HISTORICAL DEVELOPMENT OF THE LAW OF BUSINESS COMPETITION

FRANKLIN D. JONES

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
FRANKLIN D. JONES, HISTORICAL DEVELOPMENT OF THE LAW OF BUSINESS COMPETITION, 36 Yale L.J. (1926). Available at: http://digitalcommons.law.yale.edu/ylj/vol36/iss2/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
The struggling little nation, exhausted by its fight for independence, faced a world wedded to the mercantilist policy. Freedom carried with it heavy responsibilities in the world of trade. The United States was now a foreign nation subject to every restriction the monopolistic organizations of England could procure from parliament designed to check the commerce of competing nations. Hostile legislation was directed specifically at the American nation. The great trade of the Americans with the British West Indies which had existed for many years, was seriously injured by an order in council adopted in 1783, providing that the trade between the United States and these islands must be carried on British ships, owned and navigated by British subjects. American ships trading with England could only bring in articles produced in the states of which their owners were citizens. The design of such legislation was to force American trade into British hands and to destroy American shipping which had grown strong before the Revolution. It was thought that the application of stern economic measures such as these would convince the thirteen struggling little sovereignies of the futility of attempting to combat the severe restrictive legislation of the great nations, and thus cause them to seek to re-establish their allegiance to the British empire. John Adams who was sent over to negotiate a commercial treaty was ridiculed. He threatened reprisals without effect. “I should be sorry,” he said, “to adopt a monopoly, but, driven to the necessity of it, I would not do things by halves. . . . If monopolies and exclusions are the only arms of defense against monopolies and exclusions, I would venture upon them.” ¹

But the English government knew it was dealing with a weak disorganized government of thirteen independent states working at cross purposes, and under such conditions threats were futile. English tradesmen could evade individual state regulations, but American traders could not escape the English restrictions. The British trading companies and merchants meanwhile poured their low priced goods into the country and the small American factories created during the war were faced with ruin. The states individually attempted to regulate com-

¹ Fiske, THE CRITICAL PERIOD OF AMERICAN HISTORY (9th ed. 1892) 141.
merce, and adopted different retaliatory measures against English goods, but the lack of uniformity in duties merely diverted the flow of commodities to the states which imposed low duties or no duties. This quickly aroused jealousy between the states. The states then began commercial warfare against each other. Heavy duties were imposed, boycotts were declared and some states were on the verge of warfare.

The breakdown of the trade structure which had for so many years supported the commerce between the colonies and the mother country itself produced misery and depression everywhere. An orgy of paper money soon demoralized trade, and forced business back to the slow primitive processes of barter. The abnormal risks of doing business created a great group of speculators willing to assume the risk, who so aroused Washington's ire that he said he would like to hang them on a gallows higher than that of Haman. Chaos ruled in trade.

The attitude of New Jersey in reluctantly entering the Confederacy because of the lack of power in Congress over trade was vindicated by the course of events. Serious thinking men began to see the compelling need for a centralized government to control interstate and foreign trade. In 1778 New Jersey had addressed a resolution to the Continental Congress urging that the national government should regulate foreign trade. Three years later a resolution was presented in Congress affirming that "it is indispensably necessary that the United States in congress assembled should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interest." In 1785 a committee of Congress reported that Congress ought to possess the sole and exclusive power of regulating trade with foreign nations and between the states. In 1786 Virginia adopted resolutions inviting all of the states to appoint commissioners to meet in Annapolis "to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony." The representatives of five states met at Annapolis in the fall, and sent out a call for a constitutional convention the following year. After several states had chosen delegates to the convention, the Continental Congress gave its approval to the plan and the con-

\[2\] Ibid. 164.
\[3\] Madison, Debates in the Federal Convention of 1787 (Hunt and Scott's ed. 1920) 106.
\[4\] 1 Laws of the United States (1815) 23.
\[5\] Ibid. 28.
\[6\] Ibid. 50.
\[7\] Ibid. 54.
vention which was destined to create the Constitution of the United States met in Philadelphia in 1787. Certainly there was ground for the following statement of Webster in his great argument before the Supreme Court of the United States:

"Over whatever other interests of the country, this government may diffuse its benefits and its blessings, it will always be true as a matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes and by establishing a uniform and steady system."

FEDERAL CONTROL UNDER THE CONSTITUTION

The Constitution vested in Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." At one stroke it largely freed interstate and foreign commerce from the restrictions which had been imposed by the states. And it created one great central government to act in behalf of the business interests of the country in the bitter competition waged by the different nations in international trade. Congress quickly wielded this power. The first important statute enacted by Congress imposed tariff duties and allowed a discount of 10% of such duties on goods imported in ships built and owned by American citizens.

Freed from English control, the new nation was now able to attack the monopolies of the great English foreign trading companies and in this same act struck at the East India Company, by making the duty on tea brought from India in American vessels less than one-half that imposed if transported in foreign vessels, and levied high duties on tea bought from the East India Company in Europe even if transported to the United States in an American vessel. America's shipowners had for several years been encroaching on the trade of the East India Company, and in a few years developed a heavy commerce successfully breaking its monopoly. Foreign trade was by far the most important trade of the country at this time, and the first regulations of Congress were directed primarily toward the stimulation and protection of our foreign commerce. The tariff was imposed more to compel the removal of restrictions of foreign nations in our foreign trade than to develop domestic industry. Our foreign trade was surpassed only by that of England among the nations of the world, although it was of course almost entirely in raw materials and foodstuffs.

The Revolution as well as the conditions of pioneer life caused

---

8 Gibbons v. Ogden, 9 Wheat. 1, 12 (U. S. 1824).
9 U. S. CONST. art. 1, § 8, par. 3.
10 (1789) 1 Stat. 25, 27.
Americans to believe in complete liberty of individual action. Adam Smith in his epochal book, *The Wealth of Nations*, published in 1776, which formulated the *laissez faire* theory as to the relations between government and industry, epitomized the powerful sentiment of the English people against the governmental restrictions which strangled freedom of trade and deliberately fostered monopoly. This sentiment was thoroughly in accord with the ideals of American democracy. The innumerable interferences of government in England with the processes of business, which were designed to foster and protect monopolies rather than to create and preserve competition, had so aroused the antagonism of that slow acting people that even they ultimately discarded the policy of complete government control. The colonists had gone to war over the commercial restrictions imposed upon them by England's government for the benefit of privileged, monopolistic groups of English traders and manufacturers. The natural reaction in America was against the grant of any power to a central government which might recreate such a condition and only the overwhelming force of events under the Confederacy convinced the people of the necessity for granting the power of regulation to the national government. The deep seated hostility of the people toward monopoly was imbedded not only in the common law of England as adopted by the states, but also in several state constitutions.

