Ten Thousand Commandments

A Story of the Antitrust Laws

HAROLD M. FLEMING

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A Story of the Antitrust Laws

HAROLD FLEMING

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Preface

This book is not for lawyers, but for people. Or, if that distinction sounds unfair to my legal friends, let's say it's for laymen. The lawyers may read it if they want to. I put the citations in for them.

I have tried to write it as a story, not as a thesis or a document. To me, the material makes an astonishing yarn. It is about people. It is not, at least in intention, about the law, but about lawyers; not about business, but about businessmen; and not about the government, but about government lawyers.

For these people have argued, burned the midnight oil, puzzled, squirmed, gloated, and despaired over the things related here: mostly, one might think, about the meaning of a few little words here and there in the law. But, as in chess, a few little pawns can make the players squirm, and in baseball a half-inch difference in a swing will make the difference between a home-run and a pop fly. The difference here is that, in the antitrust law, a few little words can change, not only the disposition of huge sums and the location of huge plants, but eventually, the very structure of American industry.

The story told here was first rehearsed on the business page of the *Christian Science Monitor*, in a series of 28 pieces running through the summer of 1949. Some of the high spots then got a sort of quick telling in the spring of 1950 in the *Harvard Business Review* and in *Harper's* magazine.

I wrote this book with the help of a number of business friends, including some antitrust lawyers. Some of them goaded me, while others tossed documents, tomes, and decisions at me. I am a business reporter. There were times during the writing, I must admit, when I was not too grateful for this urging, and felt that if I never read another page of Congressional testimony, Supreme Court opinion, or bureau ruling on the antitrust laws, it would still be too much. But now that is over, here are thanks for the shove and the help.

HAROLD FLEMING

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I. *The Supreme Court Rewrites the Law*

The Constitution of the United States of America begins with the following line:

"Article 1, Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

The "old" Supreme Court (before 1937) struck down many an act of Congress, on the ground that it conflicted with the Constitution.

The "new" Supreme Court (since 1937) has never called any act of Congress unconstitutional. But it has developed a new habit, which circumvents Congress. Although it undoes nothing that Congress has done, it does many things that Congress has refused to do. It legislates and, in effect, writes laws that Congress refuses to write.

In fact, in a number of cases it has found meanings in the law so astonishing, so upsetting, and so obviously contrary to the will of Congress that Congress has had to rush through some kind of corrective law or resolution.

The Court did this, for instance, in the Southeast Underwriters case,[1] the portal-to-portal case,[2] and the overtime-on-overtime case.*

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* References in text are numbered by chapters and refer to notes given in *Bibliographical References*, pages 197–206.

This is not to say that the Supreme Court should never make law. Sometimes it has to, because Congress failed to. Thus, for instance, as Justice William O. Douglas has said,

> The legislative solution is often to write two opposing ideas into a statute . . . the battle that raged before the legislature is now transferred to the Court . . . A hiatus may be left in a law. The crucial matter may have been too explosive for the legislators to handle . . . The necessity to fill in the gap is then presented to the court. And the judges are left at large in a field that the legislature lacked capacity to define. To a degree the same problem is presented to the judiciary when vague and general language is employed like the words "fair" or "just" or "equitable." . . .[3]

And witness the remark of a weary Congressman in the closing debate on the Robinson-Patman Act (of which this book will have much to say).

"Bills ofttimes are vague and ambiguous. . . . You might as well know that the Bill finally agreed upon by the conferees . . . contains many inconsistencies, and the courts will have the devil's own job to unravel the tangle . . ."[4]

But the Supreme Court has gone far beyond mere pinch-hitting for Congress or filling in the gaps in meaning that Congress lacked the nerve to fill in.

For instance: In 1869, the Supreme Court ruled flatly[5] that insurance companies should be subject to state, not federal regulation. Around that decision had been woven a whole structure of state regulation. This arrangement, as the record of the companies has shown since 1907, has worked astonishingly well. Congress let the subject alone and created no federal agency to deal with insurance. But in 1944 the Supreme Court, in a case brought by the Antitrust Division of the United

States Department of Justice, reversed this 70-year-old decision.[6]

The result was total confusion. Said Justice Jackson for the dissenting minority of the Court, "A poorer time to thrust upon Congress the necessity for framing a plan for nationalization of insurance control would be hard to find. . . . Vast efforts have gone into the development of state regulation. . . . Overturning the precedents of 75 years governing a business of such wide ramifications cannot fail to be the occasion for loosing a flood of litigation and of legislation. . . ."

Congress then had to rush through the "moratorium" of March 9, 1945, on application of the federal antitrust laws to insurance, until January 1, 1948, making those laws applicable to insurance after that date only "to the extent that such business is not regulated by state law."

In 1936 Congress passed the Fair Labor Standards Act, sometimes called the Wages and Hours Act. It set minimum hourly wages, required time-and-a-half pay for work done over 40 hours a week, and set up a Wage and Hour Division in the Department of Labor. This Act rested on or assumed a body of practices and customs in the relations between millions of workmen and hundreds of thousands of employers, and on a body of legal assumptions. Among these were three: (a) that the law applied only to interstate commerce, as then defined; (b) that working time was calculated on the time worked; and (c) that overtime was calculated by current practices.

In short order the Supreme Court upset all three assumptions. First it found[7] that elevator operators and other building employees in two loft buildings, one in Philadelphia and one in New York, were "in interstate commerce," because "without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce . . ."

Then it ruled [8] that wages, for time-and-a-half calculation, must be figured on a "portal-to-portal" basis. Industry practice had been otherwise. The Wage and Hour Administrator had ruled otherwise. Congress had assumed otherwise. Pay for years had been figured otherwise. Suddenly thousands of employers found themselves open to suits for literally billions of dollars in back-pay. Congress had to rush through a law to take care of the impasse.

The law had said nothing about "overtime-on-overtime." It had assumed standard industry practice. But certain members of the AFL Longshoremen's Union in New York filed suits for back pay on the basis of a different calculation. The union itself opposed the suit, agreeing with the employers' interpretation of the contract. But the Supreme Court, by five to three, in June 1948 upheld the claims.[9]

Said *The New York Times* on July 20, 1948 of the case: "The verdicts resulted in great confusion, particularly in the stevedoring and construction industries. Employers said the verdicts would cost millions of dollars. The government probably would have had to pay much of that because the claimed liability developed when dock traffic consisted largely of war supplies." So Congress passed and the President signed a bill to outlaw these wildcat claims and to make the law read explicitly as practically everybody, except a handful of longshoremen and five members of the Supreme Court, had assumed it meant in the first place.

These, however, are only a tithe of the cases in which the "new" Supreme Court has upset going trade practices, Congressional intentions, and existing legal assumptions.

Other cases in which it has created confusion by astonishing novel rulings include the matters of reciprocal federal-state tax immunity, the tidelands oil question, the Christoffel decision [10] upsetting a 150-year-old Congressional precedent on what constitutes a committee "quorum," and many others.

Justices of the Supreme Court have themselves, in cases where they dissented from the majority decision, frequently commented on the Court's new willingness to invade Congress' field of legislation. Thus Justice Roberts in the Hutcheson case [11] stated, "I venture to say that no court has ever undertaken so radically to legislate where Congress has refused to do so."

And Justice Stone: "I think that the responsibility of departing from the long-accepted construction of this statute should be left to the legislative branch of the government to which it rightfully belongs." [12]

Justice Douglas: "The necessity of resorting to such a circuitous route is sufficient evidence to me that we are performing a legislative function in finding here a definition of a crime which will sustain this indictment." [13]

Justice Frankfurter: "If ever there was an intrusion by this Court into a field that belongs to Congress, and which it has seen fit not to enter, this is it." [14]

Justice Stone: "It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred." [15]

Justice Murphy: ". . . the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem." [16]

Justice Rutledge: "But we are as often told that Congress should perform the creative act in Congress' field. This should be most true where what we are called upon to recreate is Congress' own handiwork. If Congress intended the Administrator to act retroactively, Congress wholly failed to express this purpose." [17]

Justice Burton: ". . . I am obliged to dissent from the majority of this Court and to sound a warning against the dangers of overexpansion of judicial control into the fields allotted by the Constitution to agencies of legislative and executive action." [18]

These are only a selected few among the remarks that different Supreme Court justices have made in recent years about their own colleagues' decisions. As the government gets bigger and the federal laws get longer, there is a tendency for government lawyers to acquire more power, particularly over businessmen, who are not much liked by the federal courts.

There have been two recent dams against this growth of bureau and commission-lawyer power. One was a decision of the Supreme Court some 30 years ago,[19] on the powers of the Federal Trade Commission, which said "It is for the courts, not the Commission, ultimately to determine as a matter of law what they [the words "unfair methods of competition"] include." The other was an Act passed by Congress in 1947,[20] the Administrative Procedure Act, in which Congress said that people on trial before a government department are entitled to a Court review of whether the government lawyers really have "substantial evidence" against them.

But in case after case recently, the Supreme Court has been saying, in effect, that it will take the government lawyers' word for it. It has held, in effect, that Congress intended the courts to give a virtual rubber-stamp approval to, as "experts," the government lawyers of the Federal Power Commission,[21] the Securities and Exchange Commission,[22] and the Federal Trade Commission.[23]

As a result it is lack of money rather than lack of power that holds back such government agencies from haling more businesses into court. "If we had the money," said a Federal Trade Commissioner recently, "we could get a 'cease-and-desist' order against every businessman in the United States who is engaged in interstate commerce. The businessman has nothing to say. He can only hope the law of averages will keep him off the wrong end of a complaint." [24]

In recent decisions, the Supreme Court has carried this tendency to accept the word of government lawyers to an extraordinary degree. In the Morton Salt case, the majority decision inspired the minority to comment on "the almost absolute subservience of judicial judgment to administrative experience." And in the Cement Institute case,[25] the Court in effect banned (or cast a heavy legal cloud over) the use, by heavy industry, of basing points for pricing purposes, despite the fact that Congress had explicitly refused to write any such ban into the law.

Of this Cement Institute case the lower court said, "If this pricing system which Congress has over the years steadfastly refused to declare illegal . . . is now to be outlawed by the courts, it will mark the high tide in judicial usurpation. . . . The basing point system has been in use by industry for almost half a century. . . . Congress has repeatedly refused to declare it illegal. . . . In our judgment the question . . . rests clearly within the legislative domain. . . ." [26]

But the Supreme Court thought differently. Or at least, most industry lawyers so concluded. But the

Court's opinion ran to over ten thousand words and, to judge by the comment, it seems that "you could prove almost anything by it."

2. *Everybody Out of Step but the Government Lawyers*

The productive power of American industry is the eighth wonder of the world. It is the continual astonishment of Europe and the deterrent of Russia. The industrial powerhouse of the United States has developed a voltage and is now putting out a current of economic energy such as has never been known before in human history.

It is hard to believe that all this industrial power, available both for peace and for war, has been built on error and by criminals. When a young man shows great power in athletics or an old man holds together toward the century mark, people think there must have been something good in the makings of such a man. Not so, however, with American industry in the eyes of the federal courts and the government lawyers. It is full of original sin and needs to be taken apart and put together properly.

Moses had nothing on the Supreme Court. He handed down ten commandments. The Supreme Court is handing down ten thousand. And like the ten that Moses brought down from Mount Sinai, they are nearly all "don'ts."

The highest court of the land, of course, doesn't go into thousands of detailed "thou shalt not's." It merely decides one way or the other on each case that comes before it. But the Court's decisions these days are upholding the hand of government officials and the hand of government officials is writing the ten thousand "don'ts" for American business and industry. The doctrine of original sin is now being applied to American businessmen and official "naughty-naughties" are being turned out for it in the Federal Trade Commission and the Antitrust Division of the Department of Justice by mass production.

There's a "new look" in the antitrust laws these days and it deserves some attention from every American citizen who realizes that on American industry depends not only the comfort of his home, but its defense.

The trouble isn't simply that almost every businessman in the United States could now, by the new rules, be haled into court by government officials and be fined, branded a criminal for the most commonplace and accepted practices, and subjected to treble-damage suits by competitors and customers. It is that the policies and practices by which American business has grown so phenomenally productive have one and all in recent years been damned, discouraged, and suppressed.

The current civil suit of the government lawyers against the Great Atlantic & Pacific Tea Company is a case in point. It is not, in effect, against the Hartford brothers who own the chain, but against their methods. The proposed breakup of the system would further enrich the Hartfords. The real significance of the attack on A&P is that a victory by the Antitrust Division lawyers would mean the end of the high-volume, low-margin, hard-hitting, penny-saving methods that A&P pioneered.

American industry has developed its muscles in a business community that daily operates with quantity discounts, matched prices, freight absorption, horizontal and vertical integration, and the rapid-fire development of new, unheard-of products. Every one of these practices, if not an outright crime under federal law, is now under a legal cloud.

Take the matter of quantity discounts. Everybody knows them, at least in such forms as "Ten Cents Apiece: Three for a Quarter," "Cheaper by the Case," or, "I Can Get It for You Wholesale." Every householder can see on the back of his electric-light bill that the more electricity he buys, the cheaper he gets it per kilowatt-hour. If he ships freight he knows that the more he ships the less he pays per unit.

But quantity discounts are now in the shadow. In the Morton Salt case, a dissenting Justice said, "The case, in a nutshell, is that no quantity discount is valid which the [Federal Trade] Commission sees fit to attack." And the FTC, itself, commented that this was a "very radical interpretation."

Take the case of matched prices. Nobody is surprised if he finds that ninety-nine times out of 100 if he buys a can of orange juice or of smoking tobacco on one side of the street, and crosses the street, the price will be the same on the other side. When a merchant advertises "I will match any competitor's price," most people think well of him. Throughout American business, nearly everybody's price for the same thing is the same at any particular time.

But the government lawyers have begun to look into this situation and now it's dangerous to match a competitor's price consistently. Legally, in federal antitrust law, this can make one a conspirator, or something just as bad. "Identical pricing" has become highly dangerous.

For instance, in October 1948 the Federal Trade Commission, discussing a case that had come before it, laid out the following verbal booby trap for competitors:

> The Commission chose to rely on the obvious fact that the economic effect of identical prices, achieved through conscious parallel action, is the same as that of similar prices achieved through overt collusion; and for this reason the Commission treated the conscious parallelism of action as a violation of the Federal Trade Commission Act.

The catch here lies in the fact that the matched prices of hard competition look superficially just like the matched prices of conspiracy. If three afternoon papers all charge the same nickel a copy, it might be because their managements all agreed, or it might be because their managements all disagreed. Similarly a still picture of two or three cats looking at a piece of meat might look like a conspiracy, and it might take a good deal of waiting round with a movie camera to "prove" otherwise. But the burden of proof today is on private business, not on the FTC, and in antitrust law the old Anglo-Saxon rule that, if circumstantial evidence has an innocent as well as a guilty interpretation, the man goes free, has been talked away.

This FTC statement contains another joker for American business, in the phrase "conscious parallel action." This refers to the fact that it is now legally dangerous for American businessmen to know each others' price lists. It is generally assumed among businessmen that it is a good thing and a help to competition if everybody knows what everybody else is charging. Trade associations publish these figures, including premiums, discounts, payment terms, and so on. So do trade journals. Nowhere in the world are the facts about who is charging how much for what so well and widely known among competitors as in the United States.

But this information, too, has come under suspicion. Government lawyers are against the general dissemination of such news. The Antitrust Division had it stopped in the Sugar Institute case [1] and tried to force the American Iron and Steel Institute to quit publishing rate-books for its members.

Here the good of knowledge is in question. For competitors each to know what the other is doing and to be able to make quick estimates of what a cut or an increase means is to provide them a tool like a hatchet or a blowtorch that can be used both for good and for evil. They can use such information to soften competition, or to compete harder. Tropismatically suspicious, the government lawyers in the FTC and the Antitrust Division feel that businessmen will use such information to avoid competing. But by the same reasoning, of course, the common use of the English language, the decimal system, and of the old English nomenclature of ounces, pounds, and tons also contributes to the possibilities of "conscious parallel action" by businessmen.

Still another standard practice of American businessmen is now legally dangerous. It is "uniform delivered pricing." Everybody knows it in such forms as "Twenty-five Cents Everywhere" or "One Dollar Everywhere East of the Rockies" (zone pricing). But this is now questionable under the Federal Trade Commission's new concept of "mill-net" pricing.

The "mill-net" idea, which the Supreme Court appears to have confirmed [2] is that true "price," in the eyes of the law, is not what is charged, but what is received. Thus, for instance, a pair of gloves made in Gloversville, New York, and sold both in Gloversville and in Los

Angeles for three dollars, produces a different "mill-net" to the maker from the two places, by the amount of the freight charge.

This is important because the Clayton Act of 1914 (as amended by the Robinson-Patman Act of 1936) prohibits "price discriminations," which means the charging of different prices for the same goods to different customers (except in certain circumstances, the extent of which the Courts have been shrinking). But the Federal Trade Commission lawyers, with the "mill-net" interpretation, easily make it a violation of Federal law to charge the same price in Gloversville and in Los Angeles for the same pair of gloves. For it isn't, under the mill-net interpretation, the same price. Or, as the Supreme Court put it in the Cement case, the law "does not permit a seller to use a sales system which constantly results in his getting more money for like goods from some customers than from others."

This is practically a death-sentence anytime the FTC lawyers want to use it, for uniform delivered pricing, zone pricing, basing-point pricing, or any kind of freight absorption or phantom freight.

Thus for instance if this book is sold at the same price in Kansas City as in Jersey City, the publisher may be, by the now legally accepted "mill-net" theory, "using a sales system which constantly results in his getting more money for like goods from some customers than from others." (For, in some instances he may pay the freight; and, unfortunately, this is probably heavy reading.)

Another common practice of American businessmen is now in legal jeopardy, the "good faith" matching of competitors' price cuts. Under the law, as it was generally taken for granted until recently, a firm could at least cut its price to match a competitor's price reduction.

Such a cut would be made in "good faith competition," supposedly protected by Section 2(b) of the amended Clayton Act. But in a major case to be described in Chapter 5, the Federal Trade Commission tried to destroy this kind of legal defense against a charge of illegal price discrimination. The accused Standard Oil Company of Indiana told the Circuit Court, on appeal, that the lower court's decision would "necessitate nation-wide reconstruction of marketing procedures." But the Circuit Court upheld.

Another common form of business is now apparently outlawed, through the recent decision of the Supreme Court in the Standard Oil Company of California case involving exclusive dealer contracts, which the company held with some 7,000 gasoline retailers. Such arrangements have been a standard feature of American business. The Court's 5–4 decision thus not only outlawed the 7,000 California contracts, and probably many thousands more with other oil companies, but also made them hazardous in the distribution of many other products, like automobiles, farm machinery, hardware, and so on.

A natural alternative which manufacturers might choose for such contracts would be to go into the retailing business themselves, perhaps taking on these now independent dealers as employees instead of dealing with them on contract. This, however, is a form of "vertical integration." And the face of the federal antitrust laws is being steadily hardened against industrial integration. The Antitrust Division has repeatedly claimed that vertical integration is in itself ("per se") a crime under the Sherman Antitrust Act. A near majority of the Supreme Court was willing, a few years ago, to accept this view.

These are not all the common practices of American business which are now legally questionable, if not outright criminal. Sales managers may yet run afoul of the government lawyers even if they (a) can completely justify quantity discounts by cost-accounting; (b) do not sell at the same price as competitors; (c) do not know competitors' prices; (d) never "absorb" any freight costs in their offering prices; (e) make no exclusive contracts; and (f) do not work for integrated firms. The new powers given the FTC and the Antitrust Division threaten new hazards, even in methods taken to avoid the present ones.

As the law is now interpreted, the Acting Chairman of the Federal Trade Commission felt able to tell a Senate investigating committee recently that "under . . . these . . . decisions it is safe to say that we can take orders against 100,000 businessmen." [3]

One of the hazards that sales managers must now take into account is that some policy followed today in the light of the best legal opinion may next year be reinterpreted as illegal. In such case the crime and the penalty may be retroactive. This is as though an automobile driver who took a right turn on a red light during a month in which this was permitted by current traffic regulations, were subsequently found guilty for it because it was later ruled to be illegal. This, however, is in the "Nothing Can Be Done About It" Department, as many company officials have learned.

Another kind of hazard consists in the possibility of treble damage suits, also possibly retroactive. Firms which, with the best of intentions, run afoul of the law on one of the above counts, are open to treble damage suits under the antitrust laws, even though their offense was a course of conduct that everyone considered, at the time, quite legal as well as ethical, but that a subsequent reinterpretation of the law found to be illegal.

A saving grace in the law is its human side. This came out in Senate Committee hearings some years ago. The then Assistant Attorney-General Wendell Berge was on the stand and the transcript read as follows.[4]

Chairman (Senator Langer): How many men have you put in the penitentiary as a result of prosecutions under the Sherman Act?

Mr. Berge: None for a generation.

Chairman: I want to know why.

Mr. Berge: I have no trouble answering the question. . . . Frankly, we have to recognize that the community does not regard the antitrust violation as a moral violation in the same sense that they would regard embezzlement.

Chairman: Who says that?

Mr. Berge: The courts and the juries. . . . Our problem, sir, in criminal cases is to get convictions of businessmen who in the morals and traditions of the community are not criminals.

3. *The Argument over Whether There Is an Argument*

From where a newspaperman sits, there seems to be considerable confusion over the meaning of the antitrust laws as now interpreted. For instance the recent Cement Institute case,[1] which was largely about whether cement companies could legally pay the freight for distant customers, said at one place, about two previous Supreme Court decisions, "Thus the combined effect of the two cases was to forbid the adoption for sales purposes of any basing-point pricing system." And right after the decision, the Federal Trade Commission put out a press release which was headed, "Court Holds Basing-Point Methods of Pricing to be Unfair Irrespective of Conspiracy."

From this, one might pardonably assume that the Supreme Court had held the use of basing-point pricing systems of methods of pricing to be illegal.

However, it turned out to be not quite so simple.

They were—but they weren't. Illegal, that is.

Another reason why one might assume that the use of basing-point pricing was rendered illegal by the Cement Institute decision was that the FTC was the winner in the case, and the FTC had been haranguing Congress for ten years before the Cement decision to outlaw basing-point pricing. FTC Commissioner Robert Freer had advocated before the Temporary National Economic Committee (TNEC) a "specific ban by statute" on basing-point pricing so as to "avoid the delay, expense, and uncertainty of protracted and expensive litigation in each individual case."

However, the FTC shortly after the Cement case began to sing another tune. It was that basing-point pricing might be legal some times, and illegal other times, and that nobody could tell beforehand, except the FTC.

The Commission put out a 4,500-word "explanation" of its attitude, which said that basing-point pricing was not in itself illegal. By this time a Senate Committee had started hearings to straighten the matter out. FTC lawyers testified. But their testimony did not agree. One said such pricing systems were not illegal in themselves. Another said that only f.o.b. mill pricing was really safe. A third said that the safest thing for a manufacturer to do was to remain ignorant of his competitors' prices (thus avoiding "conscious parallel action").

Senator Capehart, who conducted the hearings, said (October, 1948) that "Confusion inside the FTC is just as great as outside it. We had the commission's six top lawyers before us in executive session. I asked them about two proposed selling methods that had been condemned by the commission and the courts, and they said that so far as they knew they were all right."

Within the next few months, FTC Commissioner Mason said explicitly that "Freight absorption is out the window," and another Commissioner, Freer, said explicitly in December that freight absorption "is not out the window."

Senator Capehart's successor on the Committee, Senator Johnson, told the Senate (January 5, 1949) that "not only are businessmen confused, but that members of the Federal Trade Commission and its staff are in complete disagreement as to when a seller may pay or absorb transportation costs." Commissioner Mason ridiculed the majority of the Commission, saying that the "agencies of government dealing with the problems of business conduct have created a Tower of Babel." [2]

Again in 1950 Mr. Mason made the same charge. Speaking at Marquette University on April 11, 1950 he said:

> . . . I openly defy the entire University to explain to any businessman what he can or cannot legally do when making up his next season's price policy.
>
> Can he absorb freight? Perhaps, if he only does it now and then, or if he is not too big, or if the amount of the freight is not too much. But who is to say? How often is 'now and then'? What size is 'too big'? And how much is 'too much'?
>
> What a young law student needs most after a diploma and a shingle and a client is a good pair of eyebrows and broad shoulders. Then when his client asks him how to stay out of trouble with the government, he can raise the first and shrug the second . . .

This kind of uncertainty has come to be a frequent result of Supreme Court decisions. Thus, in the Southeast Underwriters case Justice Roberts remarked that "It is regrettable that in an era marked by doubt and confusion . . . this Court, which has been looked to as exhibiting consistency . . . should now itself become the breeder of fresh doubt and confusion in the public mind. . . . With these frequent reversals . . . the law becomes not a charge to govern conduct, but a game of chance . . . instead of settling rights and liabilities, it unsettles them . . ."

Adding to the uncertainty, the Supreme Court, it has been estimated, reversed earlier decisions in 30 cases between 1937 and 1949, and in three years to the middle of 1949 had handed down 86 five-to-four decisions.

