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Emerson P. Schmidt

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THE CHANGING ATTITUDE OF THE SUPREME COURT TOWARD MONOPOLY

By Emerson P. Schmidt*

WHEREVER men have settled in groups, trade and commerce have arisen. Competition for the buyers' money has likewise developed simultaneously. But the way of the competitor is hard. If he can soften the struggle by agreements with his competitors, or better still by gaining a monopoly, his way is not so difficult. But price agreements or monopolies have ordinarily not treated the consumer or the general public with much sympathy. Hence certain common law doctrines arose which were directed to the preservation of a free and open market and which have served as the foundation stones of our public policy towards industrial combinations and business co-operation. These are: the doctrines of restraint of trade, conspiracy to monopolize, and of unfair competition.

With the rise of the factory system in the United States and the increases in trade, certain abuses, calculated to obstruct the free flow of trade, became more prevalent. In order to eliminate these abuses federal legislation was deemed essential. Thus were passed the Interstate Commerce Act in 1887 and the Sherman Anti-Trust Act in 1890. Between 1887 and 1897 no less than 20 states passed laws prohibiting restraint of trade and monopolistic combinations and imposed severe penalties.

The Sherman Act apparently does not change the substance of the common law doctrines but it made such contracts or combinations "in the form of trust or otherwise" penal offenses, granted a remedy by civil action for treble damages to any person injured in his business or property by the offenders and provided for dissolution by injunctive process of the organizations or arrangements condemned under its provisions. The omission of any reference in the Sherman law to the doctrine of unfair competition indicates better than any other fact the true character

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* Professor, School of Commerce, University of Wisconsin; formerly Professor at College of Business Administration, Marquette University. (This is one of a series of articles the Marquette Law Review is publishing on this question for a consideration by the *Bench and Bar*. See introduction to the series, Marquette Law Review, April, 1927, p. 153; also article by same author, Proposed Anti-trust Law Changes—Competition on the Defensive, XII Marquette Law Review, p. 25.)

of this legislation. It was conceived as a threatening measure, with provision for redress and punishment in case of transgression. No effort was to be made to safeguard the competitive economic process against the abuses of business conduct which frequently lead to its subversion.[1] Trade and industry were to be permitted to pursue their own course, subject only to the warning that the consummation of certain types of business arrangements might involve civil action, criminal action, and public resort to injunctive relief. In short, the Sherman Act mopped up the water but it did not repair the leak; it neglected the cause. As originally construed it aimed to eliminate restraint of trade and monopoly through the *enforcement* of competition rather than through its regulation.

The interpretation of statutes constitutes an integral part of the process of adjudication, and such interpretation frequently involves the conscious or unconscious judicial adjustment of legal rules to changing economic conditions. The flexibility of the law in this respect has been strikingly illustrated in the development of the judicial application of the Sherman Act. In the beginning, for example, the effectiveness of the statute was greatly curbed by the decisions which, drawing a sharp distinction between manufacture and commerce, seemed to render the federal law inapplicable to combinations in the basic manufacturing industries.[2] It is a notorious fact that from 1892 to 1896 not a single proceeding, other than those involving interstate transportation, was successfully maintained under the Sherman Act. In fact the first decision of the Supreme Court dissolving a combination in restraint of trade in the manufacturing industries was not rendered until 1899;[3] and even in this case the decision involved a loose pooling arrangement rather than a close combination. The completeness with which the Supreme Court has reversed itself on this point is perhaps best seen in the last Coronado Coal case in which Chief Justice Taft said, that when the intent of those preventing production of a commodity, "is

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[1] *U.S.* v. *Patterson* 55 Fed. 605 (1893). In the opinion in this case the Court declared: "It must appear somewhere in the indictment that there was a *conspiracy* in restraint of trade and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise."

[2] *U.S.* v. *E. C. Knight Co.* 156 U.S. 1(1895). The Supreme Court through Chief Justice Fuller said, p. 12, "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense; and although the exercise of that power may result in bringing the operation of commerce into play it does not control it and affects it only incidentally and indirectly. Commerce succeeds manufacture and is not part of it."