Miserable roads and sectional jealousies at this time made interstate trade negligible except between the larger cities. Trade consisted basically of two great branches: (1) the extraction of raw materials and production of foodstuffs, and their collection for exportation, (2) the distribution of manufactured articles from abroad. The great agency of trade was the country store which bartered the manufactured goods of Europe for the export products of its community. In the small communities these stores often possessed a monopoly of trade, sometimes forcing groups of neighbors to organize market trips to larger towns to exchange their products for the commodities needed by them.¹¹

New York, the chief city of the nation, had only a population of about 33,000 in 1790. Manufacturing was negligible, most of the necessities being produced by the versatile pioneers in their own homes. This ability of the people to supply most of their own needs, as well as the absence of large manufacturing establishments, freed the people from any serious danger of monopoly except of foodstuffs in the local towns and city markets. That the people would act to protect themselves against local abuses was to be expected. Washington, the newly established capital, following the principle of the old forestalling statutes, in 1802 adopted an ordinance making it unlawful for any person "to

buy up any provision or article of food coming to the markets,” and as late as 1826 a prosecution was brought under this ordinance. Town regulations of markets were general in the southern states and Augusta, Georgia, as late as 1818, prohibited engrossing, forestalling and regrating. Town ordinances were generally adopted fixing the weight and price of bread. The northern colonies for years had likewise had similar statutes and ordinances in effect, which were of real value until improved agencies of transportation brought in outside competition—a more effective agency for holding down prices than laws or ordinances.

In the early history of our nation a far greater menace to the freedom of interstate trade came from acts of states than from the action of any individuals or combinations. George Clinton, a bitter, hard-fighting reactionary—governor of New York and enemy of the Constitution, believed firmly in the old mercantilist theory to which foreign nations still clung, and endeavored to administer the affairs of New York in this selfish spirit. The state legislature, in line with his ideas, had granted to Robert R. Livingston and Robert Fulton a monopoly of the navigation of all waters within the jurisdiction of the state, with boats moved by fire or steam, for a fixed period of years. The grant did not include sailing vessels. Aaron Ogden, their assignee, asked the state court to grant an injunction against one Thomas Gibbons restraining him from operating two steamboats running from certain points in New York and New Jersey. An injunction was granted by the lower state court and affirmed by the highest court of the state, and an appeal was taken to the Supreme Court of the United States. Congress had prior to this time enacted several laws regulating navigation, including one for the licensing of vessels to carry on the coast trade between the several states. The case was of great importance, for Massachusetts, New Hampshire, Pennsylvania, Georgia and Tennessee had all granted similar monopolies between 1813 and 1819. Water transportation was becoming of vast importance to the future of the country, for the invention of the steamboat was beginning to make our rivers great arteries of commerce.

Great lawyers such as Webster and Emmett participated in the argument. It was pointed out that if a state could create a monopoly barring vessels from other states, it could create a monopoly of trade excluding from its territory interstate and foreign commerce. From an economic standpoint the case was one of the most important ever before the Supreme Court of the United States just as it is a landmark in the history of American constitutional law. Chief Justice Marshall in 1824 delivered the

opinion of a unanimous court. To the contention that commerce as used in the commerce clause of the Constitution meant merely the traffic in commodities involved in their purchase, sale and interchange, he answered that "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." After holding that navigation came within such a definition,\textsuperscript{14} he continued, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."\textsuperscript{15} The Constitution, it was held, was the supreme law of the land, and any state law inconsistent with it was null and void. The New York law was therefore held to be repugnant to the commerce clause of the Constitution in so far as it prohibited vessels licensed according to the laws of the United States from navigating the waters of the state of New York. Thus the great principle was established that state governments could not exclude interstate commerce from their confines by the granting of monopolistic privileges to their own citizens, and that Congress had supreme power over interstate and foreign commerce. Repeatedly from that day to this the Supreme Court has been compelled to reaffirm that principle when efforts have been made by the states to restrict or burden interstate commerce. The economic importance of the decision in establishing the freedom of interstate commerce from innumerable state restrictions of unreasonable and conflicting character can not be overemphasized. Over a vast territory, in a field of commerce destined to attain dimensions beyond the imagination, the principle of freedom of trade under uniform and reasonable regulation was established.

Interstate commerce rapidly increased during the first half of the 19th century. The European wars and the War of 1812 greatly stimulated manufacturers, and the improvement of transportation through the building of roads and canals even before the construction of railroads enlarged the field of distribution of the factory. In the court records of the states we begin to find evidences of combinations and monopolistic devices which presaged the development of a national problem. Attention was early directed toward combinations among carriers whose impartial service at reasonable rates is so essential to the life of trade. In 1847 an agreement among boat owners in New York to fix rates and divide net earnings was held null and void as a

\textsuperscript{14} Gibbons v. Ogden, \textit{supra} note 8, at 189.
\textsuperscript{15} \textit{Ibid.} 196.
conspiracy to commit an act "injurious to trade and commerce" within the meaning of a state statute.16

In 1855, the Supreme Court of North Carolina held that an act of the Colonial Assembly in 1766, which granted the right to erect a bridge over a certain stream and forbade the erection of any bridge or ferry within six miles thereof, was in violation of the express provision of the state constitution against monopoly.17 Four years later the highest court of Louisiana held an agreement among members of a trade association to refrain from selling any India cotton bagging for a period of three months, except with the consent of the majority of the members, to be a combination to enhance prices in restraint of trade and therefore unenforceable.18 In 1862 an agreement among salt manufacturers to lease their salt blocks to a single company as a means of controlling and increasing prices, was held to be void by the New York courts because made for an illegal purpose.19 And the following year the Supreme Court of Kentucky held an agreement between members of a railroad association to carry no freight at less than a fixed price was invalid as against public policy.20

AFTER THE CIVIL WAR

The close of the Civil War brought in a new epoch in American economic history. That great struggle irrevocably created one social and economic system where before two had existed. It definitely established the power of the federal government. The great expansion of industry during the war to meet war demands supplied a great industrial organization eager to develop new fields of distribution. The development of machine production made the growth of large business units inevitable. The rapid construction of railroads over the continent during and immediately following the war furnished the essential agency for the cheap and wide distribution of commodities and for welding the nation into a vast economic unit. Wave after wave of settlers drove the frontier toward the Pacific, and consumed the best of the free public lands. The rich resources of the west were tapped. Banking and other instrumentalities of trade were quickly strengthened and stabilized. The groundwork was laid for a great expansion of trade and commerce. With free land vanishing, the economic independence of the individual was

16 Hooker v. Vandewater, 4 Denio, 349 (Sup. Ct. N. Y. 1847).
17 McRee v. Wilmington R. R., 47 N. C. 186 (1855).
20 Sayre v. Louisville Union Ass'n, 1 Duv. 143 (Ky. 1863).
circumscribed. He became inevitably a part of the great economic organization of the nation, and the direct effects of its operation he could no longer escape. Classes began to stratify. Class feeling began to develop. Both courts and legislatures began to feel the insistent demand of great masses of the people for the regulation and control of the industrial machinery of the country.