If the Court itself finds it so hard to agree, it is natural that businessmen find it hard to know what the law is or will be. Five-to-four decisions mean that one Justice casts the determining vote in what may be a major case. An example of this was the Standard of California case cited in Chapter 2. The decision of one Justice meant that the contracts of at least 20,000 dealers may be illegal and their relations with their suppliers may have to be rearranged.

However, many people feel that this uncertainty is rather a good thing. Thus, for instance, Justice Douglas has recently said that [3] "the law will always teem with uncertainty . . . under the democratic scheme of things. . . . Philosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it."

Federal Trade Commission officials have repeatedly said the same. Thus its Chief Economist, Dr. Corwin D. Edwards, has said, "If the statute contained a series of specific prohibitions of particular practices and of agreements about particular subjects, the ingenuity of business men would soon devise new ways of accomplishing restrictive ends. . . ." [4] And the late Associate General Counsel of the Commission, Mr. Walter B. Wooden, told a Senate Committee that Congress "could not expect to keep its precise definitions abreast of the inventiveness of the human mind in devising new forms of restraint on competition." [5] And FTC Commissioner Robert E. Freer, opposing clarification of the law on the basing-point question, said that "the real question" is "whether the FTC and the courts are to remain free to examine the facts in each individual case and ascertain whether particular pricing systems have . . . had the effect of injuring or suppressing competition." [6]

The Department of Justice seems also to take the view that the law should not be too specific. Thus Attorney-General Howard McGrath has been quoted as follows in a press interview:

> *Question:* Then doesn't it all boil down to one thing—shouldn't there be developed a set of standards by which a businessman would know whether he was violating the antitrust laws?
>
> *Answer:* I would think it would be a disadvantage to businessmen generally if we tried to write hard and fast rules. I do agree there should be a general understanding of what the law means and we have that stated in the law. . . .
>
> I don't think it would be desirable to try to put down a specific code. I just don't think that you can develop a body of antitrust laws adequate to the country's need that way. Business practices are constantly changing and the generality of the laws makes them adaptable to new and different circumstances . . .[7]

And the Chairman of the House Judiciary Committee, Emanuel Celler, has echoed this view, saying:

> I want to make it clear that I would vigorously oppose any antitrust laws that attempted to particularize violations, giving bills of particulars to replace general principles. The law must remain fluid, allowing for a dynamic society. Otherwise, to put it bluntly, the process would become a rat-race between the monopolist seizing upon omissions and the Congress trying to fill them into the law, always eighteen steps behind . . .[8]

Some noted men have not shared these views. Thus the Viennese economist, Dr. Friedrich Hayek, in his book, *The Road to Serfdom,* recently wrote:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law . . . that government in all its actions is bound by rules fixed and announced beforehand.[9]

And a great American lawyer once said, "Clean-cut and specific rules make it possible for men to accomplish in their business dealings the legal results they intend without the necessity of constant recourse to the courts to resolve doubts." [10]

In fact, President Woodrow Wilson, the father of the Federal Trade Commission Act itself, when he first proposed the idea to Congress, said,

> The business of the country awaits also, has long awaited and has suffered because it could not obtain further and more explicit legislative definition of the policy and meaning of the existing antitrust law.
>
> Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.
>
> Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade, to make definition possible, at any rate up to the limits of what experience has disclosed.[11]

The British have been going through somewhat the same problem. A recent Act of Parliament (Monopolies and Restrictive Practices Act, 11 and 12 George VI, c.66 (1948) was so vague that the London *Economist* remarked that "some principles of economic justice should be drawn up so that businessmen may have an idea, as precise as may be, of what they may do and what not, and so that the enforcing authorities may have something other than their own prejudices to guide them." [12]

In fact the British went through somewhat the same controversy three hundred years ago, in the days of the Commonwealth. The contestants were the same —the Crown (the government) and the Parliament (the congress). The issue was the same—whether the Crown should be governed by specific rules of law or should be free-wheeling in its actions. Men of the Massachusetts Bay Colony went back to England to join issue, and when the controversy was finally decided with the Whig "Revolution" of 1688, in favor of the rule of law and a limited monarchy, Britain embarked on her two greatest centuries of achievement.

However, the new antitrust law interpretations now have come to mean not only confusion, but straight-out contradictions.

Some of these contradictions are obvious, as in the "Detroit gasoline case" (to be discussed in Chapter 5). In this the FTC, to prevent "price discrimination," required resale-price-maintenance. Others are more profound, though less immediately apparent, as in the (apparent) ban on basing-point pricing. This tends to Balkanize trade or to build up local monopolies—which the Antitrust Division will then have to attack; or in the Supreme Court's requirement of functional discounts in the Morton Salt case (next chapter) which will drive business toward vertical integration, which the Antitrust Division is opposed to. But the main contradiction is a broad one. The antitrust laws are now being used to force both "hard competition" and "soft competition." The collision (with businessmen caught in between) will be discussed in Chapter 6.

4. *The Morton Salt Case*[1]

In 1914 President Wilson urged Congress to pass some improvements in the antitrust laws. He wanted something clearer than the Sherman Act of 1890. Congress agreed and passed both the Clayton Antitrust Act and the Federal Trade Commission Act. Business people wanted something more definite about what kinds of competition were fair and what were not and, also, somebody to administer such a law. The Sherman Act was too broad a charter.[2] When a firm cut prices, for instance, it was hard to say whether this was fair or unfair competition, or in fact, whether it actually contributed to competition or detracted from it.

In the Clayton Act, Congress tackled for the first time the paradox in the system of free competition. That paradox is that when businessmen are completely free to compete, some get put out of business. So it looks like a poker game in which so many players may get wiped out that it may narrow down to no game at all.

The strength of the Clayton Act lay in Section 2, which said in part, "It shall be unlawful . . . to discriminate in price between different purchasers . . . where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." To "discriminate in price between different purchasers" means merely to charge them different prices for the same goods.

If the law, however, had stopped here, it might have called in question nearly all quantity discounts. Quantity discounts have long been a fundamental part of American business operations. Every housewife knows them in such forms as "One package, 10 cents; three packages, 25 cents." Virtually every business quotes them. Railroads use them in complicated form. Perhaps their most conspicuous use is by the electric power companies, whose rates vary as much as from ten cents a kilowatt-hour down to a third of a cent, depending on the quantity taken.

So Congress put a proviso in the Act which said "that nothing herein contained shall prevent discrimination in price . . . on account of differences in the grade, quality, or *quantity* of the commodity sold . . ."

The law so stood until 1936, with this blanket exemption of quantity discounts. But in the 1930's, two developments began to close in on this exemption. For one, the mail-order and chain stores began to blow a strong wind of new methods through the traditional methods of wholesale and retail distribution. They not only cut down retail selling margins, but also—through quantity buying and selling, among other methods—often by-passed wholesalers and were able to undersell independent retailers.

The other influence was the depression. The country became less interested in "hard competition" and wanted to get prices up, not down. With the National Industrial Recovery Act, Congress tried to support prices and protect competitors. And when NRA was struck down by the old Supreme Court, its spirit lingered on.

Organized associations of wholesalers, jobbers, and independent retailers began pushing various kinds of laws to stop the price cutting and to protect their margins.

Among these were state laws requiring minimum markups and prohibiting the use of "loss-leaders." One of the chief drives was for punitive state taxes on the large chains, aimed chiefly at the grocery chains.

It was almost inevitable, in the circumstances, that quantity discounts should come under fire. The first notable attack on them came from the Federal Trade Commission. It sued the Goodyear Tire and Rubber Company for its large sales, at substantial quantity discounts, to Sears, Roebuck Company. It argued that these discounts were illegal because the Goodyear people had not justified them on the basis of savings in cost.[3] But the Circuit Court threw this out on the ground that the quantity discount proviso in the Clayton Act did not require a cost-saving defense.[4]

Meantime, however, Congress sharply amended the Clayton Act in 1936, by passing the Robinson-Patman Act. It put into the law what the FTC had tried to enforce in the courts against Goodyear. It changed the quantity-discount proviso to read: ". . . that nothing herein contained shall prevent differentials which make only *due allowance for differences in the cost of manufacture, sale or delivery resulting from . . . differing* methods or *quantities . . .*"

This meant that quantity discounts would be illegal if, in effect, they hurt competition, unless they could be *justified on cost savings.* But this is a vastly oversimplified statement of the meaning as we shall see.

It was some time before the change got a thorough test in the courts. But in 1940 the Federal Trade Commission filed a complaint against the Morton Salt Company for certain quantity discounts. When the company resisted, the slow machinery of the law finally produced a Supreme Court decision on May 3, 1948.

This decision was so sharp and drastic that it went through the ranks of the antitrust lawyers almost like an earthquake. Even the FTC lawyers called it a "very radical interpretation of the law" and the Commission went so far, after reading the decision, as to say that it would not use all the powers it got from it.

The Morton Salt Company sold its top brand of table salt, called "Blue Label," on a standard quantity discount system. Its prices per case (after allowances for rebates and discounts) were as follows:

Less-than-carload purchases	$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive 12 months ..	1.40
50,000-case purchases in any consecutive 12 months	1.35

The two discounts here chiefly under fire were at the top and bottom. Less than one per cent of Morton's customers were so small they bought in less-than-carload lots, but the Court took them particularly into account. On the other hand the Court noted that "only five companies have ever bought sufficient to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country." (They were American Stores Company, National Tea Company, Kroger, Safeway, and A&P.)

The Morton Salt people had tried to show cost-savings to the FTC, in the original hearings, to justify these discounts. To most businessmen these discounts, including even the 25-cent lower price received by the big chains below the price to the scattering of less-than-carload buyers [15 cents or 10 per cent below the *carload* buyers] would seem easily justified on the lower costs of selling, billing, and so on. But the Commission ruled out this defense at the start as inadequate. So the question did not come up before the Supreme Court. (We shall consider later in this chapter the difficulties in the task of proving cost-savings to the FTC's satisfaction.)

Thus the main argument before the Supreme Court was whether Morton's discounts "had in fact caused injury to competition." That is, had they run afoul of the clause ". . . where the effect . . . may be substantially to lessen competition . . . or to injure, destroy, or prevent competition . . ."

The Supreme Court used to have the custom, when in doubt about the meaning of a law, to examine what was said in Congress about it during its passage.

The "new" Supreme Court, as told in previous chapters, has often departed from this custom. Thus when it apparently banned the use of basing-point pricing in the Cement case, it read back into the law what Congress had read out of it. But in the Morton Salt case the Court went right back to the Congressional record on the Robinson-Patman Act. And here it pointed out not only what a radical change the law made but also added its own "very radical interpretation."

The Court maintained: the legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competetive advantage over a small buyer solely because of the large buyer's quantity purchasing ability . . . (it) was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. The new provision . . . was intended to justify a finding of injury to competition by a showing of "injury to *the competitor* [author's italics] victimized by the discrimination."

The Court quoted the above from the report of the Senate Judiciary Committee on the Robinson-Patman bill and in a footnote it gave a longer quotation. The Committee said that the Clayton Act had previously been "in practice . . . too restrictive [on the FTC—ed.] in requiring a showing of general injury to competitive conditions . . . whereas the more immediately important concern is in injury to the *competitor* [author's italics]. . . . Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower."[5]

Then the Court said, "We think that the language of the Act, and the legislative history just cited, show that Congress meant . . . that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors."

But the finding that really jolted the lawyers of both sides was that the law "does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect . . . The Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition."

These three statements, put together, seem to add up as follows; that a quantity discount is illegal if there is a reasonable *possibility* that it has hurt a competitor. Now it was this little word "possibility" that astonished the lawyers because most had assumed that the law required a reasonable "probability." And there is a vast difference between "possibility" and "probability" in both common sense and in law.

Thus if a man drives off in his car, there is a reasonable *possibility* that he may have an accident—but (if he is a good driver) no reasonable *probability*. Most people would agree that if there were a reasonable *probability* of his doing damage, his license ought to be revoked. But if drivers' licenses were granted only to drivers who could prove there was no reasonable *possibility* of their hitting anybody, the roads would be empty.

Said Justice Jackson, dissenting,

> While I agree with much of the Court's opinion . . . I cannot accept its most significant feature, which is a new interpretation . . . that will sanction prohibition of any discounts "if there is a reasonable *possibility* that they 'may' have the effect to wit: to lessen, injure, destroy or prevent competition . . . I think the law as written by the Congress and as always interpreted by this Court requires that the record show a reasonable *probability* of that effect . . . The law rarely authorizes judgments on proof of mere possibilities. . . . This Court has, at least three times and as late as 1945, refused to interpret these laws as doing so . . . I know of no other instance in which this Court has ever held that administrative orders applying drastic regulation of business practices may hang on so slender a thread of evidence . . .

But the Supreme Court in the Morton Salt case made one more important decision which the lawyers are just beginning to discuss. It concerned "functional discounts." A "functional discount" is one that a buyer gets because he is a "wholesaler," a "jobber," or a "retailer." It does not concern quantities. In fact it tends to cross up quantities. Thus a chain buying 50,000 cases a year would be entitled (on a quantity discount basis) to a far higher discount than what most wholesalers or jobbers get, let alone independent retailers; but on a *functional* discount basis it would, since it is a retailer, have to pay more than the wholesaler or jobber (who bought in smaller quantities) unless of course its supplier could prove a cost-saving to the FTC.

Congress did not require functional pricing in the Robinson-Patman Act. But in the Morton Salt case the Supreme Court seems to have done so. Thus it said, "Theoretically, these discounts are equally available to all, but functionally they are not." And it approved those parts of the FTC order which "would absolutely bar (Morton) from selling its table salt, regardless of quantities, to some wholesalers and retailers at prices different from that which it charged competing wholesalers and retailers for the same grade of salt."

And it upheld the order which forbade Morton's ". . . selling . . . to any retailer at prices lower than . . . charged wholesalers whose customers compete with such retailer."

Whether or not the Supreme Court stretched the meaning of the Robinson-Patman Act here, the consumer seems like the goat. He is mentioned only once in the whole decision and there only by implication. That is where the Court criticized the fact that Morton's discounts "did result in price differentials between competing purchasers *sufficient to influence their resale price of salt* . . ." That means that the discounts were partly handed on to customers.

Why Morton Salt couldn't satisfy the FTC on the cost-saving of large orders may be partly explained by the following remarks of a well-known certified public accountant, formerly associated with the FTC.

> . . . It is in the distribution functions where most cost differences may be found . . . Distribution cost accounting is . . . still in its pioneering and experimental stages . . . a number of cost reports . . . have been rejected by the Commission for the reason that the costs had not been properly developed . . .
>
> Measuring factors such as salesmen's calls, number of

orders, numbers of invoices, number of invoice lines, etc., are often used . . .

The cost defense advanced in the Morton Salt case is a splendid example of the results of mere office calculations. . . . The FTC will not accept costs based largely upon unsupported estimates. . . . To try to make a survey of costs all over the country in the case of nation-wide distribution is an enormous task . . .[6]

5. *The Forgotten Consumer*

Long before World War I, when the Sherman Anti-trust Act was in its infancy, a group of retail lumber dealers were angered by a number of wholesale lumber men. The wholesale firms were edging into the retail business and they were not respecting the usual retail markup. In other words, they were cutting prices. The retailers, however, felt that they had a fair and proper place in the business, including markup, and that it should be protected.

At about the same time a leading patent medicine company, Dr. Miles, fell out with some of its distributors. They were not maintaining the retail price of Dr. Miles' medicine as the makers wanted them to.

The Supreme Court had little difficulty in striking down both of these efforts at what is now called "resale price maintenance." If distributors wanted to cut prices below the customary margins, that was all right with the court. It was a form of competition, and it benefited the consumer.[1]

Much more recently the Supreme Court made a similar finding in the Ethyl Gasoline case.[2] It found that Ethyl violated the Sherman Act when it refused "to grant licenses to jobbers who cut prices or refused to conform to the marketing policies and posted prices of the major refineries or market leaders among them." In other words, it here again struck down resale price maintenance.

These were Sherman Act cases. But recently, the Federal Trade Commission found resale price maintenance to be a violation also, of the FTC Act, as an "unfair method of competition."[3]

Times have changed. And in an astonishing recent case—the so-called "Detroit gasoline case"—the FTC reversed itself, in effect, and required a big oil company practically to enforce resale price maintenance on certain of its jobber-retailer customers. What happened in the case was this.

The Standard Oil Company of Indiana had in Detroit what is called a "dual distribution system." In other words, it sold, on the one hand, direct to several hundred retail gas stations; and on the other hand to four *jobbers*, some of whom not only sold to retailers but also sold *at retail*, that is, direct to consumers, through the jobbers' own gasoline stations.

Standard sold to the jobbers at 1½ cents a gallon lower than it sold to retail station-operators. This was a tank-*car* price to the jobbers, and a tank-*wagon* price to the retailers. This was not a wide spread. In fact a number of oil companies had been fined a few years earlier under the Sherman Act for holding the jobber-retailer spread at two cents.[4]

One of these jobbers, however, selling at retail through its own service stations, often passed on some of this discount to the drive-in customers, during some of the repeated price battles that raged in the Detroit gasoline business. And this tended to aggravate the competitive battle, pull down retail prices to the consumer, and hurt some of this jobber-retailer's competitors.

The FTC thereupon ordered the Indiana Standard company, among other things, "to cease dealing with any wholesaler who [it] knows, or should know, will not maintain [its] price to retailers." And the Circuit Court of Appeals upheld the FTC in this, saying that Standard might, "under the right to choose its customers, refuse to sell to wholesalers who sell to retailers below the price [it] makes to its own retailers."[5]

By odd coincidence a somewhat similar case was tried in Milwaukee at about the same time, also involving gasoline prices, but with a quite opposite outcome. Bear in mind that it was Detroit gasoline dealers who set off the above case and precipitated this FTC price maintenance ruling. But meantime the State of Wisconsin was winning a case *against* price maintenance in Milwaukee. The Milwaukee Retail Gasoline Dealers' Association had sent bulletins to its members suggesting resale prices, which were adhered to by more than 90 per cent of its members, while only 55 per cent of the nonmember dealers to whom these bulletins were sent, maintained the suggested price. The Wisconsin court found the Association to have conspired to maintain gasoline prices, fined it $2,000, and ordered its charter dissolved.[6]

The Wisconsin proceeding was brought under a state antitrust law. This law and the action taken under it were in line with the original spirit of the federal antitrust laws. But a remarkable change has taken place in the interpretation of the federal laws, even though on January 8, 1951, the Supreme Court reversed the Circuit Court in this case.

Thus Federal Trade Commissioner Lowell B. Mason recently said:

> I remember back in 1936 when the Department of Justice decided to stop restraints of trade in the distribution of sugar. The courts agreed with the Attorney-General's contention, and in Sugar Institute v. United States (297 U.S.553) condemned the practices of the Sugar Code as a compendium

of nearly every aspect of systematic restraint of trade that there was.

I am sure the Attorney-General will not take offense if I tell him that we (in the Commission) do not care whether he won the Sugar Institute case in the Supreme Court or not, because three months after his department obtained this signal victory over the sugar trust, Congress [in the Robinson-Patman Act—ed] gave us the power to protect not competition but competitors, and now the Federal Trade Commission can enforce the very thing the Sugar Institute code was condemned for doing. . . .[7]

And the President's Council of Economic Advisers said in its 1948 report: "The philosophy of the Sherman Act appears to be yielding to a policy of 'ethical competition' which does not differentiate between the stability of the individual firm and the stability of the total economy." And it went on to quote favorably President Woodrow Wilson's statement to the effect that he took off his hat to the businessman who by selling more at lower prices and by improving the quality of his product was able to take business away from his competitors. They observed that although warm admiration is often expressed for the policy of the Sherman Act, one exception to the antitrust laws after another has been enacted in recent years, notably the Robinson-Patman Act and the Miller-Tydings Act to permit resale price maintenance of certain branded products.

One of the most direct ways in which the old spirit of the Sherman Act is being changed is through the increasing enforcement of the "functional discount," by both the FTC and (as in the Morton Salt case) by the courts. A functional discount is one given by a manufacturer to a buyer, because of the latter's "function" in the distributive scheme. It is little more than resale price maintenance by another name. In effect, it freezes into the distribution system the traditional markups, from manufacturer, through wholesaler and retailer, to consumer. Thus, if the final consumer is expected to get a thing for a dollar, the wholesaler may get it for 60 cents and the retailer for 80 cents. By freezing-in their markups, the discount tends to freeze these people into the distribution system.

Around such traditional discount practices the FTC has been, for some time, weaving a gossamer of restrictions to prevent them from being pared, reduced, or eliminated and the reduction being passed on to the consumer. Thus it has become legally dangerous to grant a discount to wholesalers so low that, as in the Detroit case, they can resell to retailers below one's own price to retailers. In this case, it was the retailers who were being protected. On the other hand the Morton salt decision made it dangerous to sell even to the most lush large retail account like that of a chain at a price which disregards the traditional difference between prices to wholesalers and those to retailers. In this case it was both the wholesalers and the small retailers who were being protected. Any price schedule today which can injure these two categories may now, by court-supported FTC finding, prove illegal on the ground that it "lessens" or "injures" competition.

The net effect is to preserve the wholesaler in his wholesaling and the retailer in his retailing. More than that, it keeps them from invading each others' territory. Most important of all, it retards the cost-cutting expansion of chains, mail-order houses, and other dual-function and multiple-function firms. Thus it tends to preserve what might be called a caste system in distribution, with each traditional function assigned a place and a markup. This new interpretation seems to steer toward the inclusion of various traditional classes of distributors in a new "welfare state" form of security.

In its concern for these functional markups, the Trade Commission goes even beyond the letter of the Robinson-Patman Act, though perhaps not beyond the spirit. The Robinson-Patman Act does not require them, except by implication in the case of brokerage fees. But the FTC is coming to require them. And, significantly, the Commission has picked, of two going definitions of functional markup, the one most likely to protect the inefficient or obsolescent middleman. For by one definition, the functional discount is based on the *service performed* by the middleman, such as storing, re-packing, keeping books, extending credit, and so on. But the Commission has chosen the second definition, in which the discount is given according to the middleman's traditional role—wholesaler, jobber, retailer—regardless of how comparatively useful he remains in the distributive scheme of things.

This can result in what might be called "phantom" markups, in which the buyer has to pay a price which includes a markup for the intermediate middleman even though there isn't any intermediate handler. This came out in the Morton Salt case, in which it appears that the company was ordered to quote prices to all retailers, big or small, *as retailers.* In such case the big chains, who do for themselves the equivalent of the wholesaling function, would nevertheless have to pay a price for their salt which would include a charge for the wholesaler. The manufacturer will thus be collecting a phantom discount from such big buyers, since he will be in effect charging a price which includes the services of a wholesaler, though the buyer performs these services himself.

In recent years the Federal Trade Commission has been paying more and more attention to *costs.* It seems to be moving toward a sort of cost-plus principle of pricing. This has begun to take shape in at least three major cases already. In the Morton Salt case, the result of the FTC's plea was that the price of salt must include the cost of the wholesaler's function, whether actual or not. In the Cement case, the result, in effect, was that the price must include the cost of the freight (in other words the seller was not allowed to "absorb" the freight charge by paying it out of his own pocket to get the distant business). And in the Detroit case again, the price was made to include what might be called a "proper" cost for the jobber's function (that is, the goal was to prevent the jobber from reducing his markup).

The relation between cost and price is a significant one. A sales manager will not consistently charge less than his known costs or consistently take a loss on business. He will, in many markets, charge a price well above his costs. But for various reasons he may shave that price down to a razor-edge above his estimated costs, to increase or to hold his volume of business.

Thus he may be willing to "absorb" freight to distant markets in order to get added business, which often may permit larger volume with resultant mass-production savings. He may offer substantial discounts for quantity sales, which also may save on selling costs, whether the quantity goes out all at once or over a period of time. And he may cut his price to the bone to meet a competitor's lower price and so hold on to his customers ("good-faith" price reductions).

But all three of these forms of price reduction have been endangered by the Federal Trade Commission: freight absorption in the Cement case, quantity discounts in the Morton Salt case, and cuts to meet competition in the Detroit gasoline case. In each case, the brake was put on price reductions explicitly for the protection of competitors who were small local producers in the freight absorption case and independent retailers in the Morton Salt and Detroit gasoline cases.

The Federal Trade Commission is here following the spirit of the Robinson-Patman Act. As the Supreme Court pointed out in the Morton Salt case, that Act was designed to prevent injury to *competitors*. And it was said of the bill in Congress during its passage in 1936:

> *Mr. Logan:* I might say that the bill is not aimed exclusively at chain stores. It applies to all large units which control great purchasing power.[8]
>
> *Mr. Edwall:* The bill is designed to accomplish what, so far, the Clayton Act has done in an important manner, namely, to protect the independent merchant.[9]

Federal courts support this attitude. Almost their entire preoccupation is with the competitor. The consumer and the general public interest go quite unmentioned, as anyone can see by reading the decisions, but the courts' concern for competitors goes to extraordinary lengths. It applies not only to present but to possible future competitors. The courts look out, not only lest existing competitors be actually injured, but lest there be a "reasonable possibility" that prospective competitors *might* be injured.

All this is done in the name of fostering competition, yet obviously this concern for *competitors* is bound to lessen the vigor of *competition*. If it is illegal for sellers to absorb freight to distant markets, the effect is to reduce the number of competitors who will try to sell in those markets and thus to encourage local monopolies. If it is legally dangerous to offer quantity discounts, then large buying organizations are partly excluded from the market.