[3] *Addyston Pipe and Steel Co.* v. *U.S.* 175 U.U. 211 (1899).

shown to be restraint or control of the supply entering and moving in interstate commerce, or the price of it in interstate markets their action is in direct violation of the anti-trust act."[4] This early attitude of the Court accounts in no small measure for the multiplication of industrial consolidations during the late nineties.[5]

The Sherman Act as it stands prohibits all agreements in restraint of trade *unconditionally*. But in the words of Justice Brandeis: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."[6] Thus in interpreting the Act three principle issues have arisen: (a) whether the method employed in effecting restraint of trade or monopoly in any way determines the question of legality; (b) whether the restraint of trade or monopoly sought or effected must be all-embracing in scope in order to be unlawful; (c) whether the restraint of trade or monoply must be nefarious in purpose and oppressive in effect in order to constitute a violation of the law. In short, the determination of what constituted illegal restraints under the law has revolved about the question of their method, the question of their scope, and the question of their nature.

Concerning the legal significance of the methods employed to secure control of the market, it should be noted that the Sherman Act has been utilized effectively to reach concerted action leading to restraint of trade and monopoly through whatever form or mode of organization it might be achieved.[7] The Court has consistently subordinated the question of outward form to that of essential purpose. Restraints effected through agreement or combination among former competitors have been deemed inconsistent with the provisions of the Sherman Act regardless of the specific means by which the results were obtained. Agreements aiming to control price and arrangements designed to cur-

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[4] *Coronado Coal Company* v. *United Mine Workers* 268 U.S. 295.

[5] Professor Henry R. Seager has noted the following concrete results: "Lulled into a false sense of security by the outcome of the Knight case and by the inactivity of the Government, trust promoters entered upon their task after 1897 with a zeal and success unprecedented in the financial history of the country. According to the careful tabulation made by Mr. Moody in "The Truth About the Trusts," 82 combinations with a capitalization of slightly over $1,000,000,000 were organized prior to January 1, 1898, as compared with 236 with a capitalization of over $6,000,000,000 between that date and January 1, 1904." From "Recent Trust Decisions," *Pol. Sc. Quarterly*, Dec., 1911.

[6] *Chicago Board of Trade* v. *U.S.* 246 U.S. 231 (1917).

[7] *U.S.* v. *Trans-Missouri Freight Association* 166 U.S. 290 (1897); *Addyston Pipe and Steel Co.* v. *U.S.* 175 U.S. 211 (1899); *Northern Securities Co.* v. *U.S.* 193 U.S 197 (1904); *Swift* v. *U.S.* 196 U.S. 375 (1905); *U.S.* v. *American Tobacco Co.* 221 U.S. 106, (1911) and other cases might be listed which illustrate the great variety of methods employed to achieve restraint of trade or monopoly and the uniformity with which they have been held illegal.

tail output or to divide territory have been condemned whether effected through temporary concert of action or through the instrumentality of established business organizations like trade associations. Combinations in restraint of trade and quasi-monopolistic consolidations have been held to be subject to the prohibitions of the law whether organized in the form of trusts, holding companies, or of ordinary corporations.

The second fundamental issue which arose in the interpretation of the law was whether the restraint or monopoly subject to its prohibitions must be all-embracing in order to be unlawful. The consistent opinion of the Supreme Court has been that the law covers partial as well as general restraint of trade and local as well as national combinations. Early the Court said, "all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public from the advantages which flow from free competition."[8] Again, "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way as well as its effect upon the volume and extent of the dealing in the commodity, that is regarded."[9]

Finally, the outstanding issue which developed in the judicial construction of the Sherman Act concerned the nature of the restraints condemned by the statute. Did the legitimacy of the purpose and the beneficence of the effect of concerted action serve to remove agreements and combinations involving market control from the prohibitions of the law? Were all arrangements designed to lessen competition subject to the law or only such agreements or courses of conduct as were calculated to suppress competitive conditions? Stated shortly, the issue was whether the so-called rule of reason should be regarded as a part of the Sherman Act.

The origin of the rule of reason is certainly to be found in the common law. Circuit Judge Taft thus enumerated the permissible kinds of contracts in restraint of trade:[10]

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with business of the

[8] *U.S.* v. *E. C. Knight Co.* 156 U.S. 1 (1895).
[9] *Addyston Pipe and Steel Co.* v. *U.S.* 175 U.S. 21 (1899).
[10] *Ibid.*

firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, agent or servant not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business.