The overproduction of articles resulting from the war expansion of industries created a surplus of goods which caused a heavy decline in prices. Lump coal, for example, dropped from $7.86 in 1865 to $3.86, and the worried operators entered into agreements to restrict production and similar combinations.\(^2\)

The over-expanded business enterprises seeking to control competition by private agreement soon came into conflict with the long established principles of the common law in effect in the several states. In 1868 the courts of Pennsylvania held an agreement between two or more persons to forestall the market for any necessity of life by the employment of falsehood disclosing a motive of mischief toward individuals or the public was indictable.\(^2\)

There quickly developed a considerable body of decisions of the state courts dealing with trade restraints. Broadly speaking, the restraints condemned by the courts were of three classes (a) restraints imposed in connection with the sale of business, (b) restraints voluntarily imposed by competitors to restrict competition between themselves and (c) restraints effected through common ownership or control. The first group it is not important to consider here.\(^2\)

The second group of restraints i.e., agreements between competitors to restrict competition among themselves, through such devices as agreements to fix prices, to divide territory, to limit production and the like, were frowned on by the courts, which held such agreements to be void and unenforceable as against public policy.\(^2\)

The third group included more indirect methods to restrict competition through common ownership or control. Among these methods which were condemned by the state courts may be mentioned such practices as the acquisition by one corporation of the shares of

\(^2\) Jones, The Anthracite Coal Combination in the United States (1914) c. III.

\(^2\) Commonwealth v. Tack, 1 Brewst. 511 (Pa. 1868).

\(^2\) For a full discussion of this type of restraints, see Davies, Trust Laws and Unfair Competition (1915) 26 ff.

\(^2\) See, for example, Santa Clare Lumber Co. v. Hayes, 76 Calif. 387, 18 Pac. 391 (1888); Chicago Gas Co. v. Peoples Gas Co., 121 Ill. 530, 13 N. E. 169 (1887); Anderson v. Jett, 89 Ky. 375, 12 S. W. 670 (1889); Stanton v. Allen, 5 Denio, 434 (N. Y. Sup. Ct. 1848); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173 (1871).
agreements for the surrender of control of competing concerns to a trustee or trustees, who are thus able completely to control competitive policies of all such concerns; and corporate consolidations formed for monopolistic purposes.

While state courts under the common law developed a substantial body of decisions dealing with many forms of trade restraints, these decisions for the most part merely denied the right of remedy in the courts to parties participating in such agreements, thus making such arrangements unenforceable between the parties, or established the right of the state to compel the surrender of the corporate charters of such combinations.

Because of the inadequacy of the common law, legislatures and Congress also quickly felt the pressure resulting from the changing conditions following the Civil War. At first, during the seventies, the resentment of the people was directed chiefly toward the railroads. The railroads had constructed pioneer lines at heavy expense in virgin territory where the light volume of traffic could not support the costs of operation. Under such circumstances competition to secure what traffic was available tended to force rates below costs which inevitably led to rate fixing agreements, pools and similar practices. In competition for tonnage, gross discriminations were practiced between shippers and between communities. Railroad executives considered their roads strictly as private enterprises, entitled to complete freedom from government interference, and not only disregarded the rights of the public but also did not hesitate to exert improper influences on state legislators to protect what they felt to be their rights. The farmers throughout the middle west who found it difficult to move their crops to the east at a profit, developed a deep-seated hostility towards the railroads because of what they felt to be excessive and discriminatory rates. Huge promotion schemes, watered stock, graft and the corruption of government officials made an ugly chapter in American history.

In 1867 the Patrons of Husbandry, an agricultural association of farmers, more popularly known as the Grange was formed. This organization had an amazingly rapid growth. Its activities were varied and directed toward improving the general conditions of the farmers, but special efforts were made to procure legislation regulating the railroads. "Down with Monopolies" was one of the slogans of the Grange. By 1874 the Grange was

---

27 Richardson v. Buhl, 77 Mich. 432, 43 N. W. 1102 (1889); Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 183 (1895).
28 FAULKNER, AMERICAN ECONOMIC HISTORY (1924) 420.
29 For a detailed history of the Grange, see BUCK, THE GRANGER MOVEMENT (1913).
a great national organization claiming a membership of one-half million farmers and exerting a temporary but powerful political influence. Between 1873 and 1876 so-called Anti-Monopoly parties were formed in eleven states and elected many local candidates. In Illinois, Kansas and California, candidates supported by the Grange were elected to the United States Senate. After a bitter fight railroad legislation of a sort was secured in several of the middle western states. The frightened leaders of the older parties in these states were compelled to make concessions to the demands of the agriculturists. The fight against these laws was carried to the Supreme Court of the United States where in 1876 they were held to be constitutional.30

It was obvious, however, that regulations by the states alone were impracticable, by reason of the difficulty of securing uniformity as well as because of the heavy volume of traffic moving in interstate commerce. As early as 1867 Congress had considered railroad legislation.31 At one session after another legislation was considered, and the Grange exerted every possible effort to enforce the enactment of such legislation. East, west and south joined in this demand. While numerous measures were considered between 1870 and 1880, no law was passed. The membership of the Grange was rapidly falling off and its influence weakening. Temporarily the pressure of the agriculturists for such legislation weakened. Tied up with this agitation for the regulation of the railroads during the granger movement were demands for the prevention of restraint of trade. The labor interests showed a tendency to become interested in the situation. In 1875 a national labor organization of some strength, which called itself the order of Sovereigns of Industry, in its constitution declared its intention to present "organized resistance to the organized encroachments of the monopolies." The significance of the granger movement lay not so much in its direct accomplishments as in the fact that it established the power of the states to regulate the rates and practices of the carriers in intrastate commerce, and by implication the power of the federal government to do so in interstate commerce. And it would appear that the agitation caused a general reduction in rates and a marked change in the attitude of railroad officials toward the public.32

The next decade, however, saw a far more formidable movement arising out of the ruins of the old. During the eighties there spread over the southern and western section of the coun-

31 See Buck, op. cit. supra note 29, at 215.  
32 Ibid. 232.
try another great farmers' organization, known as the National Farmers' Alliance, which by 1890 claimed a membership of between three and four million farmers. Several hundred thousand farmers were also organized in a Northwestern Farmers' Alliance. These organizations demanded, among other measures, government regulation of railroads and the restriction of patent rights. The first powerful labor organization, known as the Knights of Labor, joined the movement demanding government ownership of railroads. Thus labor and farming interests presented a formidable demand for railroad legislation. And in the latter part of the eighties this demand was powerfully supported by commercial interests and shippers generally. This agitation resulted in the enactment of the Interstate Commerce Act of 1887 forbidding pooling, unreasonable rates and unjust discriminations. This Act has since been so amended as to give to the federal government great regulatory powers over all phases of transportation and has almost entirely eliminated the railroads as factors in the creation of monopolies of trade.

