pound for farm scrap, designed to result in the 43-cent-per-pound average weighted ceiling price.

<sup>1</sup> Preliminary.