And if, as the FTC successfully maintained in the Circuit Court in the Detroit gasoline case, it may be illegal to match a competitor's price if some one down the distribution line is hurt, then competition is obviously lessened.

The effect is strikingly like what is sought in the cartel system. The dictionary defines "cartel" as "an agreement between rival merchants to limit production or otherwise *temper the extremity of competition.*" The essential purpose of a cartel is to keep competitors from cutting each others' prices. The methods—dividing up of markets by percentage or territory, and so forth—are of less importance. The goal is to restrain disturbing influences, to stabilize prices, and to assure those in the business the comfortable feeling that their position is secure. This is the trend in present Trade Commission and Court interpretations of the Clayton Act, as amended by the Robinson-Patman Act.

The consumer pays the bill.

6. *Do We Really Want Competition?*

Economists have for some time been concerned about the high cost of distribution.

Back in 1939 the Twentieth Century Fund made a big study of these costs. In a preliminary release it said,

> About 59 cents of the consumer's dollar goes for the services involved in distribution. . . . In 1929 some $66 billion was paid by consumers . . . for finished goods, but . . . nearly $39 billion was the cost of distributing them. . . . Only $9 billion was for transportation . . . $1 billion for advertising, instalment selling, and other charges.
>
> Some $12.8 billion was for retail distribution, and about $7 billion was the cost of wholesale trade. In the same year the railroads took in less than $5 billion for freight, and the national farm cash income was only around $10.5 billion. In other words, the nation paid more for retail distribution than . . . to all its farmers, and more for wholesale distribution than for its rail freight bill . . .

Since then, the figures have at least doubled. Thus the Harvard Business Review said editorially in its May 1950 issue:

> It is generally estimated that not less than 50 cents of each dollar of the consumers' $128 billion spent in 1949 at retail was required to cover distribution outlays as distinct from production outlays. Of this it is entirely probable that retailing . . . requires on an average at least 25 cents.

As a matter of fact, in the case of the consumer's apparel dollar and household furnishings dollar, something like 33 to 36 cents is today required to cover the retailer's gross margin, of which incidentally less than 3 cents remains for the retailer's net profit after taxes.

These figures will indicate how much is at stake in the present interpretations of the antitrust laws. They seem to say that the American public spends about $60 billions a year to have the goods it buys moved, financed, displayed, sold, and delivered to it—perhaps $400 per capita or $1200–1600 per family, about evenly divided between retail and wholesale costs.

Until less than a generation ago, the "high cost of distribution" was something like the weather. "Everybody talked about it, but nobody did anything about it." Within the last 20 years or so, however, an amazing variety of new marketing and distributing operations have been developed, including corporate chains, voluntary chains, super-markets, and so on. A virtual revolution began to get under way. In any kind of revolution, even an economic one, somebody is bound to get hurt. And it was natural that some of the people in the line of fire should try to protect themselves by getting laws passed.

The amounts at stake are obviously huge. If, for instance, merchandisers with new methods drive down retail prices by only as much as one per cent, this would mean a total of over $1¼ billions. This is a painfully large figure to retailers. If their net profit margins are only around 3 per cent, this would clip off a third unless they too could cut their operating costs by a corresponding amount.

Some industries in this country have been regulated almost from time immemorial, such as railroads, light and power, and the telephone and telegraph business. Competition has been replaced with legal monopoly. This was done for the benefit of the consumer. The idea was that he would be better served by the economies of regulated monopoly than by the vigor of free competition. Perhaps a classic example was the merger, during the 1930's of Western Union and Postal Telegraph, enforced by Congress. The idea here was that the savings of a single system would outweigh the advantages of the stimulus of competition.

Since 1933, however, a new type of regulation has come into vogue, which is for the benefit not of the consumer but of the producer, that is, of competitors. It began with the National Industrial Recovery Act of 1933, with which Congress breached the antitrust laws and set up something designed to hold prices *up*, not down, and to protect competitors against the rigors of competition.

The NRA was outlawed by the Supreme Court, two years later. But its spirit lingered on. It appeared in the Guffey Coal Act of 1937, which aimed at "stabilizing" the soft-coal industry by limiting production and holding up prices, with the help of a heavy tax on coal sold in excess of quota. It carried a general antitrust waiver for producers who complied with its provisions. It had a statutory little brother in the state-enacted Kane Act for the anthracite industry.

In like fashion, the Emergency Transportation Act of 1933 created a railroad "co-ordinator" empowered to force operating economies on the railroads like the joint use of terminals. The Motor Carrier Act of 1935 required interstate truckers to get "certificates of necessity" from the Interstate Commerce Commission. And the Jones-Costigan Sugar Act of 1934, since renewed every three years, imposed quotas on both the import and domestic production of sugar.

All of the above, with the possible exception of the Transportation Act of 1933, were designed to prevent "ruinous competition" and thus were frankly aimed at protecting competitors from each other rather than at protecting consumers. They were set up on the principle of the cartel, rather than on the philosophy of the antitrust laws. But, perhaps, the outstanding example of the new economics was in the farm program, including the Agricultural Adjustment Act of 1933 and the Farm Marketing Act of 1938, with acreage allocations and the more drastic marketing quotas eventually applied to cotton, wheat, tobacco, peanuts and rice.

It was not surprising, in this political climate, that the distributing industry should push similar proposals. Distributors, too, were under heavy competitive pressure, not only from the depression, but from the new mass-distributing, cost-cutting methods being introduced into distribution. Backed by retailers' and wholesalers' organizations, there came a wave of state minimum mark-up laws, patterned on the old NRA grocers' code. There was another wave of state laws permitting resale price maintenance on trademarked and branded goods, patterned on the old NRA druggists' code, and topped by the Miller-Tydings Act. This Act was a rather incongruous amendment to Section One of the Sherman Antitrust Act and it permitted the movement, in interstate commerce, of goods sold under these state resale price maintenance or so-called "fair trading" acts. Punitive taxes on chain stores were also pushed through many state legislatures.

But the outstanding piece of legislation was the Robinson-Patman Act of 1936, amending the Clayton Act of

1914, originally sponsored in Congress by the United States Wholesale Grocers Association and the National Association of Retail Grocers. The sponsors of the bill were perfectly frank in saying that it was aimed at the chains; the latter retorted that it was a featherbedding device for wholesalers, jobbers, and retailers.

It took a number of years for the implications of the Act, which like the Clayton Act is administered by the Federal Trade Commission, to become evident. The Commission lawyers have stuck to the spirit of the Act, and, going even further, have pursued the spirit of the original bill, which was much modified in its passage through Congress. The purpose of the sponsors, and the evident goal of the FTC lawyers, has been to tighten up the price-discrimination features of the original Clayton Act, broadening the circumstances in which it is illegal to cut prices to one customer below another's and narrowing the circumstances (quantity discounts, "good faith" meeting of competitors' prices) in which it is legal. With a sympathetic federal court interested almost solely in the "struggling competitor" rather than the public, the FTC has achieved phenomenal legal success, in the Morton Salt case (quantity discounts), the Cement case (freight absorption), and the Detroit gasoline case ("good faith" price reductions).

An amusing angle of the situation appears in the efforts of the lawyers of the big chains and other mass distributing agencies to find ways to get around the law. In Chapter 3 it was reported how various government officials and Congressmen wanted the antitrust laws to remain "fluid" lest New York antitrust lawyers find ways to get around them. The implication was that these corporate attorneys were ceaselessly on the search for ways to restrain trade and raise prices. Thus the Chairman of the House Judiciary Committee—". . . I would vigorously oppose any antitrust laws that attempted to particularize violations. . . . Otherwise . . . the process would become a rat-race between the monopolist seizing upon omissions and the Congress trying to fill them into the law. . . ." The facts run the opposite way. For although high-powered batteries of corporate lawyers do ceaselessly search for ways to get around the law, what they are looking for are ways to release trade and cut prices to the consumer, without incurring a violation. For as the law is now written, interpreted, and enforced, almost all price reductions skirt the narrow edge of legality and verge on being bootleg. This is an odd and unfortunate thing to have to say about the antitrust laws.

Some antitrust* lawyers are now minded to recommend three important changes in corporate selling policy that would, to some degree, release the sales departments of the more aggressive companies from the new restraints imposed by these recent laws and interpretations.

It has become potentially embarrassing, under the ruling of the Detroit gasoline case, to sell to both wholesalers and retailers in the same area. A company that does this may, like Indiana Standard, incur the unpleasant choice of violating the Sherman Act by insisting that its wholesale customers maintain resale prices, or of violating the Robinson-Patman Act by letting them cut as they will. There is no such problem for a company that sells only to wholesalers or only to retailers.

* For purposes of brevity, the phrase "antitrust lawyers" will be used occasionally in the text to refer to privately employed lawyers who specialize in the antitrust laws, and the phrase "Antitrust lawyers," when occasionally used, will refer to the government lawyers of the Antitrust Division of the Department of Justice.

Secondly, since the Morton Salt case, embarrassment may result if a company sells in both small and large quantities. The discount for the larger quantities may not please the FTC. There is no such problem for a company that sells only in small or in large quantities.

And thirdly, following the Cement case, a company may invite legal action if it sells cement, steel, sugar, or other bulky standard commodities both at a distance and near the mill. If it absorbs freight to get into a distant market, its action may come to the FTC's attention as violating the FTC's idea of different "mill-net" receipts as being a geographical price-discrimination against nearby customers.

The simplest solution a company can embrace, to avoid these problems, is to "integrate," that is, to buy or build its own equivalent of the wholesaler and the retailer, so that it is a complete and single corporate unit from the factory to the consumer. Thus it could bypass not only the costs but the legal hazards of dealing with the middleman or the retailer. In the case of freight absorption, the answer would be "horizontal integration"—the purchase of mills in distant markets. But the government lawyers and the people who framed the Robinson-Patman Act have foreseen this kind of evasion. As related in Chapter 14, integration of production and distribution is, also, frowned upon.

The ultimate consumer has had little representation in this long political struggle. He has seen it first face-to-face in the publicity fight of the A&P. But in the last analysis, it may be the consumer who will answer the question, "What kind of competition do we want—hard competition or soft competition?"

7. *Mousetrap Maker's Hazard*

The year 1888 saw two things happen of importance in American history. Few people probably noted them at the time. In those days of gaslights, handlebar mustaches, sideburns, hoopskirts, and antimacassars, the chief national news was what President Cleveland and Congress would do about the tariff and silver.

But in that year, the Standard Oil Trust was formed, to control petroleum refining in the United States. And a half-dozen men, after raising $20,000, started commercial production of aluminum in a corrugated-iron shed with a dirt floor in Pittsburgh. Aluminum was then selling at $8.00 a pound. The midget Alcoa (Aluminum Company of America) produced its first specimens in the fall. Output averaged less than ten pounds a day at the start. The hard-working founders locked up the product each night for safety in the office safe.

The men that put together the legal device of the Standard Oil Trust and the men that refined the first aluminum started forces that have grown and enlarged down the decades, until they finally met head-on a few years ago.

The gist of the Oil Trust plan seemed a good one at the time. It was much like the modern cartel, or the modern ideas of the FTC lawyers, to soften the effects of hard competition. But it helped to raise the political storm which produced the Sherman Antitrust Act of

1890. The gist of the Alcoa idea was almost the opposite. It was innovation. The idea was to develop something new and, as it developed, to keep it always new, cheap, desirable, and ahead of competitive products. Both of these ideas were typically American; and still are. The one was conservative of values and the other, in the final analysis, destructive of commercial values.

By the late 1930's the founders of the Aluminum Company of America had cut the price of aluminum to 20 cents a pound and, raised its production to over 300,000,000 pounds a year. They had developed markets for it successively in novelties, in the "quieting" of molten steel, in bicycles, saucepans, high-voltage wires, and airplanes. In so doing they pushed and intruded themselves into the markets of the men who sold special steels, copper and other nonferrous metals, and had, also, in the every-day language of business, "created new markets," by repeatedly lowering price and developing new uses.

They worked at is so hard that for fifty years their Alcoa was the only maker of aluminum in the United States. Other people, including the automobile companies, who have both engineering know-how and long pocket-books, considered going into the business and decided they could get their aluminum cheaper or at less risk from Alcoa. In 1938, two years before the national defense program started, Alcoa embarked on a $200,000,000 war-expansion program.

In 1937 the Antitrust Division of the Department of Justice sued the Aluminum Company of America for violation of Section 2 of the Sherman Antitrust Act, or in other words, for being a monopoly, in the aluminum business. Alcoa had already run afoul of the Sherman Act in 1912, and signed a "consent decree" to stop certain practices. And thereafter it had retained a battery of lawyers to keep it on the straight-and-narrow path of the antitrust law. They read all the Supreme Court opinions, and advised the company accordingly.

Up to the late 1930's, or until the reconstitution of the present "new" Supreme Court, the top court of the land, in interpreting the Sherman Antitrust Act, had stuck to "abuses" and "predatory tactics." As Chief Justice Stone said, the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.

"The end sought," he went on, "was the prevention of free competition in business . . . which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." [1] The Alcoa lawyers presumably relied on the federal courts' continuing to take the same view of the Sherman Act. They were due for a jolt.

The trial started on June 1, 1938, and ended August 14, 1940. It is said to have been the longest trial, up till then, in the history of the world. Testimony and argument took 364 court days. (This was near the eve of Pearl Harbor, Alcoa had its hands full with defense business, Alcoa top executives had to cool their heels in court, and it was fortunate at least that the company had started its expansion program two years earlier.) The court record reached more than 40,000 *pages*, plus nearly 10,000 *pages* of exhibits. The transcript weighed 325 pounds, and the final record was printed in 480 *volumes*, containing an estimated 15,000,000 words, or more than 30 times as many as *Gone with the Wind*.

An amusing account of the trial and circumstances was given in the *New Yorker*.[2] It said:

> From the narrow-minded legal point of view, the trial was a set-back for [Thurman] Arnold [head of the Antitrust Division]. There were about a hundred and forty points involved, and he lost by the score of 140–0. All the charges of German domination, international conspiracies, unfair treatment of competitors, and excessive prices were swept aside.
>
> In a practical sense, however, Arnold was victorious. He forced Alcoa to spend more than $2,000,000 to defend itself. Few corporations can afford to spend $2,000,000 or any substantial fraction of that sum to defend an antitrust suit, whether groundless or not.
>
> The $2,000,000 has been only a part of the penalty which Alcoa paid for resisting Arnold. The officials of Alcoa should have been spending all their time during the last three years increasing the output of aluminum, but they have been compelled to devote half their time to disproving Arnold's charges.
>
> Alcoa has suffered other indirect penalties. Using the disproved charges as if they were proved charges, Arnold led a furious newspaper campaign against the Aluminum Company. Other government officials backed up Arnold. Jesse Jones loaned about $100,000,000 to Alcoa's competitors. Harold Ickes held up an application of Alcoa for water power for making aluminum. Senators and columnists joined the hue and cry. The public has been taught that aluminum is the lowest and most degraded substance in the table of elements.

Antitrust appealed its defeat in the trial court.

"Since the Supreme Court was unable to obtain a quorum to sit on the appeal, (320 U. S. 708) the case was certified to the Circuit Court of Appeals (C.C.A. 2) on June 12, 1944, (322 U. S. 716) which reversed the decision of the lower court and held that the Aluminum

Company was an illegal monopoly at the time of trial . . ."[3]

Alcoa lost in the Circuit Court on a single count of the one hundred forty, that it had "monopolised" the market for virgin aluminum ingots.

A recent statement by a group of top antitrust lawyers stated,

> For a long time, it was supposed that unless size were obtained or retained by an inherently illegal means or by an actual abuse of overpowering strength in the competitive field, growth in size was not a violation of the [antitrust] law.
>
> It was supposed that a concern might engage in actively enlarging its market and the scope of its business, and go ahead by its efficiency, foresight, technical improvement, accumulation of its resources, and ability to attract additional resources, as far as these efforts could take it—and we had language from the Supreme Court that would seem to justify that concept.
>
> Now the Aluminum case looks the other way—even though a concern has exercised only that type of business energy and sound judgment which, act by act, is beyond reproach, in seizing upon opportunities for the development of the size and scope of its business. . . .[4]

The Circuit Court of Appeals—Judge Learned Hand writing the decision—stunned the entire legal fraternity, from Pennsylvania Avenue to Forty-Second Street, with its decision.[5]

Since this important opinion is in *legalese*, the reader who is not also a lawyer should read it slowly. For these words sent a thrill through the hearts of government lawyers, and a chill through the hearts of business lawyers.

(And the nontechnical or nonlegal reader should know beforehand that the phrase "to exclude competitors"—or any tense or gerundive of it—means, by previous Sherman Act interpretations, to violate the law).

Said the Court: "[*Alcoa*] *insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.*"

And the Judge went on to say, "Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' " [6]

In effect the Court said that Alcoa excluded competitors by being so efficient. This was a new view of the meaning of the Sherman Antitrust Act. Up to this opinion (which is now the law) if you excluded competitors, in the eyes of the law, you did so by roughing them up, buying them out, intimidating them, or in some such way as by "manoeuvres not honestly industrial" for getting them out of your way. Alcoa beat its competitors and potential competitors by keeping ahead of them. This was a new kind of crime. (This was perhaps also the legal basis on which the Department of Justice now says that "efficiency is no defense.")

The Court's opinion, incidentally, went at some length into the competition between virgin aluminum and scrap or used aluminum. They compete and, chemically, are the same. The Court found Alcoa's monopoly in virgin aluminum, and talked the rest of the company's competition away. In this connection, Alcoa's president recently stated that "aluminum competes with copper, zinc, steel, wood, plastics, and dozens of other materials." [7]

On the general subject, the New York *Journal of Com-*

merce said, editorially, (June 1,1950) that "The Sherman Act was not designed to punish dynamic progress, and to reduce competitors to a common level of mediocrity . . .

"To all appearances a new paraphrase is being substituted for Emerson's old maxim: Build a better mouse trap, sell enough of them, and Justice Department attorneys will beat a path to your door." The Justice Department attorneys have already begun beating a path to the door of other corporate better mouse-trap makers.

In 1925 the General Electric Company bought from the German Krupp company a flimsy patent on an inferior synthetic cutting material (tungsten carbide). Krupp had had the American patent. The product was cemented on the tip of machine-tool cutting arms to cut steel. It was the next hardest thing to a diamond. But it was difficult to make, difficult to cement on to the tool, and difficult to sell.

General Electric set up a wholly-owned subsidiary company, called Carboloy, Inc., to improve and sell it. Carboloy ran into a string of production problems and then into the depression; for eleven years it failed to make money. General Electric kept putting in more money, but the price was cut again and again. By the late 'thirties the thing was a technical and commercial success. It proved invaluable in World War II and production was multiplied by 44 between 1938 and 1942 to meet the demand. The Department of Justice, however, sued GE, Carboloy, Inc., and Carboloy's officers under the Sherman Act and won a conviction. The government lawyers asked for jail sentences, but the court would not go that far and let the defendants off with fines of $5,000 apiece.

Du Pont ran into similar trouble with cellophane. After spending millions on research and development of this wholly new thing, they put it on the market in 1926 at $2.65 a pound. Its success was such that the company subsequently cut the price 20 times in the next 20 years, down to 45 cents a pound. Demand grew to nearly $100,000,000 a year at the lower price and after the war Du Pont prepared to increase capacity still further to supply the growing market.

But the Department of Justice moved in and sued Du Pont under the Sherman Act for monopolizing cellophane. The Du Pont directors thereupon cancelled their expansion plans, feeling it would be poor practice, as well as unfair to their stockholders, to expand further an operation already charged with being illegal.

In consequence, cellophane remained scarce. Since Du Pont continued to sell it at a price based on costs rather than on what a hungry market would pay for it, cellophane went into a "gray market" at prices higher than Du Pont was charging. Du Pont had tried what might be called a resale price maintenance policy in reverse. In contrast to the resale price maintenance policy, which the FTC lawyers imposed on the Standard Oil Company of Indiana in the Detroit gasoline case, du Pont tried to keep the resale price of cellophane *down*, not *up*.

In 1950, the company ran full-page advertisements in the trade magazines of the principal industries using cellophane. One of these made the following astonishing statements:

> The Du Pont Company regrets that it is unable at this time to meet the growing requirements of its customers for Cellophane . . . Several years ago, Du Pont foresaw a substantial increase in the use of Cellophane and planned to build

additional plant capacity, to become available about the middle of 1949 . . .

Preliminary plans, estimates and investigation of plant sites were well under way when the Department of Justice brought suit in December 1947, charging that our position in the Cellophane business constitutes a monopoly.

. . . Pending the outcome of this litigation, it was considered unwise to proceed with the proposed construction.

Du Pont, therefore, actively sought to interest others in the manufacture of Cellophane, in order that additional film would be available to the trade as soon as possible. It required more than a year and a half to find a company willing and able to invest the large amount of capital—approximately $20,000,000—necessary to enter the field on an economically efficient basis.

Now, construction is under way on a new Cellophane plant, designed and being built by Du Pont for Olin Industries, Inc., at Pisgah Forest, North Carolina, to have an initial capacity of about 33 million pounds annually. All Du Pont Cellophane patents and know-how are being made available to them. It is hoped that this plant will be in production by the middle of next year . . .

8. *Opportunity for Abuse*

Many businessmen complain that the government lawyers are now attacking American businesses merely because they are big. They say that bigness in business is in itself being made a crime. They point to suits recently brought by the Antitrust Division for some form of break-up of the leading meat-packers, of the American Telephone and its manufacturing subsidiary Western Electric, of du Pont, General Motors and United States Rubber, of General Electric's Lamp Department, and of the New York Great Atlantic & Pacific Tea Company. "The Department of Justice, "they say, "wants to 'atomize' big business."

Justice Department officials deny this, over and over. As Attorney-General, the Present Justice Tom Clark told a Congressional Committee, "We have not attacked bigness—although we have been accused of it—because of bigness itself."[1] And former Assistant Attorney-General Herbert A. Bergson has said:

> We have never brought a case attacking bigness. . . . There is no case that we have filed, no position that we have taken . . . which provides any foundation for (the) belief . . . that our present antitrust enforcement program is a threat to mere size. . . . On the contrary, on numerous occasions as head of the Antitrust Division I have publicly stated that bigness is not an antitrust crime and that I will not bring a case predicated on bigness alone. . . .[2]

Strictly and legally speaking, the Justice officials are quite correct. They speak, in fact, by the book. The Supreme Court has specifically said that mere corporate size is not an offence against the Sherman Antitrust Act.[3] And this is one of its explicit findings which it has never explicitly reversed. Thus the Justice Department officials not only are safe in saying this, but they *have* to say it. If they said otherwise they would be called, promptly enough, by any number of members of the antitrust law bar.

But today the word of the law and the spirit of the law (as now interpreted) are not always the same. And in this case the businessmen who complain of the attack on bigness have something. The safety of a big company against antitrust prosecution today is something like what the geometry professors call a "variable approaching zero." What the Supreme Court has had to say about bigness can best be spelled out in its own words. They are the law, after all.

Over 30 years ago the Supreme Court stated categorically that mere bigness was not in itself a violation of the antitrust laws.[4] Twelve years later, however, the Court began chipping at this statement, or, so to speak, beating a path round it. Justice Cardozo, in the Swift case,[5] quoted the earlier opinion, but then added what lawyers call a "gloss" to it. Professional writers might call it a "throw-away line." He said:

> Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an *opportunity for abuse* [italics added] that is not to be ignored when the opportunity is proved to have been utilized in the past.

This language was used by Judge Learned Hand in the Alcoa case as a springboard from which to jump to the conclusion that Alcoa, because it controlled 90 per cent of the ingot market, was an unlawful monopoly. And he added the thought,

> Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of the possible cost, an organization of industry in small units which can effectively compete with each other.

The Court showed its feelings a little more in the Tobacco case.[6] It said,

> without adverse criticism of it, comparative size on this great scale inevitably increased the power of these three [tobacco companies] to dominate all phases of their industry. "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

By now the Court was moving steadily toward the idea that the Sherman Antitrust Act is one law for the big and one for the small. Two years later it said, "In determining what constitutes unreasonable restraint (of trade) . . . we look . . . to the percentage of business controlled. . . . Size has significance also. . . ."[7]

But it was the minority's opinion in this case that sent the shudders through the antitrust bar in New York. It was signed by four judges. And it said, or almost shrieked,

> "We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. 'The Curse of Bigness' shows how size can become a menace—both industrial and social. It can be an industrial menace when it creates gross inequalities against existing or putative competitors. It can be a social menace because of its control of prices. . . . Size in steel . . . is the measure of the power of a handful of men over our economy. . . . The philosophy of the Sherman Act is that it should not exist. . . ."

The trap was pulled, however, in one of the so-called "motion picture cases." Here the *majority* said, in the words of Justice Douglas (who also wrote the Columbia Steel dissent):

"It was said in United States v. United States Steel Corporation that mere size is not outlawed. . . . But size is, of course, an earmark of *monopoly power.*"[8] (italics added)

Now in this brief remark, Justice Douglas "said a mouthful." For he focussed here on something that the Supreme Court and the government lawyers have been doing in the last ten years, which many businessmen seem to have overlooked. These businessmen have been worrying about an alleged "attack on bigness." But they have been looking in the wrong direction, or using or listening for the wrong words. The Supreme Court has not condemned bigness as a "per se" or in-itself violation of the law at all. But it *has* meantime developed a vastly larger violation of the law, called "monopoly power."