This prolonged agitation, in which such railroad abuses as the granting of rebates and gross discriminations in favor of large shippers were widely discussed, directed attention to the growth of great business corporations and created hostility toward them as potential monopolies. Corporation charters had always been granted very carefully because of the fear they could be used as instruments of monopoly, and even a great commercial state like New York did not permit incorporation under general laws until 1846. HUGE industrial enterprises, such as the Sugar Refineries Company and the Standard Oil Company, which were in fact obtaining a monopoly of production, aroused the fears and the prejudices of the people. As these companies had used the trust agreement as the means of securing a centralized control, they became popularly known as trusts. At this time a corporation under existing corporation laws enforced in the various states did not have the power to acquire stock of another corporation. So by these trust agreements the capital stock of competing companies was placed in the hands of trustees for the benefit of the stockholders of the several companies. In this way the trustees, controlling the operation and management of all of the companies, could wholly control competition between them. In 1879 the Standard Oil trust was formed and it was soon followed by similar trusts in the whiskey, sugar, cottonseed oil and other industries. In such basic industries as coal and steel, pools and pricefixing agreements were common in the

\[33\] Ibid. 302.

\[34\] FAulkner, op. cit. supra note 28, at 518.
seventies and eighties. An investigating committee of the New York legislature in 1880 unsparingly condemned the Standard Oil Company.

In the late eighties there arose a widespread demand for the prohibition of trusts, pools and similar devices to restrain trade. The opposition to monopoly which had been evident in the platforms of the independent parties now spread to the larger parties and the platform of the Republican party in 1888 called for government regulation to prevent monopoly. A committee of Congress conducted an investigation revealing existing abuses. President Harrison in a message to Congress in 1888 urged remedial legislation. The Supreme Court of Michigan, condemning the match trust in vehement language, said: "Indeed, it is doubtful if free government can long exist in a country where such enormous sums of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals." In the years 1889 and 1890 five states—Maine, Michigan, Tennessee, Texas, Iowa and Kentucky—enacted statutes prohibiting such combinations or restraints of trade.

This agitation within the states was quickly reflected in Congress. It was believed there was no common law enforceable by the federal government, so that so far as interstate commerce was concerned the public was unprotected. This was an important reason for the adoption of a federal statute. On December 14, 1889, Senator Sherman of Ohio introduced "A bill to declare unlawful, trusts and combinations in restraint of trade and production." This bill was made the basis of congressional deliberation for months, but on April 2, 1890, a substitute meas-

25 Jones, loc. cit. supra note 21; Moody, The Masters of Capital (1920) 45.
28 Richardson v. Buhl, supra note 27, at 658, 43 N. W. at 1110.
29 The feeling against trade combinations has continued strong, and in at least thirty states there are statutes against monopolies or combinations in restraint of trade. Davies, op. cit. supra note 23, at 147–150. In twenty-one states the prohibition against monopoly and restraint of trade is imbedded in their constitutions as fundamental law. Index Digest of State Constitutions (1915) 1004. At the present time at least thirty-six states have such a prohibition either in their constitutions or in statutes, and in all of the other states monopolies and unreasonable restraints of trade are unlawful at the common law. It is one phase of government regulation in which the public policy of our states is remarkably uniform.
31 Ibid. 2.
The Sherman Act prohibits all unreasonable restraints of trade in interstate and foreign commerce. The first prohibition of the law is directed at joint action and declares unlawful every contract or conspiracy which directly and unreasonably restraints interstate and foreign commerce. No written evidence is necessary, for the existence of any combined action may be implied from the circumstances and general course of dealing. The second prohibition is aimed primarily at individual action and makes unlawful any monopoly or attempt to monopolize any part of interstate or foreign commerce. This prohibition very materially adds to the act because it applies to individual as well as to combined action, and because, by reason of the interpretation of the term “monopoly” by the Supreme Court as synonymous with restraint of trade, the phrase “attempt to monopolize”

42 Ibid. 27, 28.

43 26 Stat. 209, (1890) U. S. Comp. Stat. (1916) § 8820 et seq. Section 1 prohibits contracts, combinations, or conspiracies in restraint of interstate or foreign trade. Section 2 prohibits a monopoly or attempt to monopolize any part of such commerce. Both of these sections make a violation of these provisions a misdemeanor punishable by fine or imprisonment. Section 3 applies the prohibitions of the first section to the District of Columbia, and the territories, or to commerce between them or between them and other states and foreign countries. Section 4 confers jurisdiction on the circuit courts (now vested in the United States District Courts) to enforce the law and authorizes proceedings in equity by the government to prevent and restrain violations of the law. Section 5 authorizes the court to bring any parties before the court, not named in the proceedings, when in the opinion of the court the ends of justice so require. Section 6 authorizes the seizure and condemnation of property in the course of transportation in interstate commerce, which is the subject matter of any contract, combination, or conspiracy condemned by section 1. Section 7 gives to any person injured by reason of a violation of the law the right to sue for three-fold damages, costs and attorney’s fees. Section 8 defines the word “person,” as used in the act, to include corporations and associations.


46 See dissent in Northern Securities Co. v. United States, supra note 44, at 404, 24 Sup. Ct. at 469; Standard Oil Co. v. United States, supra note 44, at 61, 31 Sup. Ct. at 516.
has come to mean any and all attempts of any nature to effectuate any unreasonable restraints of trade. It may, therefore, be accurately said that this law prohibits any unreasonable restraints of trade or attempts to effectuate such restraints either by individual or combined action.

To clearly understand this statute it is necessary to determine just what is an unreasonable restraint of trade. It is of course impossible to exactly define such a term. But the Supreme Court, through numerous decisions, has been building up a body of law which is steadily giving a more exact definition to it. From these decisions two sources of information are found: (1) the general principles which have been applied by the courts in determining the reasonableness or unreasonableness of a restraint, (2) the many specified acts which have been condemned by the court as unreasonable restraints. Here we can consider only the factors which the courts have discussed in reaching their determination as to whether or not a particular restraint was unreasonable. The chief factors thus far discussed by the courts in considering a particular restraint have been (a) its effect, (b) its extent, (c) its nature, (d) the methods by which it was effected, (e) the intent of the parties and (f) the particular facts existing in the industry.