However, "restraint of trade" as used in the first section of the Sherman law did not contemplate, primarily, situations arising out of the relinquishing of one's right to carry on a certain enterprise or occupation within specified limits and for a stipulated time as a part consideration for the purchase price and by way of protection of the good will acquired by the purchaser. The principle purpose of the Sherman Act, beyond doubt, was to safeguard the free flow of interstate commerce against combinations and contracts among former competitors calculated to restrain trade or control the market and under the common law rules prevailing in most American jurisdictions, such contracts or combinations were deemed illegal, without regard to the reasonableness of their effect or purpose. Moreover, the Act specifically included *every* contract or combination of restraint. In the Trans-Missouri Freight Association case the issue was squarely met only to be reversed later. In this case[11] the Court said:

When . . . . the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states . . . . the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

These are no uncertain words and the same rule was applied in the Northern Securities case in which the decision dissolved a holding company which held the stock of two competing railroads. However, since the Court had not yet dissolved a combination in restraint of trade which had been effected through a complete corporate merger of the absorbed properties, some still professed to perceive considerable significance in the outward form. Accordingly, in the tobacco industry the group of men which dominated the industry evolved a plan of reorganization immediately after the Northern Securities decision whereby the Consolidated Tobacco Company, a holding company, was

[11] *U.S.* v. *Trans-Missouri Freight Assn.* 166 U.S. 290 (1897).

eliminated and all the assets of the American and Continental Companies were merged in a new corporation, the American Tobacco Company. (The legal futility of the scheme was disclosed in 1911 when the Supreme Court unconditionally declared that the matter of form of combination is immaterial.)

The rule enunciated in the Trans-Missouri case coupled with the Northern Securities case was widely construed as rendering all industrial combinations, regardless of the presence or absence of monopolistic intent or restrictive conduct, necessarily subject to condemnation under the anti-trust law. It was similarly believed that a veritable barrier had been erected between economic law and Congressional law, and that a change in the Congressional law was inevitable. In fact in his special message to Congress President Roosevelt on March 25, 1908, recommended such a change stating: "In the modern industrial world combinations are absolutely necessary; they are necessary among business men; they are necessary among laboring men; they are becoming necessary among farmers. . . . ."

Under these conditions, the decisions of the Supreme Court in the Standard Oil Company and the American Tobacco Company cases came as a partial remedy to the business world. By that time the membership of the Court had been so far changed that all save one Justice acquiesced in a direct and deliberate reversal of the established interpretation of the Sherman Act. The rule of reason was adopted over the sole protest of Justice Harlan. Chief Justice White here was enabled to set forth, on behalf of the majority of the Court, the views and doctrines which had constituted his minority opinion in the Trans-Missouri case. The "rule of reason" was declared to be an integral part of the Act, and only an undue or unreasonable restraint of trade or monopolistic combinations were held to be prohibited by its provisions.[12] The Court here read into the statute the older common law meaning which it refused to do in the earlier decisions.

Since the original interpretation of the Sherman law construed restraint of trade as comprehending the voluntary restriction of competition among those engaged in the same trade or industry, and since every partnership, every act of incorporation and practically every business agreement necessarily involves a diminution of competition between the parties to the arrangement, it was argued that the doctrine of the Trans-Missouri case was calculated to obstruct and destroy that freedom of interstate commerce which it was the purpose of the anti-trust law to foster and maintain. This was the logical outcome of the rule that *every* contract or combination in restraint of interstate

[12] *Standard Oil Co.* v. *U.S.* 221 U.S. 1 (1911); *U.S.* v. *American Tobacco Co.* 221 U.S. 106 (1911).

trade whether reasonable or unreasonable is unlawful. But Justice Peckham in the Joint Traffic Association case denied that the Supreme Court entertained such views.[13] However, the Court emphasized the *enforcement* of competition. Restraint of competition and restraint of trade were conceived to be identical. Under this policy combinations by agreement though merely designed to regulate competition and perhaps designed to promote trade thereby appear to have been regarded as definitely in violation of the law as arrangements calculated to check or eliminate competition. By the introduction of the rule of reason the Supreme Court put itself in a position to differentiate between schemes to control market processes and co-operative efforts to foster trade and safeguard competition from abuses. Not every direct lessening of competition was to be regarded as a violation of the anti-trust law. The law was to be construed to be directed neither against big business as such, nor against corporate consolidations as such, nor against joint action as such among competitors.

But arrangements which were designed or calculated to suppress the competitive principle, to stifle the forces of competition in any market area through the collusive association of producers or traders, still constituted unlawful restraints of trade. The mere fact of associated action was not the evil but its influence upon the competitive situation and in its consequent effect upon the public welfare. Thus the courts were given a large measure of discretion through the adoption of the rule of reason. Whether a given practice goes to the heart of the competitive process and tends to stifle it, or simply serves to regulate the operation of competitive forces, in the interest of efficiency, stability and orderly development, is not subject to determination by means of a rigid rule or automatic interpretation. There is some question as to whether the Court has consistently followed its own rule since 1911, as will appear later.