This "monopoly power" is something that can be found wherever there is "opportunity for abuse." It is something that can be found in some of the smallest as well as in the biggest companies. Size is only an "earmark" of it. It can be found, if anyone wants to look for it, in the boy who sells the most and best lemonade at the fair-grounds for the least money just as easily as in the biggest corporation in the United States. The Department of Justice has just found it in the company that does the biggest business in live carp in Philadelphia.[9]

"Monopoly power" appears to be nothing more than *legalese* for "economic power," which is characteristic of many more companies than have bigness. How it came to be a violation of the Sherman Antitrust Act simply to have this "monopoly power" is an amusing story of legal semantics, or double-talk. It has been a fast job, too. It began with the Alcoa case, already described. The reader will remember that up to this case, when the courts said it was illegal to "exclude competitors," they meant this only in the sense of using rough stuff or "predatory practices." This meant things like price-fixing agreements,[10] production control agreements,[11] boycotts,[12] division of markets, or allocation of customers.[13]

In the Alcoa case the Circuit Court (with the later blessing of the Supreme Court) said in effect that it was just as bad to exclude competitors by *keeping ahead of them* as by "manoeuvres not honestly industrial."

That was Step One. Step Two came in the Tobacco case.[14]

The Tobacco case came up to the Supreme Court on the single question of whether the government lawyers, to prove a Sherman Act violation, had to prove that the defendants had actually excluded competitors. The Court said they didn't have to. It said so in these words:

> The question squarely presented here . . . is whether actual exclusion of competitors is necessary to the crime of monopolization. . . . Such actual exclusion is not necessary . . . provided [the defendants] . . . have such power . . . and the intent and purpose to exercise that power. . . . Neither proof of exertion of the power to exclude, nor proof of actual exclusion, of existing or potential competitors, is essential to sustain a charge of monopolization under the Sherman Act. . . .

The Tobacco decision, on top of the Alcoa decision, gave a heavy jolt to the antitrust-law fraternity. Although the Aluminum ruling said that an organization could violate the law by keeping ahead of competitors, this later decision inferred that it might violate the law even if it didn't keep ahead, but only, perhaps, in the eyes of the government lawyers, would like to (that is, by having the "intent"). In the Tobacco case the outside competitors, in the period of years under review, had more than tripled their share of the business, from around 9 per cent to around 32 per cent.

But the antitrust fraternity was due for a further jolt and it came soon in the Griffith case.[15] In this case the lower court had "found that no competitors were driven out of business, or acquired by appellees, or impeded in their business by threats or coercion." More than that, there was no charge of "intent." The Griffith movie-chain people had, according to the record, merely gone about their business of trying to make more money, to do more business, to make more money, to do more business, without hoping to hurt their competitors, or apparently even caring what happened to them.

Here the Court knocked out the requirement of "intent." Said Justice Douglas, for the majority, "It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results . . ."

And then he went on to say that "It cannot be doubted that the *monopoly power* [italics added] of [Griffith] had *some* [italics added] effect on their competitors. . ." And he sent the case back to the lower court with a pointed suggestion that the Griffith movie circuit be broken up.

Thus it seems that a company may now find itself violating the Sherman Act even though (1) it "excludes" competitors only by keeping ahead of them (Alcoa case); (2) it doesn't even keep ahead of them (Tobacco case); and (3) it doesn't try to (Griffith case).

Or to put it another way: In the old days, to violate the law, you had to have power, use it, and use it *wrongly* (unreasonable restraint of trade). With the first step of the change, you only had to have it and *use* it (restraint of trade). But today you need only *have* it ("monopoly power").

And the Court, with its ultra-sensitive feeling for competitors who might be hurt, does not think merely about actual competitors, already in business and suffering from the "hard competition" of a defendant company with "monopoly power." It thinks of imaginary or prospective ones. Thus, in the Alcoa case, the Judge said "It can make no difference whether an existing competition is put an end to or whether prospective competition is prevented." In the Tobacco case the Court said, "Prevention of all potential competion is the natural program for maintaining a monopoly here, rather than any program of actual exclusion." In the Columbia Steel dissent the minority spoke of "existing or putative competitors." And in the Griffith case the Court said that "the antitrust laws are as much violated by the prevention of competition as by its destruction."

This phenomenal concern of the Supreme Court about the fate not merely of flesh-and-blood competitors but of competing young companies yet to be born, is reminiscent of its attitude in the Morton Salt and Cement Institute cases, already discussed, about reasonable "possibilities" that some competitor, somewhere, sometime, might be hurt.

"Monopoly power" appears to have no other meaning than "economic power"—though even this is a vague term. And if this is so, it is a far more sweeping indictment than mere "bigness." Almost any company of any size can be shown to have some competitive advantage at some particular point or in some particular way.

The change in the law violates deep feelings and long-established principles of Anglo-Saxon law. For the law now says about business firms much the same as though common law and the statutory law of the States were changed to mean "The power to commit grand larceny may itself constitute an evil and stand condemned even though it remains unexercised." [16] And on such basis, any citizen who possesses the power to commit treason would be subject to arrest and imprisonment. Any firm with any kind of economic power is now, off-hand, in violation of the Sherman Antitrust Act. And if the analogy held, any citizen with so much as a fountain-pen might likewise be fined or jailed. "Intent" need not be shown. The police would have a field day. This is the dissolving of law.

9. *The "Virulent Growth of Monopoly Power"*

In 1937 business had been recovering for four or five years from the Great Depression of 1932 and 1933. Then, suddenly, it plunged. From September 1937 to March 1938, the New York *Times* index of business activity dropped four times as fast as its average 1929–1932 drop.

In April 1938, President Roosevelt sent a message to Congress asking it to look into the concentration of American industry. He intimated that it was getting worse and that it might be the cause of the "quickie" depression that had just come on the country. He mentioned a "concentration of private power without equal in history," which, he said, was "seriously impairing the economic effectiveness of private enterprise as a way of providing employment for labor and capital" and he asked for a "thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition."

In hindsight, it looks as though President Roosevelt both (a) set a fashion in economic "yakety-yak" which persists to this day, and (b) gave serious-minded people, to judge by the evidence, a totally misleading steer on the way things are going in business. Some snide observers in New York, in fact, claimed at the time that the President was trying to divert the blame for the unexpected depression (it did not last long however) from the Administration to the business community. This, however, has never been proved.

The idea that business is getting more and more concentrated has become politically valuable idiom in Washington in recent years. Thus for instance President Truman, in his election campaign of 1948, said "Great corporations have been expanding their power steadily. They have been squeezing small business further and further out of the picture. . . ."

And the President's Council of Economic Advisors, sometimes called the President's "captive economists," said in their third annual report, for 1948, that "Year by year, control of the market is passing more largely into the hands of the large corporations. . . . The process of expansion of large corporations by swallowing smaller firms continues, and the concentration of economic power becomes more intense."

And the Federal Trade Commission, in a report to Congress in the summer of 1949, warned that ". . . if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country or the government will be impelled to step in. . . ."

At about the same time as this report, the brilliant, likeable, economist-turned politician Senator Paul Douglas from Illinois was quoted in the press as saying, "Small private enterprises are being devoured by these industrial giants at an alarming rate. The area for free competition is being progressively narrowed." And the Chairman of the House Judiciary Committee wrote a letter to the editor of the New York *Times* (September 2, 1949) saying that "Bigness is getting bigger."

There is nothing in these statements. They are the purest mythology. They do not hold water either for the "long term" or for the "short term."

A recent Department of Commerce study of the fortunes of 1,000 American corporations between 1936 and 1946 showed that the 200 largest had not grown as much as the "800 others."

A Federal Reserve Board study published in January 1947, of the earnings of 2700 representative firms in the six years 1940–1945 showed that the small and middle-sized firms had a "relatively greater increase in sales, profits, and assets" than the larger companies; that little fellows with assets under $250,000 showed not only a larger rate of return but a larger increase in that rate during the period; and that in durable goods, the smallest producers' assets expanded 140 per cent, the medium-sized producers', 90 per cent and the biggest firms', 40 per cent.

Department of Commerce figures show that the number of separate business firms in the country, though dropping from about 3,300,000 in 1941 to around 2,800,000 in 1943, then rose to 3,868,000 in 1948, a new high record.

A study of the Research and Policy Committee of the CED (Committee for Economic Development) in 1947 came up with the following conclusions: ". . . (2) the trend of small business activity shows an increase numerically and in proportion to population compared with 1900. . . . (4) Although the growth of big corporations has crowded out some small business concerns, it has created new opportunities for others, such as the sales agencies, repair shops, garages, parts manufacturers, and other satellites that have grown up around the automobile industry. . . ."

Commerce Department figures on national income and "gross national product" show that the income going to the category of "Business and Professional Income" (which covers unincorporated businesses) has more than held its own in recent years, having shown a proportionate increase second only to farm income, greater than corporate income, and vastly greater than "Rental Income of Persons," "Net Interest," or "Dividends and Personal Interest Income."

This might be called the "short-term" story, covering the last decade or two. The "long-term" story runs even more the opposite of the fashionable Washington folklore. Thus for instance in oil, the country's largest competitive industry in terms of assets, the Standard Oil Company at the time of its court breakup in 1911 did 85 per cent of the country's refining. Today its nine successor companies do less than 40 per cent. In steel, perhaps the country's most basic industry, the United States Steel Corporation nearly 50 years ago did nearly two-thirds of the country's whole steel business, but today, despite its growth, does only around one-third. In automobiles, perhaps the country's most dramatic business, the Ford Motor Company thirty years ago was far and away the biggest producer, but it lost its lead in the late 1920's to General Motors, while Chrysler slipped into an important part of the business.

An article in the *Christian Science Monitor* of April 16, 1949, headed, "What Will Insurance Firms' Probe Develop?" said "There are seven times the number of legal reserve (life insurance) companies in business now as in 1900 and 121 more than listed at the end of World War II, and the total rose by 35 during 1948. Moreover the larger companies have not grown at as rapid a rate as the smaller ones. The largest 12 companies . . . have expanded since 1906 at a rate only two-thirds that of the others, while the assets of the largest four New York companies . . . increased in the same period at a rate only half that of the rest of the business. . . ."

A favorite citation of the Washington alarmists is a recent report of the Federal Trade Commission on "The Concentration of Productive Facilities, 1947, in 26 Selected Industries." The FTC's report is purely a "still." It is a snapshot, not a moving picture. It does not show or consider whether the "selected" industries are more concentrated now than ten, twenty, or thirty years ago. Most are less so. American industry is less "concentrated" than ever before.

Perhaps a good summary of the trend may be found in an article in *Harper's Magazine.*[1] It said, and this quotation does not do it justice, "All new industries start out with a multitude of small companies: television today, the radio-set industry 25 years ago, the automobile industry in 1905. After ten or fifteen years, the field has sharply narrowed . . . one of the leaders is usually out front at this stage. . . . Another fifteen years later . . . the earlier leader has lost ground appreciably. . . . From then on industry leadership tends to become more and more widely dispersed. . . ."

Many tricks are played with statistics in this Washington offensive against the "Bigs," who are supposed to be getting bigger, while the "Smalls," get smaller. A neat one was turned, for instance, by Senator Joseph C. O'Mahoney, in the *Readers' Digest* of April 1949. He said "The most exclusive club in the world is . . . the "Billion-Dollar Club" . . . corporations with assets of more than one billion dollars. In 1929 this "club" had 20 members; in 1939, 28; in 1945, 40. Today it has 48 members. . . . As such corporations increase in numbers and in assets, the people, through their city and state governments, become less competent to cope with them and so turn to the federal government. . . ."

People who live near tideland can see the catch in such figures. At five o'clock there may be 20 islands showing; at 5:05, when the tide has dropped an inch, there may be 28 showing, and 20 minutes later there may be 48 rocks in view. Between 1929 and 1949 the national income tripled. If there were not many more corporations now with assets of over a billion dollars than in 1929, it would be a wonder. The Senator could have made a much more astonishing statement if he had chosen to use gross sales as his measure. In 1929 there were only two corporations with gross sales of over a billion dollars;[2] by 1949 this figure had jumped to 17. This doesn't prove anything more than his figures, however. Big-company figures are getting bigger. So is everything else. As the farmer in the story said, "Everything seems to get more so."

One reason why the big companies don't keep on getting so much bigger that they crowd out everybody else (as the elephants would, by a version of Darwinian theory, in a few generations), is that many of them fail. Thus "Of the 100 largest industrial corporations in 1909, over 60 were no longer in the giant class in 1935, and at least 26 were outright failures. . . ."[3]

But the main reason for disregarding the Washington cries about the "growing concentration of industry" is that they are chiefly "puff." Scrutinized by the same careful standards that the Federal Trade Commission applies to cigarette advertising, they would be ruled out of bounds in no time.

They are somewhat like the assertions the government lawyers made in the A&P case, to be discussed later. The

Antitrust Division lawyers described the A&P picture as one of an "ever-broadening . . . spiral of monopoly and trade restraint in the hands of A&P." But meantime A&P's share of the retail grocery business was dropping from around 11 per cent to around 7 per cent.

Another statistical trick sometimes used—and a good illustration of what statistics can be made to do in the hands of those who want to make something out of them—is a very simple one. Take the present biggest companies in an industry. Add up their share of the industry's business. Then compare it with what they did thirty years ago. It will *always* show that they do a larger share now than then—no matter what industry is taken or how long a period is used. Why? Because today's biggest companies are the ones that have grown the most. Some of them were unheard of 30 years ago. On the other hand some of the greatest among corporations of 30 years ago are now gone.

10. *Oligopoly*

President Harry Truman wrote, in the summer of 1949, to the Chairman of the House Judiciary Committee saying,

> There is no more serious problem affecting our country and its free institutions than the distortions and abuse of our economic system which results when . . . whole industries are dominated by one or a few large organizations which can restrict production in the interest of higher profits and thus reduce employment and purchasing power.

The Chairman of this Committee, Representative Emanuel Celler of Brooklyn, New York, said a few months later:

> There is a growing tendency for a Big Three or Big Four to dominate an industry and throttle competition. . . .
>
> Where you have these companies that are large, there may be a semblance of competition, but actually there is very little, because the Big Three or Big Four or Big Five or Six don't have to meet in a smoke-filled room to fix prices and production. One sets a price and the others follow. The effect of a conspiracy of administered price is present but there may be no actual agreement or evidence of a violation of the Clayton or Sherman Act.[1]

And shortly afterward, the head of the Antitrust Division told a Congressional committee:

> Monopoly power in this nation seldom shows up in the form of one huge corporation dominating an entire industry. Instead it is to be found in those industries controlled by a

few large companies—the Big Threes or the Big Fours—following policies and practices which avoid any real competition among themselves and which at the same time enable them to maintain their dominant positions.[2]

These are representative expressions of a type of criticism aimed at some industries in the last decade.

One must note that this is a quite different attack from the one discussed in the previous chapter, on the "virulent *growth*" of monopoly power. It is not, here, a claim that industry is *getting more concentrated;* it is a claim that (whether it is getting more so or not) it is *already too concentrated*. The two criticisms are often expressed together and thus tend to get confused in people's minds. But they must be distinguished carefully and considered separately. For it is conceivable that even if American industry is not getting *more* concentrated, it is nevertheless *too* concentrated. The difference is like the difference between whether a man looking at a Great Dane should say, "That dog is *growing too fast*" or "That dog is *too large anyway*."

The favorite source book of the people who say industry is already too concentrated in too few companies is the brochure put out by the Federal Trade Commission in 1949, already mentioned.[3] The FTC found "extreme" concentration in aluminum; tin cans; linoleum; copper smelting and refining; cigarette manufacture; distilled liquors; plumbing equipment and supplies; rubber tires and tubes; motor vehicles; biscuits, crackers and pretzels; farm machinery; and meat-packing. It listed primary steel as an example of "high though not extreme concentration," with the largest company owning about 29 per cent of the assets, the largest two 42 per cent and the largest six about 63½ per cent.

These who say that American industry is "too" concentrated generally base this criticism on two grounds. Their idiom centers around two phrases: "identical action" and "administered prices." Both of these are unquestionably commonplace characteristics of those American industries where a few companies do a large share of the business. Hardly anybody argues over the *facts.* The argument is over whether they are bad or not. For most industrialists who follow the soundtrack of this argument feel that the "concentrated" industries are on trial for their virtues, not their vices.

"Identical action" is our old friend *matched prices.* Most businessmen charge the same price for the same goods at the same time and, when they change, they change en masse. More than that, they generally quote prices on the same basis or from the same place, and offer the same discounts and charge the same premiums. When anybody in the business, who is important, either cuts or raises prices, then, either the rest follow along, or else the company that made the change gets back into line. A company that charges more than its competitors for the same goods will make money (for a time) but lose business, while a company that charges less will gain business but lose profits.

The attack on business for quoting the same prices seems to have started in the early 1930's. The then Secretary of the Interior, Harold Ickes, wanted to build a dam and asked for bids from the cement companies. When the bids were opened, they were identical down to the penny and decimal point. To most businessmen this could mean severe competition. It also, however, looks like collusion. To Mr. Ickes it looked like collusion or conspiracy. He said so quite loudly.

"Administered prices" take perhaps a little more explaining. In the stock market the price of United States

Steel or General Motors varies from hour to hour and often from minute to minute. The specialists on the floor of the New York Stock Exchange who "keep the book" on these stocks vary their quotations instantly with the ebb and flow of incoming orders to buy or sell. This is an "auction market," and its prices might be called the opposite of "administered prices." The same is true of the prices of cotton futures on the New York or New Orleans Cotton Exchanges or of grain futures on the Chicago Board of Trade. On the other hand, the price of automobiles does not vary from minute to minute or even from week to week. It is set by the makers, often before the first car of the new model comes off the assembly line, after they have carefully figured such things as cost, volume, competition, demand, and so on. When they have set it, they don't change it if they can help it. This is an "administered price."

Probably more prices are determined this way than on the auction basis. Railroad fares and electric power bills are computed on the same basis until and unless strong forces change them. Wage rates are fixed for a year or more. The government itself, at Congress' behest, holds the support price or loan value of farm products at fairly steady levels.

Criticizing "administered prices," Mr. John D. Clark, one of the three members of the President's Council of Economic Advisors, told a Congressional committee,

> Where three or four large firms control 70 per cent or 80 per cent of the market, each manager knows that market price will be materially affected by his decision about the volume of his production, and he knows that each of the others has the same understanding. Each restrains his impulse to grow when business is booming and keeps his expansion within limits which will protect the market price.

> When prices weaken, each reduces his production and employment rather than his price, confident that each of the others will do likewise.
>
> That may be prudent and it may be good business, . . . but it is not the practice of a competitive business . . .
>
> . . . there need be no collusion. Inherent in the administered-price situation is the failure of the forces of competition to work effectively, and the remedy must be found by attacking the structure of the industry . . .[4]

"Price leadership," also under attack, is a term easily understood. When an industry is under pressure either to lower or to raise prices, some leading firm takes the plunge and makes the cut or the increase. It isn't always followed. Usually it is and the rest of the industry goes along. Sometimes a second-string company will make the first move. This, too, may be followed, or may not be. There have been dramatic cases, throughout the last decade, in such major industries as petroleum and steel, in which two astute managements have differed in judgment on major questions, when the pay-off was price. Thus, for example, a few years ago, two leading oil companies took different views of the prospective supply and demand for crude oil. One raised its posted price, the other lowered it. Within a few months one proved very right, the other very wrong.

The gist of what the critics of the Big Three's and Big Four's claim is that these big companies don't really compete with each other, that most of the time they charge the same prices, that they do not always cut prices to follow down a shrinking market, and that they play "follow the leader."

The Supreme Court has greatly eased the way for this idea. It has done this by greatly widening its idea of "conspiracy" as this applies to the Sherman Antitrust Act.

Section One of the Sherman Act forbids "Every contract, combination in the form of trust or otherwise . . . or conspiracy, in restraint of trade or commerce . . ." And Section Two says that nobody ". . . shall . . . combine or conspire with any other person . . . to monopolize." The Act was thus aimed at "any planned course of common action, understanding, agreement, combination, or conspiracy" in restraint of trade, as the Federal Trade Commission has recently worded it.

It was originally aimed at the "trusts," as its title indicates. When people said "trust" in those days it was no mere figure of speech or epithet as it usually is today. The "trust" was a legal device of the 1880's, as fashionable then as handlebar mustaches (but now as obsolete). Men who owned stock in competing companies would turn the voting rights in that stock over to a small group of "trustees." These trustees could then dictate the policies of a whole industry, the usual aim being to hold prices steady and choke off ambitious price-cutting competitors.

These "trusts" were outlawed by the Sherman Antitrust Act, and in a decade or two went the way of the buffalo and the dodo.

For a time, however, they were replaced by such things as the "Gary dinners," at which Judge Gary, of the United States Steel Corporation, would announce what "Big Steel's" price policy would be. The representatives of other steel companies present understood that that was to be their policy also—"or else—."

The Supreme Court long ago ruled out such transparent (though fragile) forms of conspiracy, in a number of cases such as that of "Trenton Potteries," [5] in which the competitors agreed to stick to "fair prices." But it still considered legal the common practice in many industries in which some company usually has "price leadership" and competitors generally (though not invariably) follow the leader for obvious and above-board competitive reasons. For example, in the early 1920's the Department of Justice, under Attorney General Daugherty, claimed that if competitors charged the same prices or used the same methods of quoting prices, this was against the Sherman Act; but the Supreme Court said no, it wasn't.[6]

But the "new Supreme Court" soon began to show quite different feelings. It did so in two ways: by broadening its ideas of "conspiracy" and by taking the historic brakes off the use of "circumstantial evidence."

The dictionary defines "conspire" as "1. To make an agreement, esp. a secret agreement, to do some act, as to commit treason or a crime, or to do some unlawful deed; to plot together. . . . 2. To concur to work to one end. . . ."[7]

As for the rule on "circumstantial evidence," it is known to every reader of murder mystery stories. It comes down from centuries of Anglo-Saxon common law. It is the rule that evidence, to prove guilt, can have only *one possible* interpretation: guilt. It cannot have an alternative interpretation: innocence. The hero-detective must, when he adds up the evidence in the last chapter, show not only that it proves a certain person *guilty*, but that the evidence *cannot* be added up or interpreted in *any other way*. There must be "no two ways about it." And that a man is "innocent unless proved guilty" of a crime is a commonplace and is common law, in English and American courts.

But in the Interstate Circuit case of 1939, involving an alleged Sherman Act violation, the Supreme Court said, "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." (This prompted three dissenting Justices to say that this "went far beyond anything this Court has ever decided.")[8]

Says a New York antitrust lawyer, ". . . similarity of action of competitors has never, standing alone, been sufficient to sustain a charge of conspiracy. Within the past decade, however, the Court has moved more and more in the direction of holding conspiratorial any common action engaged in by competitors in the same field. In the recent Gypsum case this was carried to an extreme when the Supreme Court held that the mere fact that several companies accepted similar license agreements from a patentee, knowing that other companies had accepted licenses containing price control provisions under the same patents was . . . prima facie evidence of conspiracy . . . if applied to antitrust cases generally this rule of 'parallel action' would make the finding of conspiracy a matter of rote."[9]

But it was in the Tobacco case[10] that the Supreme Court really gave the works to the Big Three's and Big Four's of American industry. Since then it is not merely the first or leading corporation in an industry, or an enterprising monopoly like the Aluminum Company of America, which can have the legal rug pulled out from under it by the new Sherman-Act interpretations. In any given industry not only the first but also the second, third, and perhaps (lawyers are not sure) even the tenth or twentieth biggest company can now, it seems likely, be caught in the drag-net of a "monopoly-power" charge.

The Tobacco case was in some senses a confusing one. The three biggest cigarette companies, American Tobacco (Lucky Strike), Liggett & Myers (Chesterfield), and R. J. Reynolds (Camel), were indicted in Kentucky in the tobacco-farming country, where a jury found them guilty, under the Sherman Act, of conspiring to restrain trade. The case did not go up to the Supreme Court on the conspiracy charge at all. It went up on the single question, already discussed in Chapter 8 of whether the possession of power to exclude competitors was enough to violate the Sherman Act. But the Supreme Court, as some antitrust lawyers in New York put it, apparently "went out of its way" to discuss also the conspiracy charge, and to give the jury-finding its blessing.

The Court stated, "This particular conspiracy may well have derived special vitality in the eyes of the jury, from the fact that its existence was established not through . . . a formal written agreement, but through the evidence of widespread and effective conduct on the part of (the companies) in relation to their existing or potential competitors . . . entirely from circumstantial evidence, the jury found . . . a combination or conspiracy. . . . No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential . . . violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in an exchange of words. . . "

And then the Court added: "With this *background of substantial monopoly* [italics added], amounting to over two thirds of the entire domestic field of cigarettes . . . and with the opposition confined to several small competitors, the jury could have found from the actual operation of the [companies] that there existed a combination or conspiracy among them not only in restraint of trade but to monopolize a part of the tobacco industry . . ." Friends and foes of business seemed to agree on what the Supreme Court meant in this case.