Effect of restraint. The vital test of the reasonableness of a restraint of trade is its actual or probable effect upon trade. The Supreme Court recently has said, “The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” The fundamental purpose of the Sherman Act, it stated in another case, “was to secure equality of opportunity and to protect the public against the evils commonly incident to the destruction of competition.” The types of results which are deemed injurious to the public are control of prices, control or limitation of production, impairment of quality and lessening of service. In other words, where the effect of the restraint is to compel the

47 Standard Oil Co. v. United States, loc. cit. supra note 44.
48 See Board of Trade of Chicago v. United States, 246 U. S. 231, 238, 33 Sup. Ct. 242, 244 (1913).
public to pay a higher price or to accept an inferior article, or to
deprive it of some valuable service, or to withdraw from it a
portion of the supply or to compel a section of the public, such
as laborers or producers, to accept lower prices for their labor
or commodities than they would secure in an unrestricted market,
such effect condemns the restraint as unreasonable. And where
the restraint is imposed by a combination, as distinguished from
an individual, the court holds such a combination unlawful "when
the necessary tendency is to destroy the kind of competition to
which the public has long looked for protection." 53

The second effect which makes a restraint unreasonable is such
a restriction of the liberty of a trader as will prevent him from
engaging in business or transacting his business in the ordinary
and customary way. 54 The courts evince a determination to
preserve equality of opportunity in business for every American.
The law is based, as the courts have said, "on the inherent right
of every individual to choose his own calling in life and to follow
the trade of his choice unhampered by any undue and unfair
interference from others." 55 The fact that a restraint stifles
the trade of a competitor makes it not only unreasonable as to
him, but also to the public which has a real interest in securing
the benefits of the initiative and competition of many independent
tradesmen. 56 This does not mean that any competitive action
which threatens the elimination of a competitor is unlawful, for
the law recognizes that the inefficient producer must inevitably
pass out of the market by reason of the superiority of the pro-
ducts and service of his more efficient competitors. The elimi-
nation of competitors merely by force of greater efficiency with-
out the use of unfair methods or interference consequently is
not condemned. 57 It is coercion and interference—things which
the common judgment of mankind condemn as unfair and repre-
hensible—that the law condemns when the rights of an individual
trader are injuriously affected.

Extent of restraint. The extent of the restraint may also be
an important element in determining its unreasonableness,

at 611.
54 See Loewe v. Lawlor, 208 U. S. 274, 293, 28 Sup. Ct. 301, 303 (1903); Addyson Pipe Co. v. United States, 175 U. S. 211, 244, 20 Sup. Ct. 66, 103
(1899); Binderup v. Pathe Exchange, 233 U. S. 291, 312, 44 Sup. Ct. 86, 100 (1923); United States v. Trans-Missouri Freight Ass'n, 165 U. S. 230, 323, 17
Sup. Ct. 549, 552 (1897).
1915); see Northern Securities Co. v. United States, supra note 44, at 341,
24 Sup. Ct. at 459 (1903); Ramsay Co. v. Bill Posters Ass'n, supra note 49, at 512, 43 Sup. Ct. at 168.
56 United States v. Trans-Missouri Freight Ass'n, supra note 54, at 323,
17 Sup. Ct. at 552.
57 See United States v. Motion Picture Co., loc. cit. supra note 55.
YALE LAW JOURNAL

especially where its full effects are not yet apparent. To judge of the extent of a restraint, we must consider its extent (a) as to territory, (b) as to the commodities affected and (c) as to time. The phrase "any part of the trade or commerce among the several states or with foreign nations" appearing in the law, has both a geographical and distributive significance, including on the one hand a portion of the United States, and on the other any commodity forming a part of interstate or foreign commerce. 58

A restraint which is nationwide will obviously be much more quickly condemned than one which is wholly local. Generally speaking, the efficiency of transportation, the multitude of distributors and the existence of substitutes all tend to make attempted local restraints abortive, as the force of outside competition prevents them from becoming effective. It is easily possible, however, for the dealers in a single city to organize so as to monopolize trade in that city, and exclude interstate commerce from it, in which event the law may be violated. 59 Or certain commodities, such as raisins or anthracite coal, may be produced only within a very restricted area so that restriction within very small geographical limits might tie up the entire interstate commerce in the product and thus violate the law. 60

The extent of the restraint so far as the supply of the commodity itself is affected is much more important. A control of a large percentage of the trade in a particular commodity is an indication of violation of the law, and places upon the parties possessing such control the burden of showing that it was acquired by lawful methods. 61 To be a monopoly in violation of the law, the parties must have a dominating proportion of the trade in the commodity, or a dominating power over the industry. 62 Aside from the question of monopoly, it is necessary that the restraint apply to a substantial part of interstate commerce in the commodity, although such part may be only a small percentage of the total interstate trade in the product. 63 But where the restraint indirectly affects only a trivial amount of

58 Standard Oil Co. v. United States, supra note 44, at 61, 31 Sup. Ct. at 516.
interstate commerce, the courts refuse to act.\textsuperscript{64} In ascertaining the extent of the control or restraint exercised in an industry, the courts do not consider substitute materials\textsuperscript{65} or the production which the manufacturer himself uses.\textsuperscript{66} Different grades of the same general material are included in determining the percentage of control.\textsuperscript{67} It should also be borne in mind that where the restraint is one imposed on even a single trader engaged in interstate commerce by coercion or unwarranted interference, the question of the extent of his trade becomes immaterial for the law is determined to preserve his right to engage in interstate business.

The extent of the restraint as to time, though in ancient times considered of great importance, need only be noticed in passing. The courts now hold that for a restraint to be unlawful it need not be applicable for any protracted period or beyond such a period as is required to bring in a new supply.\textsuperscript{68}

\textit{Nature of restraint.} The nature of a proposed restraint of trade is also a factor to be considered in determining its reasonableness. A restraint may be direct or indirect, voluntary or involuntary, or it may affect different forms of competition of varying importance to the public. The law does not condemn restraints which are indirect or incidental, but only those which directly restrain interstate commerce.\textsuperscript{69} Thus in labor disputes where there is an interference with interstate commerce not within the design of the parties but only indirectly and purely incidental to the accomplishment of a different purpose, the courts do not condemn it.\textsuperscript{70} Similarly the law does not apply the same test to a voluntary restraint that it does to an involuntary restraint. A voluntary restraint is one imposed by the parties on themselves of their own free will, while an involuntary re-