In cases involving corporate consolidation the difficulties inherent in the application of the rule of reason are very great. The entire history of the combination in question constitutes the source of relevant fact material touching its legality. The circumstance surrounding its organization, the purpose and ambitions of its promoters, the character of the competitive practices pursued in its administration and the nature of its attitude toward the public as evidenced by its production and price policies are among the primary considerations from which its intent and capacity to suppress conditions and achieve monopoly power may be gathered. In the American Tobacco case the Supreme Court enumerated a host of considerations which lead to its condemnation of the combination; and in the Standard Oil case the decision was based upon "a jungle of conflicting testimony covering a period of forty

[13] 171 U.S. 567 (1898).

years."[14] Attaining dominant influence or control over the market or some section thereof through the combination of previously competing concerns may be important evidence, but effective condemnation under the rule of reason is largely dependent not upon the mere cessation of competition among the former constitutents of the combination but upon the utilization of oppressive tactics toward outside competitors and the consuming public. In the case of the United States Steel Corporation the Supreme Court refused to order dissolution even though this concern had gained control of 50 per cent of the market. The Court said, "The law does not make . . . . the existence of unexerted power an offense. . . . . Whatever there was of evil effect was discontinued before this suit was brought and this, we think, determines this decree." In fact the Government could not get a single competitor to testify against the steel company's practices. About 1918 the United Shoe Machinery Company had gained control of the manufacture of 96.3 per cent of the total volume of shoe machinery in lines in which it was subject to competition and there were several kinds of shoe machines of which it was the sole producer. Yet the Court said, ". . . . the acquisitions (of competing plants and patents) may be said to be justified by the exigencies or the conveniencies of the situation. . . . . The company, indeed, has magnitude, but it is at once the result and cause of efficiency and the charge that it has been oppressively used is not sustained."[15]

Thus the judicial discretion inherent in the application of the rule of reason consists primarily in differentiating between those arrangements which merely mould or regulate the competitive process and those which tend to obstruct or tend to destroy it. It recognizes the necessity of distinguishing between the mere fact of concerted action and its tendency as evidenced by its character, purposes, methods and consequences, to stifle competition, to obstruct the free flow of commerce, to restrain trade, and to create monopoly. This reversal was definitely and concretely incorporated in the trust legislation of 1914: the Clayton Act and the Federal Trade Commission Act. The Clayton Act forbids price discrimination, restrictive sales and leases, that is, tying agreements under circumstances which may substantially lessen competition or tend to create monopoly. The Federal Trade Commission is a fact finding body charged to keep the channels of interstate trade open to free and healthy competition. It aims to prevent unfair practices before they have occurred rather than to punish afterward. However, this is not the place to go into details regarding these laws and their results.

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[14] 221 U.S. 1.

[15] *U.S. Steel Corporation* v. *U.S.* 251 U.S. 417 (1920) and *U.S.* v. *United Shoe Machinery Co.* 247 U.S. 32 (1918).

Without the development of this rule of reason the current activities of trade associations would be illegal. These associations are not mergers or combinations; the competitors become members of the association but retain their identity and autonomy, in most cases giving up no legal rights of any competitive importance. They merely associate, in the majority of cases, for the sake of gathering information about purely trade matters, production technique, keeping of accounts and the like; in some cases each member informs the central agency of his prices, stocks and sales. Also a few have actually fixed or tried to fix prices and tried to restrict output. At any rate the courts have had to deal with them and among others four leading decisions have been rendered; two against associations in question and two in favor.

The first two decisions were rendered in 1921 and 1923, respectively, and, had they not been reversed or at least radically modified in effect, would have gone a long way toward destroying the usefulness of the trade association. The facts in the first case, *American Column and Lumber Company* v. *United States*,[16] may be briefly summarized: In 1918, 400 producers of hard wood lumber comprising 5 per cent of the total number of mills listed in the census and producing 30 per cent of the total production of hardwood lumber in this country formed an association. Of these, 365 entered into an "Open Competition Plan," by which each producer agreed to furnish to all other members of the plan a daily report of sales actually made and monthly reports of production and stocks of lumber on hand. This information was sent to a manager of statistics who acted as a clearing house for receiving and distributing the reports. He also sent out certain "market letters" advising the hardwood producers to curtail production and to wait for higher prices. These letters, while probably having little effect upon the course of hardwood prices or upon the actual conduct of members, prejudiced the Supreme Court and gave a bad color to transactions that in themselves were probably innocent. At the same time that these letters and reports were being sent out, during 1919, the price of hardwood lumber advanced from 33.3 per cent in some grades to 343 per cent in others.