Said a critic of American business, as it is now organized, "With revolutionary speed . . . the doctrine of the Sherman Act has lately been transformed. . . . When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary. The big tobacco companies, in the final analysis, pursued a policy which increased the number of their independent competitors and on balance strengthened [these competitors'] positions. [But] parallel action, price leadership . . . and, above all, size—these are now key points to be proved . . . the content of an antitrust case has been enormously limited and simplified. . . . Painstaking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. . . . The immediate question is whether competitive reorganization . . . can now be required for the numerous industries which, like the tobacco industry, are dominated by a small number of large units. Steel, automobiles, petroleum, nonferrous metals, chemicals, motion pictures, electrical equipment—most of the basic areas of the economy—are organized along lines which broadly resemble the pattern disapproved in the Tobacco case. . ." [11]

Or in other words, as a corporation lawyer in New York put it, this interpretation would mean "the wrecking and rebuilding of the economic pattern in from one-third to three-fourths of our entire industrial economy . . ." [12]

There has to be a word for everything. If there isn't, someone invents one. Washington lawyers and economists have invented one for the situation of Big Three's, Big Four's, and so on, which goes in most American industry. They call it "*oligopoly*." It comes from the Greek roots ὀλίγος meaning "few," as in "oligarchy," meaning "rule of the few"; and πολέω meaning "sell," as in "monopoly"—single seller. "Oligopoly" means "a few sellers."

11. *Concentration and Competition*

When the economists of the Federal Trade Commission wrote their study on industrial concentration, they probably did not realize how much it would become a bible to the critics of American business. It has become almost a "must" reading for many Congressmen and government officials; and they quote its figures almost like a gospel.

The FTC economists also, however, probably did not realize how carefully New York economists would examine this report. It has been gone over as "with a fine-tooth comb." And unsympathetic economists have made some criticisms. They say it does not prove as much as it is supposed to. What the FTC economists reported was, in effect, that in a great many industries a handful of companies, or even two or three, do most of the business, or at least, own most of it. Critics, however, take exception to some of the FTC statistics. They say they are slanted.

There are two major ways of measuring and comparing corporations. One is by the amount they sell; the other by the amount of property they have. By the first measure, the Great Atlantic & Pacific Tea Company is a very large company; it sells almost three billion dollars of groceries a year. By the measure of assets, or property, A&P is a pint-sized outfit; its total assets are somewhere around 100 million dollars. In contrast railroad, electric power, and telephone men, to do three billion dollars of business a year, must have assets of more nearly ten billion dollars.

The FTC economists, on page 5 of their report, remarked that if they compared companies by assets they would show more "concentration" than if they compared them by sales. They used assets. On later pages, they showed that big companies tended to have less invested in inventory than in plant. They excluded inventories. To mention it may be captious, but still another misleading statistical method, used by FTC, should be noted.

"To take an example," says the FTC report, page 7, "General Motors Corporation is engaged in a number of industries—motor vehicles . . . refrigerators . . . Diesel locomotives, etc. Yet its financial figures are available only for the corporation as a whole. Accordingly, since the production of automobiles represents its principal activity, its total net capital assets . . . must necessarily be classified in one industry—motor vehicles."

B. Bradford Smith, economist for the United States Steel Corporation, has said,

> This introduces a cumulative statistical error . . . thus in a first industry an asset figure is used for larger companies that is bigger than the assets those companies actually employ in that . . . industry . . . while, at the same time, the . . . size of a second industry is reduced, leaving a smaller base with which to compare the assets of the bigger companies in that second industry. The error does not compensate as between industries but cumulates.[1]

The FTC economists did another thing with their figures which, for the offhand reader, makes American industry look "worse" in the sense of being more concentrated. They defined "industry" very narrowly and based their figures either on small industries or on parts of large industries.

Thus, perhaps by coincidence, they discussed "Carpets and Rugs" as one industry, and on the next page "Linoleum" as another. They showed that six companies had two-thirds of the net capital assets in "Carpets and Rugs" and that five companies accounted for 94½ per cent of the net capital assets in the "Linoleum" industry. Had they, of course, taken "Floor Coverings" as an industry of which to measure the "degree of concentration," the figures would have been much smaller and so looked much less alarming.

In fact, on this same line, a statistician can show almost any degree of industrial "concentration" he wants, simply by narrowing down his definition of an "industry." If, for instance, one drew a line around something called "the food industry," the degree of concentration would be very small. But the FTC economists took, in this industry alone, "Meat products," "Canning and preserving," "Grain mill products," "Bread baking," "Biscuits and crackers," and "Dairy products." They found high figures of concentration in each one. But, as a New York economist has pointed out, if one were to define an automobile so narrowly that only a Lincoln would fit the definition, then one could find a 100 per cent concentration without more ado. Only one company makes Lincolns.

In the last analysis, the fair test of an industry is "who competes with whom?" And you can go as far toward enlarging the definition of an industry as the FTC men went in *narrowing* it. Oil, bituminous coal, and natural gas, for instance, could be lumped as the "fuel business," since they compete; and the "bagging industry" could include both the coarsest counts of cotton and the heaviest products of the kraft paper business, which have now been for many years locked in the most strenuous competition.

Economists have another serious criticism of the FTC's report, not of the figures, but of the implication some people draw from them. The implication is, of course, "the more concentration, the less competition." But B. B. Smith comments that the FTC studies "do not tell us nearly as much about *competition*, as distinguished from *concentration*, as we would like to know. The two are not the same. . . . There could, for example, be one producer of a given product in each state, each enjoying a statewide monopoly, and the statistics as compiled by the government would show comparatively little concentration. On the other hand, there could be only four producers competing everywhere on a nationwide scale and the government statistics would show 100 per cent concentration in four companies.

"The concentration ratios would thus convey impressions that were the exact opposite of the truth as far as competition is concerned.

"Nor is this just a theoretical criticism. For it is, in fact, the larger companies whose distributions of products reach out, overlap each other, and thus multiply the choices available to buyers.

"There is the possibility that the [FTC's] concentration ratios mean the opposite of what they seem to mean in so far as competition is concerned . . ." [2]

And on the same subject, Peter F. Drucker recently wrote:

According to the old yardstick the building industry is, for instance, a highly competitive one; individual building contractors are in sharp competition with each other for business. Measured by the new yardstick of "workable competition," however, the building industry would hardly pass muster; no matter how competitive in behavior, building does not give the consumer too much of the effects of competition.

It lacks the "controls" without which competition is unlikely to be "workable"—in this case, companies large enough to push toward a mass market, to develop new and better ways of building, and to be able to operate on a low profit margin per unit. . . .[3]

At no point in the FTC's study of industrial concentration do the writers actually claim that the more "concentrated" industries are less competitive. They merely take it for granted.[4] If they could have made any reasonable case to this effect, it seems likely that they would have done so. But actually, it seems to work the other way. Thus, for instance, the FTC, in reporting on 26 "industries," said it found "extreme concentration" in 13 of them. These 13 included aluminum; tin cans; linoleum; copper refining; cigarettes; distilled liquors; plumbing equipment and supplies; rubber tires and tubes; office machinery; automobiles; biscuits, crackers and pretzels; farm machinery; and meat-packing. But the public has certainly been well served by these industries.

Thus two of these industries have had for at least a generation among the best price records of American industry: rubber tires, and primary aluminum. Again, the price of copper is no higher than it was a generation ago. The farm tractor industry has been enough different from the story-book "monopoly" to have increased the number of tractors on American farms in the last 30 years from about 250,000 to nearly five millions. The technical achievements of the automobile industry are too well known to need telling. If these industries are examples of "dangerous" concentration, as the saying goes, the danger does not seem to be to the consumer or to the public.

Most people are familiar with some industries that are highly "concentrated," yet highly competitive. They know, for instance, about the recent battle in the phonograph record business and in television. Both industries are highly concentrated. The platter business is, in Washington idiom, "dominated" by the "big three"—Columbia, RCA Victor, and Decca. And in television, five companies do 70 per cent of the business. And before the fight is over the "concentration" will probably be even greater. Yet in the phonograph business, the year 1949 saw a hectic struggle. Said the *Wall Street Journal on* August 23, 1949, "The war of the phonograph records has entered a new phase. Truce attempts have broken down and new alliances are shaping up for a fiercer showdown battle. The struggle, as everyone knows by now, is between two 'revolutionary' kinds of record."

In the television business, there was slashing competition during the recession year 1949 and steady price-cutting and product-improving competition have been the general rule, ever since the Federal Communications Commission granted new station permits in March 1947. Notable, in the brief history of this young industry, has been the rise of a corporate "nobody," named Motorola, to a position among the "dominant" firms in video, in the face of competition from such well-known veterans in the electrical equipment industry as General Electric and Westinghouse.

The automobile industry, an outstanding example of "concentration," is as competitive as ever. In its earlier days the Ford people pulled far ahead of everybody else. Then, when the Model T faded, they lost this place.

Chrysler came up. General Motors became the chief producer. Recently Ford has been gaining again, Studebaker has been moving up and some other producers have been sliding back in the competitive race.

The soap business has been heavily attacked in recent years in Washington for undue "concentration." But meantime, it has been the scene of a titanic three-way battle between Procter & Gamble, Colgate, and Lever Brothers. Oxydol, Super-Suds, Tide, Dreft and Vel have been swirled in competition as the new detergents have been put on the market. A year ago, according to the *Wall Street Journal* of January 25, 1950, "the sharpest defeats . . . have been suffered by Lever, and the biggest single victory has been won by Procter & Gamble." But such report carries no more permanence than a three-star story of a World Series fourth inning.

But the competition within these easily defined "industries" is, if anything, exceeded in intensity by the competition which has developed between industries which were, until recently, total strangers to each other.

Thus for instance the New York *Journal of Commerce* said recently,

> There has been so much talk of competition among textile fibers in recent years that it has tended to obscure the potential effects upon the industry of non-textile materials. The rising use of synthetics in former cotton and wool markets has focussed considerable attention upon these inroads . . . [but] other materials have made inroads of a substantial nature . . . the increasing use of plastic film and sheeting, paper and metals, in fields formerly thought of as exclusively textile, may have a much more profound influence upon the industry than the inter-fiber competition . . .

For another example, the petroleum, natural gas, and soft-coal people are now locked in competition, particularly over home-heating and heavy industrial markets. Also there is competition between the railroads and the air lines for the passenger dollar, and between the post office, Western Union, and the long-lines service of the American Telephone & Telegraph Company for the communication dollars of businessmen and sweethearts.

The president of the du Pont company recently remarked:

> . . . in most of the fields in which the du Pont Company has a position of importance it is confronted with the most rugged . . . competition. . . . Du Pont manufactures paints and lacquers. . . . There are 1200 producers in this field and . . . Sherwin-Williams is larger in this field than is du Pont. . . . American Viscose is larger in the viscose field . . . and Celanese in the acetate field. Du Pont makes photographic film; but Eastman makes more. And so it goes right on down the line . . . nylon must compete with wool, cotton, silk, rayon, and other synthetic fibers . . . cellophane . . . had to compete with paper, glassine, metal foils, and plastics . . . [but] a new wrapping material better than cellophane or . . . costing less, could change the situation rapidly. . . . Competition is far from dead and it is our belief that in coming years it will become even more intense . . .

"You know," remarked the president of the United States Steel Corporation, apparently exasperated at the sniping remarks of Washington Congressmen about the lack of competition in his and other leading American industries, "sometimes I wish these critics could join our sales force for a few weeks and try to sell a little steel. I think they would find out for themselves what competition really is." [5]

The sales managers, advertising heads, vice-presidents, board-chairmen, and others of the big companies' officialdom, who have helped lift their firms to "dominant" positions in the ceaseless competition that has made American industry the power it is, all seem to feel that there is "no rest for the weary." Some of them, in fact, sound, or even look, a little weary themselves. But there is no rest for them. Competition in this country is getting, as the years roll by, not *less* strenuous, but *more* so.

12. *Monopolistic Competition*

The historian of perhaps 1980 will report, among the intellectual oddities of the 1930's and 1940's, the phrase "monopolistic competition." In a sense, this phrase means nothing at all, like "loveless love." Monopoly is the absence of competition and competition is the absence of monopoly. But in another sense it means a great deal and is heavily charged with emotion. It is, in the last analysis, an epithet hurled against the Big Three's and Four's of American industry. The professors, Congressmen, and government officials who use it, though they often profess to be objective about it, seldom "smile when they say it." For it is the verbal epitome of their desire to reorganize American industry. It spearheads their attack on the structure of business as it has developed in this country. It points up the wish, as Omar Khayyam put it:

> Ah Love! could you and I . . . conspire
> To grasp this sorry Scheme of Things Entire,
> Would we not shatter it to bits—and then
> Re-mould it nearer to the Heart's desire! . . .[1]

Back of the phrase "monopolistic competition" is the idea that when three or four companies do most of the business in an industry, that industry is not likely to be "really" competitive. The men who use this phrase feel that the men who run leading companies use their power to soften competition. And, in such mood, they criticize the most basic habits of American industrialists. They are, in fact, so deeply critical that the businessmen who have time to study their criticism sometimes conclude that they, themselves, can "do no right," and that whatever they do, they are "damned if they do and damned if they don't."

There are three basic criticisms of American business which go with the phrase "monopolistic competition." They are "identical pricing," "administered prices," and "price leadership." They are all true. The issue is not over the facts, but over their meaning. These criticisms say, in effect, that in certain industries businessmen charge the same prices, do not change these prices as often as they should, and follow the leaders. This is bad, because it means that these industries are not truly competitive. Businessmen find it hard to deny the charges, but they seldom subscribe to the conclusions.

On "identical pricing," a group of New York lawyers recently wrote to the Secretary of Commerce in Washington that "From our observation there is no contention that creates greater uncertainty and sense of helpless insecurity among businessmen than that 'conscious similarity' (of pricing) is in itself unlawful. There is nothing that creates more of a question in the mind of the public, whether justified or unjustified, than the prevalence of the phenomena of similarity."[2]

Two lower federal courts have made interesting comments in this connection. Said Judge Major in the Cement case,[3] ". . . The charge of combination is little more than a pretense to get all the members of the industry . . . before the same Court. . . . These two competing mills are faced with a simple business proposition. . . . Each can confine its sales to the territory in which it has an advantage or can extend its business into the territory of the other. If . . . the former . . . as the [FTC] would require . . . each will have a monopoly of its own territory, and competition will be at an end. On the other hand if . . . they go into the territory where they are at a disadvantage freightwise, they necessarily must meet the price which they find there in order to sell . . . cement is sold at all points of destination at an identical price and . . . bids to the government have oftentime been made in identical amounts . . . the same result would ensue as the result of any pricing system and whether used individually or in combination.[4] . . .

". . . we think it is the inevitable result of any pricing system that cement must be sold at the same place at a uniform price . . . If one producer persists in selling for more than the others, his customers will be lost. If he sells for less, the others will be compelled to lower their price to the same level or forego the business . . ." [5]

More recent is the St. Louis milk case.[6] The Pevely Dairy Company and the St. Louis Dairy Company did 63 per cent of the fluid milk business in St. Louis. They were competitors, selling the same kind of milk in the same area and almost always at the same price. Said the Circuit Court,

The circumstantial evidence relied upon as sustaining the verdict [against the companies in the lower court] consists of the uniformity of the prices charged . . . and the proximity in time of the price changes listed in the indictment and bill of particulars. . . .

. . . For each of the price changes charged . . . detailed evidence was furnished concerning the economic reasons . . . and shown to have resulted from economic conditions. . . . The milk . . . was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces. Economists called as expert witnesses testified that in a market such as the fluid milk market in St. Louis . . . uniformity of price is to be expected . . .

In an article entitled "Collusion," appearing in the December, 1948, issue of *Farm Economics*, published by the Department of Agriculture Economics of the New York State College of Agriculture, appears the following:

"There is nothing peculiar in the fact that a change in the price of wheat or cotton occurs simultaneously in all markets. If the price of No. 1 Northern Spring Wheat in Minneapolis rises 5 cents a bushel, it advances 5 cents in Baltimore, 5 cents in Buffalo, 5 cents in Chicago, and 5 cents in all the small towns in Minnesota, North Dakota and Montana. These prices not only all advance by the same amount, but . . . on the same day. This is as it should be. There is no collusion. Under the free enterprise system, competition forces all handlers to pay the same price."

These economic principles must of necessity be recognized by the courts. Thus, in Cement Manufacturers' Protective Association v. United States, 268 U.S. 588, 45 S.Ct. 586,592, 69 L.Ed. 1104 . . . Justice Stone, speaking for the [Supreme] Court . . . said . . . "the fact is that any change in quotation of price to dealers, promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. . . . A great volume of testimony was . . . given by distinguished economists in support of the thesis that in the case of a standardized product sold wholesale to fully informed professional buyers . . . uniformity of price will inevitably result from active, free and unrestrained competition. . . ."

And so the Court concluded, in the Pevely case, that it was "clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Antitrust Act." The Supreme Court refused the Antitrust Division's request that it review this case.

The constant refrain of the Federal Trade Commission lawyers about the allegedly sinister meaning of identical or matched prices produced the following comment from a New York economist:

> Two contradictory truisms seem to have run through the debates of the last few months . . . (1) Prices are matched in every market. How could it be anything but collusion? That seems to be the refrain of the Commission . . . (2) We are dealing with an identical and widely used product. How could it ever be sold at any but an identical price? Who would pay more? . . . When could collusion not be inferred? Would an industry be saved by a *little* deviation in price of terms? Economically, this would be of no significance. Would it be saved by a major deviation? Such deviation would be met, I believe, and completely. There might be a sparring period, but it would be met . . .[7]

And the Secretary of Commerce said on this subject that "Mere similarity or so-called 'parallelism' of action should not be penalized unless . . . based upon collusion. Parallelism is likely, in a normal competitive situation, to result from informed competition. Similar conditions result in similar action if there is adequate knowledge. . . ." [8]

An outsider, however, may think prices consistently identical, but this isn't always true. Thus, for instance, the sales manager of the United States Steel Corporation recently said, ". . . Published [steel] prices always have and still do differ to a marked extent between competing producers. . . . Actual prices . . . frequently vary from published steel prices. Quality, availability, and service, as well as price, are decisive factors . . ." And he added the unpleasant, but understandable, remark that "Those who apply such terms [as 'oligopoly,' 'price leadership,' and 'administered prices'] simply are not conversant with the facts. . . . The steel business is highly competitive. . . . The disagreement between the practical men of business and those who rely on theories about competition largely arises from a difference in information and of interpretation, based on knowledge in the first instance and superficial misinformation in the second. . . ."[9]

A touch of humor has been tossed into the "identical pricing" picture by the perennially ironical Federal Trade Commissioner Lowell B. Mason. He said:

> Be sure you don't know your competitors' prices. . . . This is difficult. What happens when one of your salesmen walks into a store and offers a retailer one of your 1948 models of rubber-mounted shaving mugs at $13.75 the dozen? The first thing the purchasing agent says is, "Why, you poor so-and-so, Glutz is selling his mugs for $12.95."
>
> This means the jig is up. For . . . if you come down to $12.95, you are matching competitors' prices, and that . . . if carried out systematically, results in a conscious parallelism which . . . is tantamount to a conspiracy.
>
> There is, however, a way of getting around this difficulty. Equip all your salesman with earmuffs . . . my apparent flippancy is but the cry of a man who sees in these cases the seed of internal decay for our distribution system . . .[10]

"Price," said a well-known New York financial writer recently, "is but one of countless forms in which competition expresses itself, and in many cases one of the least consequential."[11]

And a Washington antitrust lawyer recently remarked on this "underlying economic theory . . . that price alone determines selling. Perhaps this is always true But . . . if it is, a great deal of liquor has been poured by salesmen to no good purpose . . ."[12]

13. *Administered Prices*

The critics of the larger American companies complain that these companies, in "concentrated industries," do not really compete. They start with an ideal of "pure competition" and they find that the sales managers in the larger companies fall far short of it.

In this imaginary "pure competition," there would have to be a large number of little companies, all selling just about the same product. Nobody would have any control over the price he could charge. "The market" would be a thing in itself. Producers would simply sell for all they could get, everything they could produce at that price. If the competition in such a market was "pure" enough, nobody would even use salesmen, put out advertising or use brand names. Selling in such a market would be something like selling 80 x 80-count print cloth in the Worth Street market, or even like selling a thousand shares of "Steel" "at the market," or 10,000 bushels of March wheat on the Chicago Board of Trade.

The political objection, in this ideal, seems to be that any industry that falls short of it can be criticized as practicing "impure" or "imperfect" competition. And that sounds like monopoly—or "monopolistic competition." It's illegal. For the opposite, or negative, of competition, is monopoly. But the number of industries which sell by this ideal "pure competition" is almost, if not, totally nonexistent.

Thus, one of the President's three Economic Advisors recently told a Congressional Committee:

> Where three or four large firms control 70 per cent or 80 per cent of the market, each manager . . . restrains his impulse to grow when business is booming and keeps his expansion within limits which will protect the market price. When prices weaken, each reduces his production and employment rather than his price, confident that each of the others will do likewise. That may be prudent and it may be good business . . . but it is not . . . competitive business. . . . Inherent in [this] administered-price situation is the failure of the forces of competition to work effectively, and the remedy must be found by attacking the structure of the industry. . . .[1]

But the figures don't seem to bear this out. Ten years ago a government economist made a careful study of 407 separate manufacturing industries, as to price, output, and *degree of concentration.*[2] He took his figures chiefly from the U. S. Census of Manufactures, for two separate periods: the decline between 1929 and 1933 and the recovery between 1933 and 1937. He did not find that it was so.

> ". . . There appeared," he said, "to be no strongly marked relation between . . . concentration . . . and . . . quantity and price behavior; high and low concentration and large and small changes in price and quantity appeared together almost as if by chance . . ." [3]

A Boston economist has since then gone over the same question. He went the government man one further and looked into sellers' "unit direct costs." His conclusion was[4] ". . . that concentration cannot, as alleged, be considered to exercise a significant influence during depression on either price behavior, production behavior, or price-production behavior for individual industries taken separately . . ."

In the middle 1930's an economist in the U. S. Department of Agriculture set a style in Washington economic thinking with a pamphlet which said that the hard times of the 1930's were mostly because industry was getting more concentrated and managers in concentrated industries preferred to cut production instead of cutting prices.[5] This fast became economic "party-line" in Washington. President Roosevelt used the idea in his 1938 message asking Congress to look into "the concentration of economic power in American industry." And it is what Dr. Clark was saying in 1949.

Said Dr. Means, "The basic cause for the failure of a laissez-faire policy is . . . [that the] shift to administration has brought . . . inflexible administered prices which disrupt the workings of the market. . . ."[6] But while Washington economists and politicians promptly bought this idea, New York economists quickly swarmed over it. And they soon found what seem to be errors.

A well-known economist, Dr. Rufus Tucker, pointed out that Dr. Means had "made no attempt to compare price movements in the present depression with those in previous depressions," and that "if he had . . . he would have found that rigid prices always existed; that to a very large extent they were characteristic of the same articles of which they are now characteristic, and that there is even very strong reason to believe that a hundred years ago, when John Stuart Mill was writing his "Principles of Political Economy," rigid prices were proportionally more numerous and more important to the consumer than now . . .[7]

The fact is that rigid prices have always been important.

Were the classical economists aware of that fact? A study of their texts makes it impossible to doubt that they were. Adam Smith very plainly stated "that the price of linen and woolen cloth is liable neither to such frequent nor to such great variations as the price of corn [wheat], every man's experience will inform him." . . . there is strong reason to believe that competition has more nearly approached the theoretical ideal in recent years than . . . in the time of Smith and Mill. . . . It was . . . common knowledge that wages did not fluctuate with the price of commodities; that manufactured goods and agricultural goods did not move together; that the price of bread . . . did not change as much as the price of wheat . . .

Naturally, the records show that prices of manufactured goods remain unchanged for months at a time, while prices of farm products vary daily. . . . Manufacturers are compelled to announce in advance what they expect to charge, frequently before they have any product ready for sale. They have to inform their salesmen and dealers and in some cases the buying public. They print price lists and advertisements. Necessarily prices so announced cannot be changed frequently. . . .

. . . Whether the discovery by certain economists and politicians of a phenomenon that was common and generally known in the eighteenth century is justification for discarding an economic system . . . is a question every economist must answer for himself. In my opinion it is no more important . . . than the discovery by Molière's bourgeois gentilhomme that he had been speaking prose all his life.

Administered prices are perfectly consistent with active competition. They have been common and in fact necessary in certain types of industry for centuries. Throughout our history some prices have changed rapidly, others at longer intervals. . . . These differences in price-behavior have not been the effect of monopolistic practices or large-scale operations, but of differences in the nature of costs. . . . if costs consist largely of payments for materials and hired labor the extent to which they can be reduced is limited by forces usually beyond the seller's control. But if they consist largely of overhead or other deferrable items, or payments for the producers' own services, as in farming, prices can be reduced, and in some cases the reduction may have enough effect on demand to remove the necessity of cutting down output. . . .