\textsuperscript{64} See Industrial Ass'n of San Francisco v. United States, 268 U. S. 61, 45 Sup. Ct. 403, 408 (1925).
\textsuperscript{70} See Industrial Ass'n of San Francisco v. United States, \textit{supra} note 61, at 81, 82, 83, 45 Sup. Ct. at 407, 408; United Leather Workers v. Herkert & Meisel Trunk Co., \textit{supra} note 69, at 471, 44 Sup. Ct. at 627.
strait is one which imposes restrictions on others against their will. If the restraint is a voluntary one the law is concerned only with its effects, or probable effects, on the general public which must be substantial before the law intervenes. If the restraint is an involuntary one, however, even though it threatens the existence of only a single competitor it will be almost certainly condemned for the purpose of the law, and the determination of the courts is to protect every business man in his right to engage in business. The type of competition which the restraint is designed to affect may also have some bearing on its reasonableness. Restrictions of any kind on competition in price are of dubious legality for the determination of price under the free-play of supply and demand is the basis of the competitive system. Restrictions on other forms of competition might not be so important, and in some instances might be of a nature clearly benefiting the public and all competitors, as for example, a program of standardization of the products of an industry. The law looks with disfavor on restraints of competition in buying as well as of competition in selling. It is possible, however, that courts may look with less critical eyes on restrictions on competition in buying, where such restrictions ultimately result in lower prices to the public on the finished product. The courts seem to make no real distinction between actual or potential competition, condemning any unreasonable restraint of either.

Methods used. The methods used to accomplish the restraint are receiving increasing consideration by the courts in determining unreasonableness. Where fair, normal methods of doing business are used, the courts seem more and more inclined to hold the acquisition of a considerable control over competition is not unlawful so long as such control does not become so great as to wield a dominating power over the entire industry. Despite the express wording of the statute prohibiting any mo-

---


19 See United States v. Whiting, supra note 63, at 477; Swift & Co. v. United States, supra note 61, at 399, 25 Sup. Ct. at 280.


monopoly or attempt to monopolize any part of interstate commerce, it is possible to interpret recent decisions of the Supreme Court as holding that an individual concern may acquire a practical monopoly if no unfair methods are used in acquiring it.\textsuperscript{7} This is a more or less logical result of their decision in the \textit{Standard Oil} case, holding that the words “monopoly” or “attempt to monopolize” merely mean “unreasonable restraint of trade.” But where the methods employed are not the fair ordinary methods of winning trade, but are obviously intended to work against the interests of the public and to unduly restrict the rights of competitors, their use alone will make the plan unlawful.\textsuperscript{71} Typical of such questionable methods are those involving fraud, coercion, intimidation and improper interference with the business of a competitor. What would be normal and fair methods for a smaller concern, when employed by a great corporation with the intention of acquiring a monopoly, may become unfair and abnormal because of their far-reaching effect in eliminating competition.\textsuperscript{72} Obviously a practice, such as price discrimination, when utilized by a weak concern might have no effect, but if employed by a powerful concern against weak competitors, would drive them out of business. What the Supreme Court calls the “deliberate, calculated purchase for control” is not deemed a fair method.\textsuperscript{73}

\textbf{Intent.} Intent is, of course, extremely difficult to prove. But the men participating in a restraint well know its purpose, and their own conscience, therefore, is a rather accurate measure of the lawfulness of any proposed plan. Intent in Sherman law cases is important only in that class of cases where the actual restraint or power to restrain has not yet been secured. Where an intention to acquire monopoly or control price is shown, the court is in a better position to interpret the facts and forecast their consequences, and will not hesitate to enjoin the continuance of a plan in order to fully protect the public.\textsuperscript{74} The intent creates a dangerous probability of the restraint being effected which warrants action by the court in the public interest.\textsuperscript{75} Ap-

\begin{itemize}
  \item Standard Oil Co. v. United States, \textit{supra} note 44, at 58, 31 Sup. Ct. at 515.
  \item See United States v. Great Lakes Towing Co., 203 Fed. 733, 744 (N. D. Ohio, 1913); United States v. Reading Co., \textit{supra} note 60, at 370, 33 Sup. Ct. at 103.
  \item United States v. Reading Co., \textit{loc. cit. supra} note 62.
  \item See Board of Trade of Chicago v. United States, \textit{loc. cit. supra} note 48; United Leather Workers v. Herkert & Meisel Trunk Co., \textit{loc. cit. supra} note 69.
  \item United States v. Swift & Co., \textit{supra} note 61.
\end{itemize}
parently the Supreme Court requires something more than proof of an unlawful intent; their use of the term “probable effective intent” would indicate the existence of a probable ability to effect the restraint.\(^8\)

But in the class of cases where the restraint has been effected and substantially restricts competition, proof of intent is unnecessary for it could be presumed from the control exercised or methods used.\(^8^4\) It is the existence of the unreasonable restraint, or the power to unreasonably restrain, which is the vital thing and even the best of intentions is no defense or justification. Many fine purposes have been assigned for restraints effected, but in every case the courts have brushed such purposes aside where a public injury appeared.\(^8^5\) Nevertheless in recent cases involving interference with interstate commerce, where the commerce affected was not very substantial, and there was clearly no direct intention to interfere with it, the Supreme Court has seemed to give considerable weight to the intention of the parties.\(^8^6\)

**Unique facts.** In determining the reasonableness of a restraint in a particular industry, it is necessary also to consider any special or peculiar facts existing in that industry which may properly bear on the question. For example, in the *Window Glass Manufacturers’* case,\(^8^7\) it was shown that hand glass blowing was a dying industry, that the machine production fixed the price, that the glass blowers had been drawn to other industries and there were not enough blowers to man all of the factories during the working season. The hand glass blowers’ union and the association of manufacturers of hand blown glass entered into an agreement whereby the factories were divided into two

\(^{8^3}\) United Leather Workers v. Herkert & Meisel Trunk Co., *supra* note 69, at 467, 44 Sup. Ct. at 626.


\(^{8^7}\) National Ass’n of Window Glass Mfrs. v. United States, 263 U. S. 405, 44 Sup. Ct. 148 (1923).
groups, each group being permitted to operate only part of the
time, during which time the other group remained idle, the short
supply of laborers being shifted between the factories. The
Supreme Court held the legality of such an agreement must be
determined by the particular facts, and in consideration of the
unique facts existing in this trade held that the agreement was
not an unreasonable restraint of trade. Again in the Quaker
Oats case, the court gave great weight to the unlimited supply
of raw material available and the fact that only a small capital
was required to enter the business, thus viewing potential com-
petition a very powerful factor, making improbable any injury
to the public from increased prices. In the American Can case
the court also considered the ease with which new competitors
with small capital might enter the field if any attempt were made
to exact high prices from the public. On the other hand, if
the business concern is a quasi-public employment, and practi-
cally a monopoly by reason of peculiar facts, the courts would
probably scrutinize much more closely any joint action than it
would where the parties were ordinary commercial competitors
subject to the force of the competition of many other direct com-
petitors.