The Supreme Court (Justice Holmes, Brandeis and McKenna dissenting) acted on the theory that the activities of the members of the association in collecting and distributing price and production statistics were mainly responsible for the rapid advance in hardwood prices and that the members of the association in this plan were consequently a combination unreasonably restraining trade. To quote the Court:

While it is true that 1919 was a year of high and increasing prices generally and that wet weather may have restricted production to some extent we cannot but agree with the members of the Plan themselves, as

[16] *American Column and Lumber Co.* v. *U.S.* 257 U.S. 377 (1921).

we have quoted them, and with the District Court in the conclusion that the united action of this large and influential membership of dealers contributed greatly to the price increase.

Admitting that these dealers had a desire for higher prices the question still remains whether this group had the power to cause such extraordinary price increases or whether they were merely the relatively passive recipients of the benefits of the upswing of the business cycle caused by a complex of economic forces. It is a commonplace among economists that profiteers do not make high prices but that high prices make possible profiteers. The dissenting opinions by Justices Holmes and Brandeis pointed out that the acts of the hardwood producers did not in themselves amount to unfair competition, that the sending out of price statistics was a normal method of making competition more vigorous and free, that the association did not exercise preponderating power and hence could not actually control prices, and even if prices were raised to some extent this did not necessarily indicate an illegal restraint of trade.

Were the activities of the members of the association illegal in themselves? To collect and publish the latest information as to actual prices is a most important function of the stock market and the grain exchanges. The minority opinion pointed out that the Federal Government furnishes such information itself as was compiled and distributed in this case for the benefit of those engaged in the cotton, grain and coal industries. It prevents the ignorant buyer or seller from being imposed upon and from trading at a higher or lower price than is current at the time. Justice Holmes in his dissenting opinion said that the buyers were probably no less active in their efforts to know the facts. In short, knowledge tends to equalize prices but it does not tend to raise their average level. The collection of statistics which tends to stabilize conditions and to prevent both wild periods of inflation on the one hand, and long periods of depression on the other is surely not made illegal by the Sherman law. The Supreme Court, however, held that the writing of letters by the manager of the plan predicting a rise in market prices when linked up with the innocent gathering of facts, tinged the whole with illegality and made it a subtle plan for the evasion of the law.

Did the association have the actual power to raise prices? This ought to be the test, if any. The Supreme Court held in the United States Steel Corporation case (1921) that a single corporation with a control of 50 per cent of the steel output of the country did not have such power over steel prices. In the Hardwood case the members of the association were competitors but even at that their combined output was only 30 per cent of the whole. Had they raised their prices higher

than market conditions warranted, surely the mills controlling the other 70 per cent of the hardwood lumber production of the country would have readily poured their lumber into the markets in such quantities that the price of the association would have been broken. The Court should not have been misled by the accidental coincidence of a runaway market in hardwood prices and in practically all other commodities as well, with the formation of this association, its collection of statistics and the letter writing of its manager. It appears that the Court inverted cause and effect.

The root of the difficulty lies in the fact that the Sherman law itself was framed in the days when the small business unit was not only deemed the ideal in a democratic state but also the most efficient unit of production. It appeals to all our individualistic and liberty-loving sentiments. The Supreme Court, even though it got away from this psychology in the steel case, seems to have reverted to it in the lumber case.

In the Linseed Oil case[17] decided in 1923, twelve firms composing the association had signed identical contracts with the Armstrong Bureau of Related Industries binding them under penalty of fine to report all past sales, and to send in price lists and to promptly report any lowering of prices quoted. The bureau agreed to relay all these facts to the members. The reports sent in by each member revealed the names of the reporting member, the identity of customers, and of the sales or quotations being reported. The bureau relayed to members not mere unidentified totals but all of this information. Sales made by members at prices varying from their reported prices had to be reported by telegraph. Attendance was compulsory at monthly meetings. The contracts stipulated, however, that no part of the bureau's machinery should be used to fix prices, divide territory, limit sales, produce or manufacture or control competition. The Court was not deterred by this clause but considered the contract to be a plan to defeat the purpose of the Sherman Act.