Thus the people who use what might be called the "Mexican jumping bean" theory of industrial prices are hardly being fair to businessmen. They seem to expect businessmen to produce price "jiggles" in all directions at all times. It is an impatient view. These critics seem to feel that because businessmen do not compete like tennis-players (which they seldom do) but like chess-players (which they usually do) they are not "really" competing. The critics are in a hurry for action. But it takes some time to see the moves in the game of business competition, as in the game of chess. Moves, however, there are and, over "the long term," the patient observer will often find them dramatic.

But this brings up another point at which the critics complain. It is the point where someone in an industry, usually one of its most successful companies, takes "price leadership" and makes one of these important occasional moves. Said a federal Circuit Court judge in a recent case, "Price leadership is implicit in any pricing system. It inevitably exists where one or more members of an industry occupy a commanding position because of their strength and magnitude. . . .[8]

An interesting example of how price changes happen is the following story as related by the capable petroleum editor of the New York *Journal of Commerce*, Wanda Jablonski.[9]

Price developments in the oil industry on the East coast in the past few weeks serve to illustrate once again one of those economic ideas that sound fine in theory but don't always hold much water in practice.

The Federal Trade Commission and some economists have been advancing the theory that parallel price action by a group of companies—especially upward—constitutes proof per se of monopolistic behavior. . . . Closer observation, however . . . in actual practice—rather than in theory—indicates quite a different explanation.

At the beginning of August Esso Standard raised heavy fuel prices 10 cents along the seaboard. . . . Within a short time Socony-Vacuum and other suppliers followed the rise. "Collusion," according to some theories.

Later that month Socony advanced light fuel oils. Some days later Esso also increased light fuels, but by amounts smaller than the Socony rise at most points. Within a few days Socony was forced to cut back its price to the Esso level. Collusion?

Last week Socony once more advanced light fuels. After studying the market a week Esso yesterday also announced an advance—but again by smaller amounts. . . . Again Socony will have to readjust back. . . . Collusion?

When an important competitor raises his price, the reasons for following . . . can easily be traced to what might be termed competitive horse sense. . . .

In the first place, a company does not usually announce a price rise until it is convinced that market conditions . . . warrant an advance and that the same factors are affecting . . . its competitors. With experience and first-hand knowledge of the market, it is more often apt to guess right than to guess wrong.

Secondly—and this is the crux—most sellers are naturally interested in making profits, and therefore usually have an incentive to follow a price rise announced by a strong competitor—unless this is offset by a competitive advantage to be gained by not raising.

However, sellers know from years of experience that the competitor which initiates a price rise watches market reaction like a hawk, and has no intention of letting others swipe his customers by offer of the lower price . . . the moment the initiating company finds its competitors trying to do so it will rescind its increase—and do so retroactively if need be to hold the customer . . .

A leading oil man has said:

> The so-called price leadership in the petroleum industry boils down to the fact that some company in each territory most of the time bears the onus of formally recognizing current conditions. . . . [But] the executives of the leading marketer . . . are always in danger of taking a step with which competitors will not agree, with the penalty for misjudgment a sharp reduction in profits unless the misjudgment is rectified at once.
>
> In short, unless the so-called price leader accurately interprets basic and local conditions, it soon will not be the leading marketer. . . .[10]

"Those who claim," said a cabinet officer recently, "that competition does not exist between giant firms do not know what they are talking about. The competition which goes on between large business organizations is as real as the struggle between contending armies in war. The very size of some units may give the impression that they are not struggling—are carried along by their own momentum. But if any concern ceases to compete, or isn't continually on its toes, the result in sales shows up promptly. . . ."[11]

"A genuine monopoly," said an economist recently, "is very much more difficult to establish, let alone to maintain, than we used to be told . . . one can no longer assume that the business man is driven by his own self-interest into monopolistic behavior. On the contrary, his self-interest must lie in maintaining, if not expanding, his share of the total consumer purchasing power—an aim which will tend to deter him from restricting production and raising prices, as the traditional theory of monopoly insisted he would do."[12]

But perhaps the *Wall Street Journal* hit the nail on the head even more succinctly as to the reason why American businessmen compete, when it said editorially "we think that the best safeguard against monopoly is that Americans are not monopoly-minded. They will compete [even] when there is nothing to compete against." [13]

An odd aspect of the "administered price" story has appeared since V-J Day in the spread between mill prices and "gray market" prices. Mill-men in steel, paper and pulp; automobile, chemical, and other manufacturers have been selling at what they considered "fair" prices rather than at "market" prices. Steel has been selling in "gray markets" at as much as three times these mill or producers' prices. These gray market prices are the result of "pure competition." They are "the market" that results from the balance between what buyers will pay and holders can hold out for. The mill prices are strictly "administered prices." They are lower.

14. *Integration*

In the last couple of decades, businessmen have gone in for "industrial integration" as psychiatrists have gone in for "emotional integration." "Integration" means making things one; or in other words putting things together, and thus avoiding conflict.

Businessmen have put the *same* kind of businesses together—"horizontal integration," like a string of bakeries, tin-can factories, or roadside eateries. They have put together different functions of the same general line of business—"vertical integration," like an oil well, a pipeline, a refinery, and a service station, or an iron mine, a blast furnace, a rolling mill, and a steel-product warehouse.

In recent years, it has been mostly vertical integration into which business has entered. Grocery-store men, such as the A&P people, have begun making cornflakes. Shoe manufacturers have opened shoe-stores. Mail-order houses, Montgomery Ward and Sears, Roebuck, for example, have gone into manufacture, on the one hand, and store-distribution, on the other. The original Standard Oil Company was almost entirely in the refining business, but since it was broken up by the Supreme Court into nine companies (and over a score of smaller ones), the successor companies have expanded "vertically" by choice or the pressure of competitors, back into oil-field production and forward into bulk-station distribution, as well as to a small extent into running roadside service stations.

In a sense, industrialists have only been, by means of this integration, restoring business to what it used to be. The modern shoe-manufacturer who also runs his retail stores is like the old-time cobbler who used to make shoes in the back of the store and sell them in the front. They both are "integrated"; they both make and sell shoes. The trend in the late nineteenth century was for all the processes of industry to be broken up. Goods went through more and more different hands. The trend in the twentieth century has been for these processes to be put together again, or "re-integrated."

Times have changed in the last generation, so far as the achieving of business unity is concerned. In the gas-light and derby-hat days at the turn of the century, the men who brought together competitors made the headlines on the financial pages. Those were the days when J. Pierpont Morgan put together the United States Steel Corporation from a flock of competing steel mills. Rockefeller had only recently put together the Standard Oil Trust of once-competing oil refiners. The American Can Company was formed from over 80 little tin-can makers. But a budding move to unify a number of competing railroads, for the resultant economies, was nipped in the bud by the Supreme Court.[1] Those were the days of "horizontal integration" and most of the business was done by Wall Street bankers. But Wall Street, in a growing world, has not grown; horizontal integration is nearly, as the French say, "passé." The twentieth-century form of American industrial integration is largely something in which a business saves up its money and buys up other businesses, either as a source for its raw material, a means for its transportation, or an outlet for its products.

But in recent years, the professors and politicians who have attacked "monopoly power," matched prices, administered prices, and price leadership, have also attacked industrial integration. Perhaps the simplest of their criticisms appears to be the plain charge that industry ought to be organized by plants, not by industries.

Thus for instance, an assistant professor of economics of Michigan State College, in the most recent assembly of witnesses against business as it is now organized, told a Congressional Committee that the unit of technological efficiency is the plant, not the firm.[2] "This means," he said, "that while the advantages of a large-scale integrated steel production-unit at Gary or Pittsburgh or Birmingham are evident, there seems no technological justification for the unification of these three functionally separate plant units under the administration of one firm.

"In such cases," he said, "the size of present-day firms is explained by conditions of market strategy rather than by the economic dictates of the producing process. . . ." A more dreaded academic critic of business, almost two years earlier, said nearly the same thing.[3] "The unit of technological efficiency in modern economic life is the factory, not the firm. Most of the huge combinations of modern business grew in order to achieve the profits of market position, or to provide bankers with new issues to float, not to exploit the technological advantages of scale. . . ."

But this is a slow ball compared to the fast curves now being pitched against the vertically integrated companies. It does not take much discernment to see the hole in the the aforementioned arguments. They have about as much relation to industrial planning as an argument that in war a brigade, a division, or an army is the unit of technological efficiency has to do with military planning. It cost the North, in the Civil War, four years of war to discover that the unit of technological efficiency is not the unit of total efficiency; it had at one time six armies deployed under independent generals.

The fast curve now being used in the argument against integration is a street-car of an argument called "subsidy." According to this argument, the profits of a more efficient department of an integrated firm are used to "subsidize" a less efficient department. Thus the books of the big oil companies apparently often show a much better profit on transportation than on marketing.[4] The books of A&P show a similarly good-sized profit on its manufacturing, but a razor-thin margin of final profit on its retail stores. And, say the critics, these integrated companies use the profits from their profitable departments to outdo competitors in their unprofitable departments; they have, in short, too much economic power.

Of course, to charge that one department is "subsidizing" another, one must go to the books of the integrated company. Those books must contain estimates of the prices at which the goods are transferred from one department to another. These prices, however, are of course imaginary, since the goods stay in the same hands, until finally sold to the public.

Let us look at a simple illustration.

Many farmers run a partly integrated business. A farmer may grow corn, for instance, feed it all to hogs, and sell only the hogs. Or he may feed the corn to chickens and sell only the eggs. Thus he is in part "vertically integrated."

In such case he might be content merely to figure his total costs against his total receipts. But he might want to go further with his books and learn how much it cost him first to grow the corn and second to grow the hogs.

He might then find that his corn cost him only 75 cents a bushel to grow but that he was getting the equivalent of $1.50 a bushel of corn, in the selling prices of his hogs.

To determine whether he was making his profit from his corn-growing or his hog-growing, he would have to put a "book-value" on the corn as he tossed it to the hogs. If he followed general accounting practices, he would "carry" his corn on his books at the open market which he would get if he sold it instead of feeding it, or if he bought it instead of growing it.

The result may seem at first strange. For if the market price of corn were $1.50, this would mean that the farmer was making a large "paper" profit on his corn, but none at all on his hogs. On the other hand if it was as low as 75 cents, it would mean that he was making no profits at all on his corn, but a large profit on his hogs. Thus his paper profits might vanish from one side of the business and appear on the other without his changing a single thing in his way of farming.

Obviously this sounds like sheer fiction, but the farmer can find it very useful. For it can tell him where to concentrate. It might tell him, for instance, that it would be cheaper to buy corn than to grow it, or, on the other hand, more profitable to sell his corn than to feed it. In one case, he might increase his farrowings, in the other case, his plantings.

Of course, this is a vastly oversimplified picture of an integrated operation. For the integrated operator, many prices are fluctuating at the same time. And for many operators, there is no easy outside market price to use as a yardstick. Yet this is essentially the way they have to guess, forecast, and run the business.

Plainly, however, it would be a rare case indeed in which an integrated company could not be accused of "subsidizing" one department with the profits of another, for all the profits eventually flow into a common pool of the company's over-all earnings. Some departments are bound to be making more and some less.

The people who criticize integration almost invariably do so because it seems to make it harder for the competitors of certain departments of the integrated companies. Let us say, for instance, that in the small town of Pleasantville there are two repair garages and an automobile dealer. The dealer decides to go into repair work also, since he has some spare space and, perhaps, equipment. This is a midget form of integration. Then if the other two repair garage owners try to prevent or discourage him, because he might hurt their business, this is a microfilm of the Washington attack on integration.

For instance Federal Trade Commissioner John Carson recently listed these competitive advantages which he said the major integrated oil companies enjoyed against independent operators: cheaper transport by pipe-line and tanker; ready access to supplies, assured by ownership of crude . . . through crude oil trunklines; assured marketing outlets from a highly integrated marketing program . . . ; tire, battery and accessory programs which provide a profitable source of income without requiring proportionate investment; and the opportunity to diversify risks among the various branches of the industry.

Many Congressmen sympathize with this view. The Chairman of the House Judiciary Committee, during "anti-monopoly" hearings in 1950, suggested that the big steel-producing companies should be forbidden to go into the business of fabricating steel. But perhaps the most indefatigable opponent of integrated companies in Congress is Representative Wright Patman of Texas. In 1950 he introduced a bill with the extraordinary title, "A Bill to promote competition [sic] by forbidding manufacturers to engage in retail selling." Under such a sweeping prohibition, unless they were especially excepted, electric power companies couldn't both generate and distribute electricity, bakery companies couldn't also run stores, milk companies couldn't run both dairies and milk routes, shoe manufacturers couldn't sell direct throught their own stores, direct selling, such as "From Kalamazoo Direct to You," would be illegal, and even the Fuller Brush man would have to find a new employer.

But Congressmen who want to make vertical combination illegal may be wasting their time, or may have had the way already prepared for them. It seems to be already illegal—or dangerously near it—for the Antitrust Division has been for some time arguing that vertical combination is "per se" or in itself a violation of the Sherman Antitrust Act. And in a series of recent decisions the Supreme Court has already come within a hair's-breadth of agreeing. It looks as though the officers of most integrated companies are already walking around on borrowed time. A good case could probably be made against them already by stringing together certain recent statements and remarks of the Supreme Court which are of course automatically now a part of the law.

Thus in the Schine case [5] the high Court said, "The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent." That would seem to mean that it is illegal for the officers of different departments of an integrated company to cooperate. If they don't cooperate, however, there's no integration.

In the Paramount case,[6] the Antitrust Division argued that vertical integration was in itself illegal under the Sherman Act. The Supreme Court would not go that far. But it did say that "the legality of vertical integration . . . turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent."

From this, it seems a reasonable *probability* that the Antitrust Division might go into Court and prove a case against any integrated company it saw fit to attack, by the obvious combination of this case, the Tobacco case (power to exclude is a violation), and the Griffith case (intent need not always be proved.) It is, in fact, also a reasonable *possibility* that a majority of the present Supreme Court might now be willing to agree that vertical integration is *in itself* illegal. This is only a surmise. But Justice Douglas, in dissenting in the Standard Oil of California case,[7] remarked that "a majority of the Court could not be obtained [in the Paramount case] for holding illegal *per se* the vertical integration in the motion picture industry."

It was Justice Douglas, himself, who had written the majority opinion in the Paramount case. So this sounds as though *mighty near* a majority of the Court was at that time willing to do so. Since then two new Justices have been appointed, Minton and Clark. Minton wrote the A&P Circuit Court decision which roundly denounced A&P for the "abuses" of integration (hardly distinguishable, to economists, from the "uses" of integration). Clark stepped directly to the Supreme Court bench from the chieftaincy of the Department of Justice.

So neither is likely to see much good in integration.

But perhaps the Department of Justice scored its greatest victory against integration in the A&P case. One of its chief charges, accepted by the Circuit Court, was that the profits of A&P's manufacturing and wholesaling were used to "subsidize" or were "siphoned over to" the retailing divisions (and in large part handed on to the consumer). It called this an "abuse" of integration, but what it successfully criticized seems characteristic of all integrated operations. (The A&P case will be discussed in a later chapter.)

15. *Integrated We Stand*

Back in 1907, the United States Commissioner of Corporations made a report on the petroleum industry. Those were the kerosene days, when nobody had heard of octane ratings, of East Texas, of catalytic cracking—or even of industrial "integration." But he said, rather prophetically, "Each of the stages in the industry can be more economically conducted when it works in entire harmony with every other stage, and such entire harmony can be secured only through a single control."

Because of its nature, the oil business is one of the most highly integrated industries in this country. It was not so in 1907, when the Commissioner made his remark. The early Standard Oil Trust, and the later Standard Oil Company, were mostly interested in refining. It was only when independents like Texas, Pure Oil, and Sun began to give the nine new little children of the big company a heavy run for their money that refiners began to reach back for supplies into the oil fields, producers began to reach forward into refining, and the whole industry, in a rough and tumble competition that the arrival of the automobile only aggravated, began to sprawl and grow, horizontally and vertically. The upshot of this competitive free-for-all was, among other things, the growth of over 200 refining companies which are integrated in varying degrees, of which about 20 are arbitrarily called the "majors" by governmental and other critics.

The basic reason for this integration can be found, perhaps, in simple form. There is a standing teen-age joke that when you open a peanut-shell, you will "see something that nobody has ever seen before nor ever will see again." But in the case of most petroleum products, *nobody ever sees them.* When the motorist drives down the road, he is using for fuel something that throughout its life has been not only "untouched by human hands" but also unseen by human eyes. Out of the ground, it has flowed, unseen but almost steadily, through pipe, coil, cracking plant, bubble-tower, tank-car, tank-wagon, and filling station, into the back of his car. A huge oil refinery is an almost motionless mass of silence. Only through a few little glass openings do the engineers ever see the product. Yet it is in almost constant flow. It is not strange that this flow is so frequently handled by a single "integrated" management, from the oil well to the filling station.

So it is of interest what the executives of integrated oil companies have to say about the structure of their companies. A prominent oil company lawyer recently said:

> Integration is a great deal more than the mere putting together . . . of enterprises. . . . It is a combination of functions for a new purpose. . . . [It] is to management . . . what assembly line production is to a manufacturing plant. . . . Integration facilitates the full, free, easy transfer of information about the several aspects of the petroleum business to one management. . . .
>
> The integrated firm can more easily engage in effective advance planning. . . . It is the difference between a group of people with organized and understood teamwork relationships . . . and a number of separate firms with . . .

different plans and objectives . . . different views of their relationships to one another and of their objectives and responsibilities. . . . The integrated enterprise can plan better . . . take a longer view . . . and . . . better coordinate the carrying out of its program. . . .[1]

And of the oil industry's wartime achievements, the same man said, "Experts who handled these operations during the war agree that they would have been impossible without integrated companies. . . . There would have been 500 phone calls instead of five. . . . There simply isn't time during war for such inefficiency."

A former president of the Standard Oil Company (N. J.) told the TNEC Committee:

> Integration is the uniting into one business of several of the stages through which a material passes. . . . The refiner needs to be assured of his market . . . The marketer needs to be assured of his supply. . . . There is a high degree of mutual interdependence. . . . If such relationships are not provided by common ownership they must be provided by contractual arrangements. When [they] take the integrated rather than the contractual form, there is no need for secrecy or tactical manoeuvring . . . planning can be more effectively accomplished by an integrated company . . . the inherent risks of the oil business are substantial . . . conservative investors . . . want to have some assurance of continuity and stability of earnings. . . . Without integration oil companies would not have been able to spend such large sums on research and improvements.[2]

A competitor, president of the Sun Oil Company, said,

> . . . If producer, transporter, refiner, and marketer are all owned and operated independently . . . every unit . . . must have its own buying and its own selling organization. This is expensive.
>
> But a greater difficulty is that among these multiplied buying and selling agencies there is nobody who has his eye on ultimate results—the final cost of the product and the price . . . to the consumer. Everybody is thinking of

how to make the best deal with the man next to him . . . nobody is worrying about the consumer down at the end of the line. . . . In the completely integrated unit . . . an executive authority—president, chairman, executive director, board of directors, or what you will—has its eye always on that party down at the end of the line:

. . . After all, the consumer is the boss; . . . somebody must keep him in mind all the time; and the hagglers along the way can't be expected to do it. They are too much engrossed with their own particular jobs; too many removes from the consumer. . . .[3]

And another oil-company president has claimed that "it is mainly the large integrated company that is doing the forward-looking research and development work, which requires the assets of an integrated company and *requires the inter-relation*—because many problems involve . . . manufacture, sale, and transportation."[4]

But oil is only one of many integrated industries. Another one, which has incidentally held down its prices far below the average over recent decades, is aluminum. The president of the Aluminum Company of America recently said of his business, "An industry made up of small, primary producers could not possibly bring aluminum to the public at a price the average customer could afford to pay. An efficient producer of primary aluminum must be well integrated, and it requires a great investment of plant and facilities if the operations are to be efficient. . . ."[5]

Perhaps the largest recent growth of vertical integration has been in dry goods and groceries—through the growth of mail order houses and chains. It began, perhaps, about twenty years ago. An economist had this to say about it. "The unfortunately wide differentiation between wholesale and retail prices may be regarded as a vestigial remainder of the mercantilist system [as a colossal system of restraint upon trade] which has only recently begun to be undermined. The growth of mail-order houses and of large-scale retailing through chain stores is salutary and . . . abundantly promising. . . ."[6]

The cotton textile industry has been going through the throes of integration during and since World War II.

It had been an outstanding exception to the general trend. In contrast to petroleum, cotton textiles are normally touched, felt, and traded a half dozen times from the breaker-room of the spinning mill through the weave-shed, the bleachery, the dying and printing plants, the wholesaler's warehouse and the retailer's shelves.

But mills began buying up converters, and converters began buying up mills. The first reason the trade gave for these economic marriages was the wartime desire of government buyers to minimize the number of contracts. These government buyers wanted to be able simply to buy the finished goods, instead of having to buy the gray goods and shepherd them through all the later transactions. Also, mill owners looked over the fence into the converters' business and saw bigger profits, while converters looked over the fence into the mills' business and saw a chance to have a sure supply by buying a mill. So Lowenstein bought Merrimac Mills in Alabama; Pacific Mills (partly a converter) bought Rhodis Mills. Cluett, Peabody bought the Grosvenordale Mills; and so on. And all this, incidentally, at a time when mills were selling at the highest prices per spindle in 25 years.

There seem to have been many reasons for the vertical integration of American industry. Chiefly, perhaps, they could be boiled down to the following: (a) Stability of operations; (b) Spreading of the risk; (c) Assurance of either a reliable supply for the marketer or a reliable outlet for the producer.

In "(a)" and "(b)" of these reasons we are back to our old friend of the previous chapter—the "subsidizing" of one department by another. And here we can go back to the simple illustration of the energetic corn-hog farmer. He is in two businesses (raising both corn and hogs), not, presumably, because he can make money in both. In any given year, he probably makes more money in one than the other and, if that went on indefinitely, he would presumably shift to the one he was best in. But he can't tell. And by being in two businesses (and closely related ones), he has a better prospect of staying up financially than by being in only one business, just as an airplane is safer with two engines than one.

He is, however, not going to stay in either of these businesses if it nets him a loss year after year and seems likely to keep on doing so. Neither, by the same token, will *any* integrated *company* stay persistently in any branch of the business that brings it annual trouble, year after year.

As two of the above-mentioned oil presidents told the TNEC ten years ago: ". . . If any branch of an industry is regularly and persistently unprofitable, the average earnings of a fully integrated company will be lower than those of companies which *engage only in the profitable branches.* Only if the profitableness of each branch varied greatly, frequently, and in opposite directions from the others would the integrated company have an advantage; and that advantage would consist solely in its having comparatively stable earnings, not higher average earnings over a period of years." [7]

In other words, nobody with an eye to the main chance (financially, that is, to steady long-term profits) is going to really "subsidize" one branch of a business out of another. He may be willing to earn *less* out of one branch than another, over a period of years. Or he may be willing to risk his money in that branch for a year or several years in the hope of a profit that does not materialize.

But if these are "subsidies," then this is a new meaning for the word. It is a meaning which consumers should like. It means that somebody is willing to take a comparatively small profit, or a comparatively large risk, from which the consumer is bound to be the chief beneficiary.

The attack on *integration in itself* seems to be another attack on "hard competition." It seems to be a defense against injury to *competitors*, rather than injury to *competition.* The attackers are generally quite frank about this. Up till now, anybody in any part of any business has been free to move into any part of that business and try his hand at it. The result is bound to be *more competition.* The attack on *integration-in-itself* could not help but slow this down. The consumer would lose. The result would be as though the law had been changed in the early days to protect the petroleum teamsters who tried to tear up the pipelines refiners were laying down. The shot would be aimed at the integrating company; but the consumer would be the "innocent bystander."

There is today, however, one more way in which the public interest is jeopardized by this attack. It was related by the District Court Judge in the latest decision in the Alcoa case. Refusing to order the break-up of the Aluminum Company, Judge Knox "pointed out that a strong aluminum industry was 'a vital necessity for national security and the peacetime welfare. . . .' He described Alcoa as a company whose service to the public had been outstanding in many ways and mentioned the testimony of Army and Navy officials that a disservice would be done to national security if the efficiency of the aluminum industry were impaired. . . ." [8]

16. *The Great Atlantic & Pacific Tea Company*[1]

As a preliminary to the recent conviction of the A&P under the Sherman Act, 18 government investigators spent 23 months going over A&P's books, files, records, and so on. They examined 2,000,000 documents, going back nearly 30 years, and photostated 50,000 of them. They submitted 5,000 of these documents in the trial. Some very sour remarks were culled from these documents and placed in the record. Some minor A&P officials had talked out of turn and out of the corner of their mouths, on occasions.

But if any organization, operating at its heyday over 15,000 stores, and dutifully keeping the records kept by modern business, could survive this kind of a combing-over without the uncovering of a few indiscreet remarks, it is hard to imagine. It would have to be an organization with a head only, but no heart.

The setting of the A&P case goes back to the early 1930's. Chains were sweeping the cobwebs out of the grocery business. But at the same time, the NRA was trying to protect high distribution margins. When NRA failed, Congress passed the Robinson-Patman Act, frankly aimed at the chains, and particularly the grocery chains.