Thus through the years the federal courts have been building
up a body of principles which in a measure help to clarify the
meaning of the phrase "unreasonable restraint of trade." Of
much greater effect in clarifying the situation, however, have
been the numerous decisions of the courts declaring many prac-
tices to be unlawful. It may, therefore, be truly said that the
law is acquiring definiteness and certainty.

ENFORCEMENT OF THE SHERMAN LAW

The enforcement of the Sherman Law was started vigorously.
In the latter part of 1890, injunction proceedings were brought
against a combination of coal operators, known as the Nashville
Coal Exchange, and an injunction secured. Criminal prosecu-
tions were instituted against different officials of the alleged
whiskey trust, but the lower courts held the indictments faulty
or ruled that the prohibition of the law was directed only toward
an absolute monopoly. In a criminal action brought against a
lumber combination, a demurrer to the indictment was sustained.

\[89\] United States v. American Can Co., supra note 66, at 500.
\[90\] United States v. Whiting, supra note 63, at 475; see United States v.
\[91\] United States v. Jellico Mountain Coal Co., supra note 50.
\[92\] In re Corning, 51 Fed. 205 (N. D. Ohio, 1892); In re Greene, 52 Fed.
104 (S. D. Ohio, 1892).
on the ground that an agreement restraining trade was not unlawful unless it "involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion." Even in the famous Trans-Missouri Freight Association case, the lower federal court held an agreement between the railroads to fix rates, under the circumstances presented, was not an unreasonable restraint of trade. Other cases brought by the government and individuals usually ended in similar fashion. These discouraging results, together with the business depression of 1893 and the unfriendliness of some Attorney Generals toward the policy of the law, made the act appear to be a failure so far as reaching trade combinations was concerned.

The act, however, was applied effectively against labor organizations. It was successfully invoked to break a railroad strike in New Orleans, and a few months later its provisions were enforced to break up the great railroad strike which was threatening to paralyze business over the country.

The Supreme Court in 1895 itself temporarily destroyed the restraining influence of the statute when in the Knight case it held that the acquisition of refineries by the American Sugar Refining Company, even though it had given this company a monopoly of the manufacture of sugar in the country, was not within the reach of federal action because manufacture was not commerce and a monopoly of manufacture affected interstate commerce only indirectly and incidentally. The government failed to offer any evidence showing any steps by the parties with intent to restrain interstate commerce, and it is upon this ground alone that the Supreme Court has subsequently justified the decision. This decision, business men and lawyers believed, gave them a free hand in forming holding companies, mergers and similar consolidations of producing plants. As a result, during the last half of the nineties, there was a great scramble for the consolidation of competing concerns. Many of our greatest business organizations were created during this period, either through the device of the holding company or by merger. Huge promotion profits, over-capitalization and similar abuses were

common. The movement quickly aroused widespread apprehension throughout the country. In 1892, the Massachusetts legislature adopted resolutions urging Congress to adopt laws "effectually to prevent such combinations and destroy such monopolies" as the anthracite coal combine. The Democratic party, in its platforms of 1896 and 1900, inveighed against trusts and monopolies. In 1897 the New York State legislature, through a committee, made an investigation of great combinations in the sugar, rubber and wall paper industries and enacted an anti-trust law. Numerous other states during this period adopted similar legislation often more stringent than the federal statute. Congress, in 1898, appointed the Industrial Commission to investigate various industrial problems, including corporation evils and the trusts. The investigations and report of the commission aroused widespread interest. Its chief recommendation was for the establishment of some agency in the federal government which would give widespread publicity to the improper practices of corporations and trade combinations, thus acting as a deterrent.

The first few years of the twentieth century witnessed a powerful attack upon the large corporations. This was the heyday of the special magazine writer known as the "muckraker." Articles by writers, such as Ida Tarbell, powerfully pictured existing abuses. In 1902, President Roosevelt began an energetic attack on the trusts which quickly secured public support and resulted in legislation.

In 1903, the Expediting Act was enacted which gave priority in the federal courts to cases arising under the Sherman Anti-Trust Act and the Interstate Commerce Act, thus making possible quicker action for the correction of conditions by the courts. The Elkins Act was also passed, designed primarily to destroy the practice of rebating by the railroads which, by granting rebates to the large combinations controlling a heavy volume of traffic, were driving the smaller concerns out of business. The third law providing for the creation of a federal bureau of corporations, marked a great advance in the enforcement of the law.

**Bureau of Corporations.** The Bureau of Corporations was created largely as a result of the recommendations of the Industrial Commission and Attorney General Knox, and the vigorous support given the measure by the President. This Bureau was made a part of the Department of Commerce and Labor. It was

---

90 Report of Joint Committee of Senate and Assembly, State of New York, March 9, 1897, No. 40.
93 (1903) 32 Stat. 825, 827, 828.
given the power to investigate the organization, conduct and
management of corporations and combinations engaged in inter-
state commerce, other than common carriers, and to make reports
to the president concerning them, which reports were to be pub-
lished according to the president's directions. Incidental powers,
such as the right of subpoena, and to compel production of
books and records, were also given to make the power of investi-
gation effective. This act marks the second important step in
the federal regulation of business combinations for it added
publicity as a means for discouraging improper activities, and
it created a fact-finding body to make scientific studies of differ-
ent industries, with a view of aiding the Department of Justice
in necessary prosecutions and of making recommendations for
constructive changes in the law should the need arise. The
bureau made a number of important investigations of different
industries, and its reports resulted in some of the most im-
portant prosecutions ever instituted under the Sherman Law.
Publicity without prosecution was of itself a restraining influ-
ence, because the great corporations which depended upon the
good will of the public both for their finances and for the maxi-
mum distribution of their goods, dreaded unfavorable publicity.
Publicity took its place beside prosecution as a means of dis-
couraging restraints of trade. The fault of the previous system
of legal proceedings, as Theodore Roosevelt phrased it, was that,
"It entirely fails to give the publicity which is one of the best
by-products of the system of control by administrative officials;
publicity, which is not only good in itself, but furnishes the data
for whatever further action may be necessary."

Strengthening of the law by the Supreme Court. The de-
cisions of the Supreme Court added strength to the statute. In
a few earlier decisions when public feeling was strong, the court
had read real meaning into the law. These decisions, however,
involved such practices as agreements to fix prices or to restrict
production concerning the illegality of which there could be little
dispute. In 1904 the court delivered its famous decision in the
Northern Securities Company case, declaring that company,
which was a holding company designed to control competition
between two great trans-continental railroad systems serving
the northwest, to be an unlawful combination in restraint of
trade. This device, which had furnished a simple method of
quickly effecting monopolistic combinations, had been very
popular, generally supplanting the trust agreement which had
been held to be unlawful by various state courts. This decision

103 United States v. Trans-Missouri Freight Ass'n, supra note 56; United
States v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25 (1898); Addys-
ton Pipe & Steel Co. v. United States, supra note 54.
104 Northern Securities Co. v. United States, supra note 44.
strongly deterred combinations of this character and forced efforts to restrain trade into the more ineffective forms of "gentlemen's agreements," tacit understandings and similar devices, except where it was possible to merge the properties of competing corporations into a single corporation—a task often involving many legal complications. The effect of the decision was also greatly to encourage government prosecuting and investigating agencies, and to stimulate legal proceedings by the government.