The Court said, "With intimate knowledge of the affairs of other producers and obligated as stated but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers, necessarily ignorant of true conditions. Obviously they were not bona fide competitors. . . . ." Thus the Court did not say that the association fixed the price but merely held that in the jungle of other facts there were evidentiary facts sufficiently tending to establish the contract to fix prices. Again the Court said, ". . . . Concerted action through combination . . . . is forbidden when the neces-

[17] *American Linseed Oil Co.* v. *U.S.* 262 U.S. 371 (1923).

sary tendency is to destroy the kind of competition to which the public has been looking for protection."

In the Maple Flooring and Cement cases[18] the Federal Supreme Court favored the trade associations. The principles set down in the two cases do not differ radically, hence only the Maple Flooring case will be examined. In this case the defendant trade association was composed of twenty-two companies engaged in the hardwood floor business and in 1922, the year the association was formed, the defendants produced 70 per cent of the total production of the types of flooring in question and during the five years up to 1922 they had produced an average of 74.2 per cent of the total output. The association made no attempt to fix prices but engaged in the same type of activities as we found in the two previous cases: computation and distribution among the members of the average cost of flooring and doing business; compilation and distribution among the members of a booklet showing freight rates on flooring from Cadillac, Michigan, to nearly 6,000 points of shipment; gathering and dissemination of statistics of inventories, amounts sold, prices and the like, and, finally, holding monthly meetings.

Justice Stone in delivering the opinion called attention to the fact that the Government neither alleged nor proved the existence of an agreement among the members of the association, "either effecting production, fixing prices or for price maintenance." Yet the defendants were willing to admit that there was a combination among them and that their activities tended toward uniformity of price. The Government contended that the activities of the association would tend to bring about a concerted effort among the members to maintain a certain price and this would constitute a necessary and inevitable restraint of interstate commerce. The Court admitted that the facts gathered by the association might be made a basis for price fixing. But it found no such use made of the data. However, the same information was made available in numerous trade journals, and was also sent to the Department of Commerce, to Federal Reserve and other banks. The association had been advised by counsel that future prices ought not to be discussed at the monthly meetings. There was no charge on the part of the Government that there was any understanding, "either express or implied, at the meetings or otherwise, with respect to prices." The Court further pointed out that in order to prosecute successfully the Government "must stand or fall upon its ability to bring the facts of the present case within the rule as laid down in the *American Column and Lumber Company* v. *United States*, where it was said at page 400 . . . . it has been repeatedly held by this court

[18] *Maple Flooring Manufacturers Assn.* v. *U.S.* 268 U.S. 563 (1925) and *Cement Manufacturers Protective Assn.* v. *U.S.* 268 U.S. 586 (1925).

that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition is unlawful. . . . ."

Thus the Court does not believe that it has reversed itself in this decision from that in the American Column and Lumber Company and the Linseed cases. In these two later cases the Court felt that the necessary and inevitable result would be a material suppression of competition. However, Justices Taft, Sanford and McReynolds dissented from the majority opinion in both the Maple Flooring and Cement cases on the ground that the rule of the American Column and Lumber Company and Linseed Company cases should hold. Justice McReynolds in a rather scathing opinion pointed out that the activities of the members of the Maple Flooring Association and Cement Association were such as to ultimately restrict competition and to raise prices, and that the Government ought not to be obliged to await the final destruction of competition before demanding relief.

The majority opinion discusses at some length the activities of trade associations which will be sanctioned by the Court. And for a moment it turned economist, coming out in favor of stabilization, the goal for which economists all over the country are working. These were the words:

> It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of prices and trade practices. . . . . Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from over-production.

Again the Court says:

> But the natural effect of the acquisition of wider and more scientific knowledge of business conditions on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price can hardly be deemed a restraint of commerce, or if so it cannot, we think, be said to be an unreasonable restraint or in any respect unlawful.

Thus it is clear that the Court, although it still condemns combinations which fix prices or curtail output or which inevitably will result in such phenomena, has departed a long way from its unconditional individualism of the first two decades after 1890 and now not only allows but sanctions and urges combinations and associations pointing out their efficiency[19] and their stabilizing effects.[20]

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[19] *U.S.* v. *United Shoe Machinery Co.* 247 U.S. 32.

[20] Maple Flooring case.