Political foes also pushed bills through various state legislatures to pile punitive taxes on the chains. Congressman Wright Patman, co-author of the act, in 1940 introduced into Congress a bill called "H.R. 1" to impose a "progressive tax" on chains, progressing with their size. On A&P the tax would have been $450,000,000, or about 50 cents on every dollar the housewife spends at A&P. (The big chain normally takes less than a cent and a half of her dollar for its net profit.) It would have put A&P and all the other chains out of business. The bill never got out of committee.

The A&P lawyers promptly set about devising ways for the company to obey the Robinson-Patman Act and yet to continue buying cheap and selling cheap. This was one of the things on which the Circuit Court first criticized them. Said the Court, "After 1936 the [A&P] buyers, instead of getting credit for alleged brokerage, induced their suppliers to reduce their price further to A&P by the amount of the brokerage fee. . . . When this was outlawed by a decision of the Third Circuit upholding a cease and desist order of the Federal Trade Commission. . . . A&P adopted a policy of direct buying. It thereafter would buy from no one who sold through a broker. . . . This clearly affected the business of brokers, who resisted as best they could. . . ."

It was shortly after this that the Antitrust Division began its attacks on A&P. The story has been told in A&P's advertising. The first judge, in Washington, D. C., said he hadn't tried a case in 40 years so "absolutely devoid of evidence." The second judge, in North Carolina, said that he had "never tried a case where a greater effort, more work, and more investigating had been done," but that "you can't make bricks without straw and you can't make a case without facts." The third judge, in Dallas, threw the case out, because the indictment contained inflammatory statements that he wouldn't permit to be presented to a jury. The indefatigable Antitrust Division then took the case to Danville, Illinois. During these years the Supreme Court had been re-interpreting the law. A&P was convicted in Danville, appealed, was convicted by the Circuit Court of Appeals, paid its fine, and did not appeal to the Supreme Court. When the Department of Justice, thereupon, as expected, started its present civil suit, A&P began taking its case to the public.

People who want to understand the A&P case must first learn to skip the abusive and "inflammatory" words which the government lawyers persistently used and which even the Circuit Court, in some cases, echoed. They are semantics—the use of words for ulterior purposes. They include words like "vicious, illegal practices," "abuses," "predatory," "coerce," "blacklist," "boycott," and so on. They are not as bad as they sound. A case does not go through four lower courts and up to the United States Circuit Court of Appeals on charges as bad as these words would indicate.

"Blacklist" and "boycott" are good examples of this kind of semantics used by the government lawyers. They entered the story on what most people would probably consider the simplest grounds. The government lawyers made a great deal of the case of the over-priced corn-flakes. There were only three firms making corn-flakes for private brands, a good instance of "monopolistic competition" if corn-flakes are to be considered a separate industry. A&P was buying from one of them. The maker's profits on these sales to A&P were very large. So A&P buyers, asking for a lower price, pointed out that A&P itself is a very successful manufacturer, and could make its own corn-flakes. Down came the price, not only to A&P, but to others also. The threat was that A&P might, if it went into corn-flakes itself, scratch this manufacturer from its buying list and do no more business with it. This, however, to the government lawyers and the Court was "coercion," "blacklisting," and "boycott."

Up to this time a boycott had been an agreement between *different people* not to deal with somebody. A Captain Boycott, in Ireland in 1880, was the first victim of such. As the Circuit Court said, a boycott had been found illegal under the Sherman Act in the Fashion Originators Guild case.[2] But it is a big jump from this case to the A&P case. In the former one, a *group* of originators of fashions tried to *drive out of business* some manufacturers who kept copying their originals and selling the copies *cheap.*

In the A&P case, however, the Court found A&P guilty of boycotting by citing the Schine case[3] already mentioned in a previous chapter, in which the Supreme Court found that the cooperation of the officers of an integrated company might be a conspiracy. And after all, the A&P is really an organization of men.

This seems to mean that any integrated company which refuses to do business with some other firm, because the other firm will not cut prices, may be violating the Sherman Antitrust Act in doing so. This, however, is not what most people would assume from the word "boycott."

Nor would most people consider A&P's forcing down of the price of corn-flakes by threatening to make them itself, as "coercion." According to that definition, a householder who told a carpenter "Your price is too high, I'll do the job myself," is coercing the carpenter.

Out of the millions of words in the case (and with the vicious words left out), the government lawyers' criticisms divide themselves into three major groups. They attacked A&P on its methods of buying, on its methods of selling, and on its integration of buying, selling, and manufacturing. Each group of criticisms involves a radical new interpretation of the law and economics—and a most questionable one.

The government lawyers attacked A&P's buying methods chiefly on the following grounds. A&P buys cheaper—or tries to—from manufacturers, processors, and canners than its competitors. It does so by volume purchases, for which the law permits lower prices. But therefore, argued the government lawyers, these suppliers must increase their prices to their other customers, to make up for the smaller profits, or the losses, they take on their A&P business. Therefore, by knocking down prices for what it buys, A&P actually drives them up for other people and for most of the public.

Government lawyers have made this economically absurd statement again and again. It has become almost their theme-song and party-line on the case, since A&P has taken the issue to the consumer. Thus Attorney-General Howard McGrath has said that Justice Department success in the A&P case "should result in lower food prices for over 90 per cent of the public which buys from other grocers who because of A&P's practices are required to purchase their supplies at higher prices. . . ."[4]

Assistant Attorney-General Herbert A. Bergson said ". . . when these same suppliers sell to other stores or chains, they are obliged to add to their prices the losses they have sustained through doing business with A&P."[5] The Circuit Court of Appeals, in affirming A&P's conviction, used it three times. It said, ". . . the supplier had to make his profit out of his other customers at higher prices which were passed on to the competition A&P met in the retail field . . . the price was added to A&P's competitors' costs . . . increased the price to A&P's competitors. . . ."

Businessmen do not usually price this way at all, although they might like to. When, in an "imperfect market" like that of food products, somebody gets a cut, the likely result is that his competitors will hear about it somehow and go after it also. The effect is not to raise prices, generally, but to lower them. It is a most unreal assumption that a canner or a corn-flakes maker, after tangling with an A&P buyer and conceding a price cut, will be able to turn around and *raise* his prices to his *other* customers. If he were able to do so, why didn't he do it before? It is also a most unreal assumption that this canner or corn-flakes maker will have knuckled under to the A&P buyer to the point of taking an A&P order which nets him an actual loss.

The idea that "over 90 per cent" of the public would get lower prices if A&P didn't get lower prices, is like the idea of the tail wagging the dog. It is out of this world. As an economist has said, "In imperfect markets such as those in which A&P buys, an integral part of the process of price reduction is unsystematic, buyer-enforced price discrimination." [6] And "Actually, buyer-instigated price discrimination exerts downward pressure on general price levels. A price reduction to one buyer has what (for the seller) is a most unfortunate tendency to spread." [7]

The government lawyers' theory ignored another important point. When a food manufacturer has a large, continuous market with a steady, prompt-paying customer, this actually can make it easier for him to lower his price to other customers. His sales to such a customer involve practically no selling cost, involve no credit risk or loss, carry a large part of the overhead of his business, and spare him the need of reaching for a quick profit on each sale to offset the risk of not soon making another sale.

The Court, nevertheless, concluded that "this two-price level . . . could not help but restrain trade and tend toward monopoly." Yet the government lawyers hadn't proved this curiously naïve theory. They merely assumed it, or deduced it and the Court accepted the deduction. The Court's decision also criticized A&P's buying methods for their effect on the food broker. (See page 125 for a part of its words.) This criticism has a curious economic implication, as follows.

A&P's buyers, in their efforts to reduce costs, were trying to save the cost of the brokerage. In effect A&P did its own brokerage. This by-passed a lot of brokers. But the Court's condemnation was only the latest in a series of moves in which first Congress, then the Federal Trade Commission, and then the Department of Justice were, in effect, trying to make A&P pay brokerage anyway.

That worked as follows:

To begin with, when A&P bought from, let us say, a canner, it had to pay the price plus the brokerage. Then it began to demand that it be excused from the brokerage. This was outlawed by the Robinson-Patman Act, Section 2(c). A&P began, then, to demand that it get a lower price by the amount of the brokerage, which was really just a different method of billing. This was stopped by the Federal Trade Commission.

Then A&P announced to the trade that it would buy solely from firms that dealt only direct and not at all through brokers. (In such case, there could be no charge against A&P of evading the brokerage.) Since this now seems legally questionable, the next natural step for A&P would seem to be to buy or build its own canneries, thus vertically integrating still further. But this would seem to be legally and economically questionable, since the Antitrust Division has brought a suit to break up the existing A&P, both vertically and horizontally.

The government lawyers would seem to favor only one way by which A&P could solve its difficulty. It could pay the brokerage, even where it does not go through brokers. This would be a "phantom brokerage," charged by the canner and collected from A&P, even though there was no broker. It would be akin to the "phantom freight" sometimes collected by firms selling on geographical basing points. Phantom freight, however, has been condemned by the Supreme Court in the Corn Products [8] and Staley [9] cases. And it would violate the spirit of the Federal Trade Commission's "mill-net" definition of price, under which a seller must *net* the same from different customers, or else a "price-discrimination" results. The seller, in this case, would net more from A&P by the amount of the phantom brokerage. The "discrimination" would be *against* A&P. This "discrimination" would be an actual, as well as a legal, one as long as A&P continued to perform its own brokerage functions, while also having to pay phantom brokerage.

The food business is a huge and sprawling one, doing tens of billions of dollars of sales a year, in products and brands as varied as the goods on a super-market's shelves. A&P people say it includes 50,000 food manufacturers, 45,000 wholesalers and about 500,000 retail food merchants including nearly 1,600 chain store companies with

50,000 outlets. It is anything but a "perfect market." Prices are what sellers can get, and they vary between places, between sellers, and between buyers.

This is the reason for brokers, but it is also the reason for large chains' buying success. Any large, close-knit buying department that can be "all over the map" in such an "imperfect market" can find for itself the best prices, and pass them on to the consumer. This, of course, is hard on sellers, who don't like to have this large buying power squeeze down their profit margins. In effect, such large, skilled buying organizations as A&P's are the actual day-to-day forces, which police such a market against the development of temporary "oligopolies" and keep profit margins of producers down.

But the government lawyers were only getting steam up when they criticised A&P's buying policies. As will be discussed in the next chapter, they also criticized its policies of cutting profit margins to get more customers, of helping out its store operations with profits from manufacturing, and of cutting prices in one division to get business and making this up in other divisions.

One theme runs consistently through all these charges. Each and all are against price *reductions*, whether in prices paid or in prices charged. Each remedy asked by the Antitrust Division would result in A&P's either paying or charging higher prices, or both.

Only by hypothesis did the government lawyers look toward the consumer's interest in *lower* prices. The A&P policies they attack result from day to day in *actual* lower prices. The lower prices for the consumer which they favor are conjectural, imaginary, deductive, some other day. This pie-in-the-sky is promised on the grounds that (1) if A&P didn't buy things so cheaply other grocers could; and (2) if A&P were stopped from cutting prices in some districts, it wouldn't raise them so high in others. Actually, the entire sound-track, except for these falsettos, is concerned with A&P's competitors, not its customers.

17. *A Strange New Definition of "Monopolize"*

In the year ended February 28, 1950, the A&P, with all its corporate children, sold about $2,900,000,000 worth of groceries and earned, on this, a "consolidated net profit" of about $33,400,000, or about 1⅙ cents on each dollar of sales. These figures on sales mean only sales to the public. They do not mean what might be called A&P's imaginary "sales to itself," that is, from one division to another.

The profits, also, are for "the whole business." The accountants got them by taking the whole $2,900,000,000 rung up in the cash register and subtracting from it *all* the costs: buying, manufacturing, retailing, administration, taxes, and so forth, which came to about 98⅚ cents on each dollar of sales. For "accounting control" purposes, however, A&P broke down its profits into those of different departments. It is a vertically integrated firm and it wanted to know how it was doing at different levels.

The accountants used, as near as possible, the usual accounting method, as sketched in Chapter 14 on Integration. They priced the goods transferred from one department to another at as near as possible the going "market." This is not too easy in the food business, since food is handled in a very 'imperfect' market. The results indicated, as they have been doing for years, that A&P makes rather lush profits in its manufacturing, but almost paper-thin profits in its retailing department.

By and large these figures would say that A&P ought to do more manufacturing, where it seems to make the most money, and less retailing. This is not so certain though. One of the things that helps manufacturers most to lower costs is steady, uninterrupted operation for an assured mass market. And this the A&P manufacturing divisions have, because A&P is a mass *retailer*. They might not find it if A&P were broken up, unless they tied up with some other mass distributor, in another integration. They also save by not having to have sales departments.

Nobody knows how far A&P's big manufacturing profits are due to this tie-up with its retailing. But it looks as though A&P might almost go so far as to take a book-loss on its retailing in order to give its manufacturing divisions this steady mass outlet. Few people, however, used to worry about this. It was a nice accountant's problem for a long winter evening. The important thing was that the big-volume total operation made a profit as a whole.

When the Antitrust Division people saw these figures on division profits, however, they expressed what some people might call horror and others, elation. They said in the closing argument at the Danville trial:

> The very heart of the government's complaint is, in effect, that the company uses the profits from what the government calls its non-retail operations to lower its retail prices. And the government contends by such practices, the A&P made it difficult if not impossible for others to compete. Without these advantages which permit A&P to reduce gross profit, no competitor can hope to remain long in business. . . .
>
> Profits from all operations of the system are siphoned

into its retail stores in order to offset *uneconomic retail profit rates.* . . . By 1942 the crediting of non-retail profits to retail operations enabled A&P to operate its stores with *inconsequential profits on retail sales.* . . . The profits from the non-retail end . . . subsidized the retail business, so that the latter could operate at an *uneconomic profit rate, a privilege not possible to A&P's competitors.* This, the government contends, is an *inherent abuse of the vertical integration of A&P's system.*[1] [Italics added.]

This is perhaps the most astounding charge ever brought against any company under the Sherman Anti-trust Act in its entire 60 years. One might expect A&P to be attacked for having gouged the housewife with its high manufacturing profits, then to be forgiven for having disgorged and passed them on to her through its retail divisions. Instead it is attacked, not for making so much money on manufacture but for making so little on retailing. The phrases "uneconomic profit rate" and "inconsequential profits," in their context, indicate that, in the government lawyers' opinions, A&P did not charge *enough* for its groceries. By old-fashioned standards, the government is attacking A&P for its virtues.

Moreover, when the government lawyers call this type of operation "an inherent abuse of the vertical integration of A&P," they have forged a two-edged sword, which can, as successfully, cut down any other integrated operation, as easily as that of the big chain. "Inherent" it is, not only in A&P's operation, but in any other in which some divisions or departments make larger profits than others. But if it is an "abuse," then virtually any integrated operation can be found to be an illegal abuse.

Another bombshell for American business methods was exploded by the government lawyers in their attack on the lowering of prices to get more volume. The classic instance of this was the action of the Ford Motor Company around 1910, when it determined to build a car "which the American workman could afford." It cut its prices sharply, then hoped this would bring in a volume of orders heavy enough to get production costs down to a profitable level.

This has been characteristic of American industry in the last generation or more. Twentieth-century industrialists are looking for a profit just as were the earlier capitalists. But they go at it in a more roundabout way, via low prices and mass production. The idea is somewhat as follows:

If you charge $10,000 for an automobile you may sell only a hundred of them. You may make them at a cost of only $5,000, but this will give you a profit of only $500,000. But if you charge only $1,000 apiece, you may get orders for a million cars, which you may be able to make at $900 apiece, due to the savings on mass production. Then your profit is $100,000,000.

There is, however, a speculation involved here, for there is no real way, except trial and error, to determine, when you cut prices, how much of a cut will bring how much of an increase in volume, which will permit how much of a decrease in costs. And the price of an error is a loss.

In the grocery business, this process consists of cutting the markup on goods, or the "gross profit rate," in the hope of getting more customers, hence lower store costs, hence more net profits. This is what the government lawyers had to say about it in the A&P case.

> In speaking about how meat business . . . had increased from $200 to $1,200 per store, he [John Hartford, chief defendant] pointed out: "This was accomplished by reducing the gross profit rate until the volume was built up to a point where the expense rate was low enough to permit

the store to operate at a profit." *We know of no more clear and concise words with which to express the government's charge. . . .* [Italics added.]

. . . The evil . . . inherent in this pattern lies in the selection of an arbitrary gross profit rate chosen without regard to the expense rate and fixed at a figure which defendants believe will produce the chosen figure of desired volume.[2]

Of course, the lowering of gross profit rates may *ultimately* result in increased sales and hence in increased profits. But [this] ignores the restraining effect upon A&P's retail competition during the interval required for increased sales to reduce the expense rate.[3]

At another point the government brief remarks that an "honest retailer" would try to "price his merchandise in the traditional American way, that is, cost, plus expenses, plus a profit."

It has been said of John Hartford, one of the A&P founders, that "he would rather sell 200 pounds of butter at one cent per pound profit than 100 pounds at two cents a pound profit." The A&P's policy, here condemned, is akin to what the late Wendell Willkie, when he was a power-company president, used to call an "objective rate." The TVA claimed to have pioneered it and there was quite an amusing controversy, with Willkie retorting "Don't teach grandmother to spin." It consisted in lowering rates to get more customers in order to decrease unit-costs, which increased profits.

How the *automobile* industry still follows this policy may be seen from the following remarks of President Charles E. Wilson of General Motors.

Question: In making your prices, is there such a thing as a stabilized profit?

Answer: It can't be stabilized because it keeps changing all the time. . . . A fair price, I've always thought, is a compromise between what has been paid for similar articles, what your competitors are willing to sell comparable products for, and what your costs are. It's when you compromise on those things that you finally decide on your price. If it's too high, you wonder how you can get the cost down so you can cut the price. *Or, if you lose the business, you go ahead and take an abnormally low profit or even go into the red awhile until you gain enough time to reorganize your designs and your production processes to try to make a profit.*[4] [Italics added.]

The Antitrust lawyers had one more basic criticism of A&P's operations along the same lines. It followed the same reasoning as the previously mentioned assumption that suppliers, who sold to A&P at a lower price, made it up by charging other people a higher price. So the government lawyers claimed that, when A&P sold lower in some areas to get business, it then made it up in other areas with higher prices.

Thus, they claimed, in the civil case filed after the criminal case, that "As was found in the criminal case, A&P expanded its retail sales, and eliminated competition from independent grocers, meat dealers and local food chains by temporarily selling food at a loss in selected retail areas in order to expand its sales outlets in such areas, and recouping these losses by charging consumers higher prices in less competitive areas."

Here again the reductions were facts, while the advances to "recoup" them were assumed. The Circuit Court, discussing A&P's sales in "Area X" and "Area Y," said, "When the gross profit rate is reduced in Area X, it is an *almost irresistible conclusion* that A&P had the power to compensate . . . by raising the gross profit rate and retail prices in Area Y. . . . There *must inevitably be* a compensation somewhere in the system for a loss somewhere else, as the over-all policy of the company is to earn $7 a share per annum on its stock." [Italics added.] Here again, the increases are *assumed* and the assumption is merely that A&P made money in some places, while it lost it in others, and the gains enabled it to keep afloat financially. This is essentially the argument against vertical integration, turned horizontally. This has never been a violation of the law before. It is the normal course of business. If this argument were carried to its logical conclusion, A&P could be condemned for recouping from the buyers of cabbages for its losses on turnips, or from buyers on Saturday for its losses on Wednesday.

It is hard to guess where these hypothetical markets might be where A&P can arbitrarily raise its prices to make up for losses incurred elsewhere. It does very little business at rural crossroads. There is vigorous price competition everywhere it operates.

Probably the best way to describe A&P's retail price policy would be to say that it tries to keep its gross profit rate at the lowest practical point—lower than competition, if possible—everywhere. That makes it *especially* low in *some* areas, either because of stiffer competition, or in order to build necessary volume.

The Circuit Court, in its decision, said, "we will consider this case as a whole." And that is the way it should be considered. The whole case, from government briefs to court decision, reeks with criticisms of price cuts. It is immensely concerned with the actual or potential fate of A&P's competitors, but gives only the merest lip service to its customers. The steady refrain, like a steady rain, of the government lawyers' criticism and the court's findings against A&P was that it cut, cut, and then cut prices.

In many of the cases previously discussed in this book, one could draw a fine point of distinction on the following question: did the defendant company intend, want, or hope to get ahead by *killing off competitors*, or was it merely driving ahead to expand its own business, while disregarding the fate of competitors? In the A&P case the question is pointless. The A&P management must be assumed to have economic sense. And in the food business, to try to kill off all competition or competitors is like trying to sweep back the ocean.

Or as two economists have put it more specifically: "Even granting the possibility of eliminating rivals by means of local price-cutting, the retail field is so easy to enter that, when this purging process had been raised, new rivals very likely would enter the field again almost immediately, with the result that all the effort would have gone for naught. This . . . situation is particularly true in the grocery field, since normally stocks of merchandise and facilities are easily obtained. . . ." [5]

In this connection the Circuit Court made the incredible statement that "the inevitable [sic] consequence of this whole business pattern [of A&P] is to create a chain reaction of ever-increasing selling volume and ever-increasing requirements and hence purchasing power for A&P, and for its competitors hardships not produced by competitive forces and, conceivably, ultimate extinction."

Yet at the beginning of the period reviewed in the case, A&P did only about 11 per cent of the country's retail food business and at the end only about 7½ per cent. In recent years, other national corporate chains have been gaining on A&P; "voluntary" chains like Red & White have been gaining on the corporate chains; local chains have been gaining on national chains; and independents have been gaining on all chains. The "ultimate extinction" of A&P's competitors seems a long way off.

Two of A&P's biggest chain competitors, Kroger and Safeway, were indicted a few years ago on almost the identical Sherman Act charges of monopoly and restraint of trade. They did not fight the charge and so pleaded "nolo contendere" [which is Latin for "I do not choose to fight"]. They paid their fines and got off. But it does not make much sense that *three competitors* could each be charged with having a "monopoly," especially in the food business.

The reason so many of A&P's competitors have come to its defense in the public prints seems to be a rather simple one. They are not concerned over the particular fate of A&P in the Antitrust Division's pending suit for A&P's dissolution. Nor would the public need to be concerned about it, if the suit were merely brought to "get" A&P for some political sin or error. But A&P's competitors are concerned because of the *business methods* that have been outlawed, directly or indirectly, in the recent suit. The housewife should be even more concerned, for if A&P is broken up for using these methods, other firms will have to stop using them and her ten-dollar bill at the grocery store will return her a good deal less change, or a good deal less groceries, or both.

18. *The Attack on Bigness in Business*

President Truman recently said, "I would rather see a hundred steel companies than one United States Steel Corporation, and I would rather see a thousand banks than one National City Bank.

"I would much rather see a thousand insurance companies with four *million* dollar assets each than one insurance company with four *billion*." [1]

And the remarks of Supreme Court Justice William O. Douglas on the subject, though already quoted, are pertinent here also. He said:

> "We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The 'Curse of Bigness' shows how size can become a menace—both industrial and social. . . ." [2]

One must note a sharp distinction between this attack on bigness and the attack, outlined in Chapter 10, on the "Big Three's and Four's" of American industry. They are quite different. The other was an attack on what might be called "*comparative* bigness in particular industries," which might apply to companies in small or narrowly defined industries. This chapter is about the attack on what might be called "absolute bigness." The other might be aimed at a merely *million*-dollar firm which happened to be the largest part of the can-opener or pretzel-bending industry; in this chapter, however, the hunters are looking strictly for big game in the *billion*-dollar category.

Thus, while the people who have this fear of sheer bigness often use the word "monopoly," the word is probably less well taken here than in the former case. As Charles E. Wilson whose General Electric Company is, of course, here under attack, recently put it, people often overlook "the fact that in many product lines small businesses come considerably closer to having a monopoly than do the larger ones. Especially is this true of those concerns which have been built around closely held patent positions. . . . in our consideration of the problem of bigness in business we must recognize that it is a problem totally distinct and separate from that of illegal monopolization. Only by such a differentiation will we be able to achieve the dispassionate attitude essential to an intelligent approach to the problem. . . ." [3]

Some critics complain that this fear of absolute bigness in business is not very discriminating or analytical. There are two different kinds of business bigness—in assets or in sales. It takes up to 30 times as large assets in some industries as in others to do the same annual volume of business. To do a billion dollars of annual sales, a grocery chain may need an investment of only 100 million dollars, but a power company may need five billions. Which is the measure of size?

At this point, however, this is no matter. The attack is due to a fear; fear is an emotion; and in emotional matters, figures do not matter too much. Nor does analysis. The fear is of the country's biggest companies. Statisticians who try to define a company in such category will succeed no better than the Irishman who tried to tie a string around a puff of smoke. The nearest to such a definition might be: "Any company of whom an observer might say, "Is it *biiig*? *Is* it big! Is *it* big!"

Suffice it to say that this would include the blue-ribbon list of nationally known firms such as General Motors, Standard Oil Company (N. J.), United States Steel, A&P, National City Bank, Metropolitan Life Insurance Company, General Electric, American Telephone & Telegraph, and so on. Membership in this "club" comes high; to get on the list brings respect from some quarters, distrust from others.