Popular feeling against the trusts, particularly in the southern and western states, continued to be strong. President Taft in 1910 and 1911 urged a voluntary federal incorporation law with provisions against over-capitalization and holding companies.105 Very important proceedings brought by the government during this period were terminated by the decisions of the Supreme Court in the Standard Oil and American Tobacco Company cases in 1911, which as a whole strengthened the law. The holding company was again condemned, and in the latter case the court found a merger of properties of competing concerns which operated in unreasonable restraint of trade to be unlawful.106 The court not only ordered the dissolution of these great combinations, but also in forceful language stated that the law was not to be evaded by "any subterfuge or indirection."

At the same time in these cases the court introduced the famous rule of reason, holding that the law prohibited only unreasonable restraints of trade. In previous decisions the court had held the law prohibited all restraints of trade, and it now frankly reversed its position. This action was condemned by prominent members of Congress as judicial legislation, and the decisions caused widespread discussion, again focusing attention on the problem. No action, however, was taken by Congress and the interpretation given by the court still stands as the law of the land. It has, beyond doubt, resulted in considerable confusion and uncertainty as predicted by Justice Harlan, but the Supreme Court and the lower federal courts have since rendered numerous decisions, which are clarifying and defining the meaning of the term. The dissolution decrees were severely condemned at the time as being wholly ineffective. While their effects were not noticeable for a few years, there is no doubt that the tobacco decree ultimately restored competition in that industry. And the oil decree has very probably restricted the use of unfair methods by the companies created under the dissolution decree, thus giving a fair opportunity for independent concerns to develop their enterprises as they have very successfully done dur-

105 Messages to Congress, January 7, 1910, December 5, 1911.
ing the remarkable expansion of the industry in recent years. In a number of decisions up to the present time the Supreme Court, with a very few exceptions arising out of particularly difficult facts, has rigorously applied the prohibitions of the law in cases coming before it. Beginning with the Roosevelt administration there has been a steady presentation of cases by the Department of Justice to the federal courts for determination. In recent years there has also been an increasing use by the government of criminal proceedings, and not only heavy fines but sentences of imprisonment have been secured. The Sherman Act has become a powerful restraining influence against monopoly and restraint of trade in the world of business.

Interesting evidence as to public sentiment at the time is contained in the report entitled “The Trust Problem” issued by the National Civic Federation in 1912. This organization sent out questionnaires to thousands of manufacturers, bankers, labor leaders, educators, professional men and other prominent citizens, asking their opinion as to various phases of the trust problem. The replies indicated that there was strong sentiment for the clarification of the Sherman law by definition, and for a more effective control of corporations through national incorporation or license laws as well as by the creation of a Federal Trade Commission. And at the same time there was an equally strong sentiment against excepting labor or farmer combinations from the prohibitions of the law.

107 Some sixteen thousand answers were received, the first thousand being carefully tabulated and the results of such tabulation checked against the remaining fifteen thousand answers to assure that the tabulation of the first thousand answers was fairly representative of the whole. The questionnaire and the results as tabulated were as follows:

1. Do you believe that the Sherman Law, as now interpreted, is made clear and workable? Yes, 192; no, 841.
2. Do you consider it feasible to attempt to return to what are commonly known as old competitive methods in business? Yes, 181; no, 881.
3. Do you favor a repeal of the Sherman Law? Yes, 379; no, 600.
4. Do you favor amending the Sherman Law in any way? Yes, 585; no, 149.
5. Should railroads be allowed to enter into agreements affecting rates, subject to the approval and regulation of the Interstate Commerce Commission? Yes, 975; no, 63.
6. Should trade unions be excepted from the operation of the Sherman Act? Yes, 102; no, 962.
7. Should combinations of farmers, either to restrict production or to hold the crop for higher prices, be rendered lawful under the Sherman Act? Yes, 209; no, 828.
8. Do you favor a national incorporation law? Yes, 757; no, 191.
9. Do you favor a federal license law? Yes, 451; no, 204.
10. Do you favor an interstate trade commission, with powers not unlike those now enjoyed by the Interstate Commerce Commission in relation to common carriers? Yes, 614; no, 278.
The Democratic party in 1912 made the prevention of monopoly and the correction of corporate abuses a major plank in its platform. Woodrow Wilson, in speeches throughout the country, emphasized the necessity for more effective control, and with his election to the presidency additional legislation became inevitable.

**Panama Canal Act.** In the latter part of 1912 before the Democratic party came into power, Congress adopted an act providing for the maintenance and operation of the Panama Canal, in which, as a further safeguard to the public, it was provided that no vessel engaged in coastwise or foreign trade of the United States should be permitted to pass through the canal if such ship were owned, chartered, operated or controlled by any parties doing business in violation of the several antitrust acts already mentioned.

**Anti-trust provisions of Wilson Tariff Act.** In 1913, the Wilson Tariff Act of 1894 was amended so as to include prohibitions framed in imitation of the Sherman law, declaring illegal all combinations, conspiracies and agreements between parties, any one of whom is engaged in importing any article from any foreign country into the United States, when intended to operate in restraint of lawful trade or free competition, or to increase the market price in any part of the United States of any article imported or intended to be imported, or of any manufacture into which such imported article entered or is intended to enter. A violation of the act was made a misdemeanor and the courts were given power to restrain violation. Property owned under any contract, or by any combination or party to any conspiracy violating the act, was made subject to seizure and condemnation and any party injured in his business or property was given the right to three-fold damages. This law remained for years a dead letter, but it was this provision which was recently called into life by the government in its unsuccessful injunction proceedings against the sugar exchange.

It was not until 1914, however, that President Wilson was able to give real consideration to this problem. More urgent legislation, such as the Federal Reserve Act, occupied the attention of Congress. At the request of the President, Joseph E. Davies, United States Commissioner of Corporations, in 1913 prepared for his confidential use a survey of laws regulating business

---

enacted by the more important nations of the world, and summarized the opinions of leading citizens as publicly expressed on the subject during the preceding decade. On January 20, 1914, President Wilson delivered his message before Congress on "Trusts and Monopolies," outlining a program which was over a year later enacted into a law by Congress in two important laws, the Clayton Act and the Federal Trade Commission Act.

(To be concluded)