The big business corporation of today seems to have inherited, in modern folklore, the horns and tail once pinned on the small owner-capitalist of the ninteenth century. The modern political cartoonist, particularly of the left wing, usually means "a big corporation" when he draws a fat man in a cutaway and top-hat. Half a century ago this usually meant Wall Street; a century ago its earlier counterpart meant a private capitalist.

Congressional committee hearings were held throughout most of 1949 on the subject of "monopoly power" and concerned themselves largely with big companies like Metropolitan Life Insurance, du Pont, and United States Steel. These hearings produced no legislation, and in fact were not expected to. The Chairman of the House Judiciary Committee, who conducted them, Representative Emanuel Celler, introduced and publicized a bill, however, which said:

> Any corporation whose size and power are such as substantially to lessen competition or to create a monopoly in any line of commerce in any section of the country shall be dissolved into a number of independent enterprises sufficient to restore competition in such line of commerce; provided that no action under this section shall be taken if the

corporation . . . can demonstrate that the proposed action would materially lessen efficiency in any line of commerce.

If Congress passed any such bill, its effect would, of course, depend entirely on how the Supreme Court interpreted it. The Court has already gone about as far as this bill would seem to go. But the bill would make the Court's path easier, or its progress faster, in at least three ways.

First, it adds five important words to the present law and changes two. The predicate of the first sentence is taken from the Clayton Act which says "where the effect may be substantially to lessen competition, etc., in any line of commerce." But this bill strikes out the important "may be," at the beginning, and, at the end, adds "in any section of the country." The present Supreme Court could do lots of things with those changes.

More important, such an Act of Congress would end the Court's troubles, once and for all, over how to get round its earlier finding, in 1920, that "mere size is not an offense against the Sherman Act."

And lastly, it would vastly simplify the present complicated legal procedure through which the Antitrust Division must go to get a corporation broken up (as in the A&P case, in which it had first to win a criminal suit, then bring a civil suit).

While Congress seems unlikely to pass any such legislation in the near future, it has shown some sympathy. Thus, in the law for the disposal of war plants, it placed handicaps on their sale to larger corporations. President Truman, in his proposed bill in January, 1950, for the sale of government synthetic rubber plants, proposed somewhat similar handicaps on their sale to the bigger companies who might bid, even to those who had designed, had built, and had been running them.

There seem to be two major fears of sheer bigness in business. One is, of course, the concern lest it crush little business. The other is a broader fear that it will produce serious social and economic changes.

19. *The Job of Big Business*

If we had no big business, we would have to invent it. And if we are not willing to have privately operated big business, we shall have to have big business operated by the government. When the President said he would rather see one hundred small steel companies than one United States Steel Corporation, he was merely being nostalgic for the "good old days." But the President himself heads the biggest business in the world, the United States Government.

Included in this government is the biggest insurance system in the world, the Social Security Administration; the second biggest bank in the world, the Reconstruction Finance Corporation; the biggest owner and operator of ships in the world, the Maritime Commission; and the biggest butter-and-egg dealer in the world, the Commodity Credit Corporation.

In these days of big cities, big unions, big armies, and big government departments, there is sometimes a question whether some businesses are big enough. Both government people and corporate executives sometimes show this feeling. Government people have since the war urged that the government be put into new programs of electric power and of synthetic fuel development because, they said, these programs were too big for private business to handle.

On the other side of the fence, an instance occurred since the war in which a job was too big for two big private companies to swing by themselves and they called in two even bigger companies. The Texas Company and the Standard Oil Company of California, trying to swing the Arabian-American Oil Company, took in the Standard Oil Company (N. J.) and the Socony-Vacuum Oil Company. These are four of the biggest companies in the third biggest industry in America.

The technological advantages of size were perhaps first shown in railroading. The present New York Central line to Buffalo was once in the hands of eleven different companies and out of where is now the North Station of the Boston & Maine Railroad once ran lines owned by the Boston and Eastern, the Boston and Lowell, the Boston and Fitchburg, and others.

The scale of economical size has risen vastly since then and continues to rise. Modern chemical developments take initial outlays in the tens of millions. When du Pont went looking for a competitor to go into cellophane it had to find somebody who could put up $20,000,000. Du Pont put $43,000,000 into dyestuffs before profits offset losses and spent $27,000,000 on nylon before it knew whether it had "won or lost." Pratt & Whitney spent $40,000,000 on the development of a single engine and the armed forces spent over $50,000,000 on the B-54 and then abandoned it. Over twenty years ago, the Ford Motor Company spent $100,000,000 to switch from the Model T to the Model A, but, in 1948, General Motors had to spend $50,000,000 merely to bring out its newly engineered Chevrolet.

Oil wells used to cost between $50 to $100,000, but, with deep drilling, they went to $250,000 and, with offshore drilling in the Gulf of Mexico, the Humble Oil Company recently sank $2,000,000 in a single deep-water well.

The political talk is all of hydro-electric power rather than steam power, but hydro costs about twice as much as steam per kilowatt for original investment. Similarly, the latest developments in liquid fuel call for multiplying original costs; gasoline from natural gas means twice the original plant outlay as from petroleum; from coal, four times as much. And in the steel industry, greatly increased outlays will be needed in the beneficiation of taconite compared with those for the mining of Mesabi ore.

Whether his humor was intentional or not, the case has been put neatly by the president of the du Pont Company. Testifying in Washington on bigness and the antitrust laws, he said, "I think it is false reasoning to deplore the fact that a small company cannot gather unto itself the capital necessary to produce a nylon or a cellophane. If it could it would no longer be a small company." [1]

Of course, the reason for the large size of these modern investments is that once the plant is built, the high initial cost is followed by a low production cost. In the last analysis, these big operations are economical. Thus when the President expressed a yearning for a decimation of industrial corporate size he was in effect like the man who went into the store and said "No I don't want the 'large economy size'; give me the small spendthrift size."

But the really big companies are not so much justified by the large cost of these things, as by the large risks. The very large corporation is one means by which men can avoid the great risks of a fast-moving and growing economy. These risks include obsolescence of products and services, fickle markets, changing fashions and unpredictable social trends.

The large corporation protects itself against these risks not by avoiding them but, like an insurance company, by spreading or diversifying them. It operates in different parts of the country, produces for different kinds of buyers, and keeps bringing new products on the market. This enables it to stay in business in a dynamic world, which is in a constant state of flux. But this diversification takes size.

The greatest risk against which industrialists have learned to protect their companies is obsolescence, the inevitable fading of earning power out of machinery and of marketability out of products due to competitors' innovations in a free economy. Obsolescence has much to do with the growth of bigness in American business. A classic case was that of the Ford Motor Company, which made no important changes in its Model T from 1918 to 1928. This nearly cost the Ford Motor Company its corporate life, but it was lucky enough or foresighted enough to be able to dig up the $100,000,000 necessary to get back in the game.

President Charles E. Wilson of General Motors was recently asked what were the advantages of GM's group ownership of different production units. He said, "One advantage of the grouping of these operating divisions is that they don't succumb as the result of one bad mistake, which sometimes happens in different companies.

"Some people might build up a company and have a pretty nice business and a good reputation and then make one big mistake, and before it was discovered they would be out of business. . . ." [2]

It was big American business, in fact, which developed the very concept of obsolescence. It is not mentioned by any of the classical economists, from Adam Smith to Jevons, and they evidently didn't know anything about it. They took it for granted that if you put money in brick and stone it would keep on earning money, almost as though you put it in government bonds. They called this "*fixed* capital," or sometimes "*sunk* capital." The capitalists, however, who made this mistake, usually found *themselves* in a fix and, if they didn't keep putting more money into better property, they eventually were also *sunk*.

Nor did the two American writers who have had the most to do with fashioning present-day economic theory, Wesley Mitchell and Thorstein Veblen, give it any important place. In fact, it has no accepted place in modern accounting, where it appears only in the guise of depreciation. Industrialists learned about it, not from books, but the hard way.

The role of obsolescence in the story of big business lies in three hard facts of economic life. First, only those companies who have consistently "thrown good money after bad," developing ever new products at ever better prices, have stayed in business. Second, in the competitive games that big businesses play, the price of the chips to stay in gets bigger and bigger. And third, no new development, no matter how many millions it costs, is a sure thing. It may be a flop and, unless its company has "other irons in the fire," the company will flop as well.

One way "the bigs" meet these risks, or are able to take them, is through the diversification of their markets and their products. Another is through the continual development of new products. And back of this is "production research" or "applied research."

Finally, still further supporting this, is "pure research."

For this latter, only the members of the "billion-dollar club" with the very longest pocket-books can afford the price and the waiting. It takes millions of dollars and years of waiting before such investments pay off.

Another way of discussing obsolescence is to reverse the emphasis and talk of "innovation." For one man's obsolescence is due to another man's innovation. And as *Barron's Magazine* recently said, "There are apparently just two important roads to obtaining above-average prices. One is monopoly, the other innovation." It might have added that in fact there are only two ways to stay in business permanently: monopoly or innovation.

Despite what is said in Washington, American big businesses have chosen the way of innovation. They have, in fact been forced to, in the sense that since some do, all must. There can be no lasting big monopolies where there are big innovators. Even legal monopolies are not safe, as the fate of the street cars and the difficulties of the railroads show. True monopoly and innovation cannot long exist side by side.

This is why the big American companies that seem to fit, in part, the traditional picture of monopolies in the control of all or nearly all of a certain product, like aluminum, do not and could not fit the rest of the traditional monopoly picture, the holding down of production and holding up of prices. They too must keep on innovating with new products, new uses, lower prices, expanded capacity, and so on.

"The commercial results of being too grasping would in the long run be fatal," a big-business president has said. "For example I suppose it is quite literally true that if we elected to charge five times the present price of nylon yarns, we would find a market—a minute market, but nevertheless a market—and the profit per pound might be quite impressive. But *our own interest* and that of the consuming public *leads us in the other direction.*"[3] [Italics added.]

In the recent House Judiciary hearings on "monopoly," committee members kept hammering on the question of whether big businesses crowd out little businesses.[4] But big businesses do not normally compete with little businesses. They compete mostly with each other. The relations between big and little business are mostly those of buyer and seller, rather than of competitors. In other words, the large businesses do the large jobs, for which they are best qualified, and keep out of the little jobs, for which they are not.

Thus, Standard Oil's biggest competitor is not the Jonesville Filling Station, but Socony-Vacuum, Gulf, or Shell. GM's threat is Ford, not Joe's Garage; GE's is Westinghouse, not a little-known electrical supply house. Only when a little fellow works up to big league size, as did Chrysler, Sylvania, Great Lakes Steel, Monsanto, Philip Morris, Pepsi-Cola, and Motorola, do they come into competition with the big fellows.

Big business' own story on this was indicated by Charles E. (*General Electric*) Wilson, before the House Judiciary Subcommittee. He said,

> Where the objective to be undertaken is easily met, the company formed will be a small one; where the objective is large, the company must, in turn, be big. . . . There are many fields wherein small business is the only answer . . . and many more where small business, with its superior adaptability, is in a highly advantageous position. . . .
>
> That small business can compete . . . more than holding its own with big business . . . is demonstrated in virtually every portion of our economy. . . . In nearly every industry [there are companies] which, like the following, are small, make a well-known product, compete with very large

companies, and are eminently successful: Hormel Packing Company (canned meats), Webster Manufacturing Company (record-changers), Brockway Truck Company, McGraw Electric Company (toasters), Lincoln Electric Company (welding equipment), General Tire Company, Western Tablet Company (paper), Hires (soft drinks), and Okonite Company (cable).

A survey of "Business Size and the Public Interest," published by the National Association of Manufacturers, has said that certain figures "suggest that in manufacturing the large business firms differ from the small firms not only in size but qualitatively. The large companies in general are doing different jobs and using different methods."

On the other hand, the inter-relation between big and little business may be shown by some of the big companies' estimates of their suppliers and customers. The Alcoa people say there are 18,000 firms who produce fabricated castings or otherwise use aluminum for the manufacture of products. The United States Steel Corporation has an estimated 50,000 small suppliers and 90,000 small customers. The du Pont Company either buys from or sells to an estimated 80,000 suppliers or customers. General Electric has some 31,000 suppliers and sells to some 200,000 dealers through several thousand distributors. And census figures show that there are more men employed in the repairing, servicing and selling of automobiles, which are essentially small business operations, than in their manufacturing.

As President Benjamin F. Fairless of United States Steel said to the Monopoly Subcommittee, "If there is one economic lesson which our twentieth century experience has demonstrated conclusively it is that America can no more survive and grow without big business than it can survive and grow without little business. . . . You cannot strengthen one by weakening the other. Big business needs small business; small business needs big business; and the nation needs both."

20. *Big Corporations and People*

Many people are afraid of what big corporations will do to the political and social life of the country. Senator Ralph Flanders once said he was disturbed because "No matter how well the big efficient corporations are economically justified, they cannot keep on growing without changing the social and economic system. . . ."

The growth of big industry is already visibly changing the social landscape, just as did the original growth of manufacturing. Just as the farm town was converted into the old-fashioned mill town, so the mill town has been converted into the larger factory town or huge mill city, with mills and factories owned, perhaps, by strangers and run by "brass hats" in a distant metropolis.

The problem of economic size is not new. Down through the centuries, technological advance has brought larger production units and larger production units and organizations have brought social and political change. The development of power tools in the eighteenth century brought the industrial revolution, rising from the mill. Railroads and new means of communication and recording have brought centralized administration. Nothing anywhere near as big as General Motors, the

National City Bank, or the Social Security Administration would be possible without the latter. But for as long as there is written history, the question "How good is bigness?" has been at least a farm problem. The Roman Senate, the British Parliament, and the Soviet government have, in their turns, wrestled with the problem of large, efficient estates versus small family farms.

By and large the historic pattern has been somewhat as follows. Progress of the industrial arts, to begin with, has brought new economies in the form of larger production units. These have begun to upset the existing social pattern. The struggle has, then, been over the question of whether the new economies should be abandoned so as to save the old social pattern, or whether new patterns could be worked out. And this is esentially the question at stake now about big business: should it be hobbled or broken up into "one hundred steel companies instead of one United States Steel Corporation" or can adjustments to it be made?

The first of these solutions, the "nostalgic approach," was expressed some years ago by Justice William O. Douglas, when he said, "Enormous spiritual sacrifices are made in the transformation of shopkeepers into employees." This is the same feeling that Charlie Chaplin expressed in his comical-tragic movie, "Modern Times," in which Charlie got lost in the machinery.

The feeling seems to be that the village blacksmith who becomes an open-hearth furnace man, the independent oil dealer who becomes a uniformed salesman, the grocer who becomes a branch-manager for a chain, the small-town banker who becomes a big-town v.p., and the farmer who becomes an assembly-line worker have lost the spiritual advantages and satisfactions of working for themselves. That many of them do not see it that way, is illustrated by the steady drift of farmers and their sons to the assembly lines, accelerated during the war. (Then there is the story of the C.I.O. assembly-line worker who turned down the offer of a job requiring more skill and attention, because his routine job left his mind free to think about the evils of capitalism and big business.)

One reason why the big corporation can obtain a continuous supply of workers and hold them is because of the comparative security it can offer. (In fact, this brings up a curious contrast in the way many Washington people look at big business compared with the way they look at "social security," the "welfare state," and the "union shop." All are "paternalistic," to use a nearly forgotten word, both the security offered by big business employment and the last-mentioned programs. The main difference is that the latter are compulsory.)

Few economists, particularly in Washington, seem to realize the vast difference between the mainspring that moved the "economic man" of classical economics and the one that drives modern corporate managements. It is still simply "the profit motive." But what a change has come about! The "economic man" was in business with the simple motive of the honest speculator: to buy as cheaply, sell as dear, and get out with as large a profit as possible. Or so he was imagined. With a few sinister lines added to the picture, his imagined modern counterpart, the big corporation, emerges as supposedly moved by arrogance, cunning, and greed. But this isn't necessarily so. The libretto used by many Washington politicians is opera-bouffe, or gaslight melodrama.

By and large the predominant purpose of large corporate managements, in all their major policies, is to make sure the company will remain indefinitely in business. They don't keep the company in business to make profits, they see that it makes profits so it can stay in business. The aim is to keep the company's fences mended at all times on all fronts: competitive, financial, political, and ethical. When there is a choice, for the company, of more profits and less security, or more security (on these various fronts) and less profits, big-business executives almost invariably choose the safe way.

A long series of corporate policies are far more easily explained this way than in the conventional way. Among these are "administered prices," held down in boom times to protect the company's good name with customers and the public and held steady in bad times to protect the company from bankruptcy. Another is the maintenance of sound, rather than speculative, capital structures. Still others are the diversification of markets and products and the long-range planning and development of new products and heavy investments in research (sometimes called "the industry that produces industries").[1] The recently increased investments in "public relations" on the community and national levels may be included here, too.

Such essentially conservative and long-range policies are, in effect, the modern corporation's old-age security program for the organization itself. Insofar as they guarantee the company's own economic life, they enable it to offer comparative security to employees in a shifting world. Young men who want security can start with such corporations with the reasonable probability that so long as they do a fair day's work for a fair day's pay they can count on a pay-check as long as they work and a pension as long as they live.

The President of one of the very largest corporations, Standard Oil Company (N. J.) said a while ago:

> The American people . . . are testing various ways of protecting the individual against the more damaging effects of inevitable change. They are asking for constructive improvements which will defend the individual against forces too great for him to cope with.
>
> So far as the management of my own company is concerned, we have formed the habit of thinking and speaking in terms of "career employment" or "lifetime employment." That is our goal. We have reached a point today where 90 per cent of our employees—wage-rated as well as salaried—have been continually employed since the day they were hired.[2]

Corporate managements are still feeling their way in employee relations. One reason for this is that the modern corporation is something new under the sun. It has no historic precedent. Its managers have been preoccupied for a generation in learning the economic hazards to be avoided; for every lesson in corporate policy some big corporation has gone bankrupt. Only recently have managements achieved enough economic security for their firms to give them time to turn their attention to programs giving the employees economic security. They had to learn to economize before they could begin learning to socialize.

But a great deal has been done. In recent years there has been much heart-searching in corporate managements about the "gulf" between management and men. Polls have been taken, studies made, and new policies adopted. The upshot has been a not inconsiderable list of achievements by corporate management in their domestic relations. To an increasing extent they have become not only bosses, but fathers. Pension systems, suggestion systems, group bonus plans, improved upgrading methods, in-plant training programs, plant hospitals, and house organs have expressed the new "social consciousness" of corporate managements.

It may be said cynically that "they had to," or charitably, that they were big-hearted, or acidly, that "it pays." It comes to the same result. Big corporations are becoming social as well as economic institutions.

Many people feel that because big corporations are not owned by the government, they are not responsible to anybody. Actually, the larger they are the more people they are responsible to. This is one of those cases in which "power" is also vulnerability. Washington economists say big business has power over many people, but big businessmen say they "serve" many people. To sum it up, it is servant to as many people as it "dominates."

The first of these responsibilities is of course the consumer or customer. As the president of du Pont has put it, "Every day is election day in American industry. The larger a company may be, the greater its need to satisfy more and more buyers to survive. Usefulness is the test of whether a company shall stay big. Certainly a company will not grow big unless it is useful, nor stay big unless it continues so. The only power corporations have, big or small, is the right to stand in the market place and cry their wares."

They are also responsible to their stockholders, their employees and their unions, and to local and national opinion. They are also accountable, in varying degrees, to the Bureau of Internal Revenue, the Securities and Exchange Commission, the National Labor Relations Board, the Wage and Hour Administration, the Social Security Board, and probably to several other government departments.

A popular fashion today is the drawing of "organization charts," or "work charts," showing lines of authority. Government departments go in for them particularly, with neat lines and boxes showing what agencies, divisions, bureaus and so on are under whom, over whom, and responsible to whom. Since big private businesses aren't in the government's chart, some people assume that they are not responsible to "the people."

This is, essentially, the idea of socialism. It is being carried forward fast in Great Britain with the "nationalization" of industry. It is based on the assumption that there can be no responsibility without, so to speak, a line on a work chart leading up from each industry to the central government, from which in turn a line of responsibility leads directly to the top box of all, the ballot box.

It is difficult enough for the millions of owners of the large corporations to keep up with what is going on, despite the efforts of the management to keep them informed. It would be many times more difficult for the entire electorate, as "owners," to keep up with what is going on. It is doubtful if public opinion has as much influence, for instance, on the policies of the Commodity Credit Corporation, the Reconstruction Finance Corporation, the Maritime Commission, or the Bureau of Reclamation, as it has on Jersey, Steel, GM, or GE. But the public "owns" the first four of these huge "concentrations of economic power," and the other four are "privately owned."

21. *"Break 'Em Up"*

The Antitrust Division has launched on the mass production of breakup suits against leading American companies. The outcome is about as certain as that of a game of billiards played by a man using a lopsided cue and an elliptical ball on an uneven table. No one knows how long the cases will take, nor how many more will be brought, nor whether other companies will take their cases to the public as A&P has done and what the outcome of that would be if they did.

Following are some of the leading "divorce, divestiture, and dissolution" suits already brought:

To divide the four leading meat-packers (Armour & Company, Swift & Company, the Cudahy Packing Company, and Wilson & Company, Inc.) into 14 "separate and competing" companies;

To force the American Telephone & Telegraph Company to sever relations with its manufacturing company, the Western Electric Company, of which it owns 99 per cent, and to break up Western Electric into three competing companies;

To require that the General Electric Company dispose of half of its Lamp Department;

To break up the A&P system both vertically and horizontally, separating its manufacturing and its buying departments from its retail department and breaking up its retailing division into seven independent geographical divisions;

To cause seven leading major integrated oil companies, on the Pacific Coast to divest themselves of their marketing assets and operations and to operate their transportation facilities as public utilities. (Attorney-General J. Howard McGrath stated, shortly after the suit was filed, "We're going to file similar suits in other regions, probably without waiting for a decision in the case here.")

The Department of Justice has also been reported preparing to file suit to compel the United States Steel Corporation to divest itself of various subsidiary companies which mine coal, operate merchant ships, and fabricate steel.

Presumably these suits are the result of the Supreme Court's recent favorable decisions, in several cases, in which it indicated at least partial dismemberment of the defendant company,[1] coupled with the Alcoa case (single company), the Tobacco case (three companies), and the Circuit Court's decision in the A&P case. Whatever the sources, an Assistant Attorney-General has repeatedly said that he believed the Antitrust Division already had power, under existing interpretations of the Sherman Act, to break up the Big Three's and Four's of industry.

As the law is now interpreted, no antitrust lawyer appears willing to guess who next may be attacked. The new legal concepts of "exclusion," "conspiracy," "intent," and "monopoly" are now so sweeping that practically any large business appears likely to be found guilty anyway whenever the Antitrust Division might bring suit for divorce, divestiture, and dissolution.

Moreover, something further has been added to antitrust history. Until recent years the Antitrust Division rarely asked for divestiture as a penalty and it was even more rarely granted. It generally asked for fine and imprisonment and got a fine. (The company of course also suffered damage to its good name, plus court costs, danger of treble-damage suits, and so on, even though it had abandoned the illegal practice some time before.) The idea generally was "make the penalty fit the crime."

Now, however, the Supreme Court has shown in a number of cases that it will grant divestiture much more frequently. In the Schine case [2] it said, ". . . We start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. . . . Such a course would make enforcement of the Sherman Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees."

So it looks as though Antitrust will, after this, ask the Court for divestiture in an increasing proportion of its cases. To sum up the situation, Antitrust is (1) bringing more cases; (2) winning a larger percentage of them; and (3) appears likely to ask for divestiture in a larger percentage of its victories.

All this means that the Supreme Court has given the Antitrust Division of the Department of Justice an extraordinary power over the leading American firms. The Department decides first whom to file suit against; then, when it wins the case, it practically decides how the losing company is to be broken up.

In a divestiture case, the Supreme Court eventually leaves the business of making the final order to the lower court. But lower court judges are busy. They turn the matter over to the antitrust lawyers and the defeated company lawyers to work it out. Since the judges cannot be economists as well, they have little choice but to turn over the general economic principles of the breakup to the antitrust lawyers.

The government lawyers have an almost limitless choice of forms in which to demand divestiture. They can divide a company "horizontally," "vertically," or both, and in varying proportions. In the General Electric lamp case, they set 50 per cent of the company's business as the amount it should drop. This was jotted down by some antitrust lawyers in New York as one more clue to the inscrutable mind of the Antitrust Division economists. Perhaps they picked it out of the air. Congress has laid down no rules or principles concerning how a company should be broken up—let alone as to *why* it should be broken up.

The Supreme Court has given Congress many broad hints on issues which some of its members, at various times, have felt Congress ought to decide (and not leave to the Court). Many were given in Chapter 2 of this book. The majority in the Columbia Steel case, in another instance, said, "It is not for the courts to determine the course of the Nation's economic development. . . . If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts." [3]

Justice Jackson, in the Standard of California case,[4] said,

> I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, but the judicial

process is not well adapted to exploration of such industry-wide, and even nation-wide questions.

Were Congress to look into this matter, it would have to consider three major and quite different questions. First, it would have to consider whether the Court was wise, in the Schine case, in saying that "an injunction against future violations [of the Sherman Act] is not adequate to protect the public interest." If it were wise, then practically any company found violating the Act is subject to divestiture. If it were not, then Congress might well try writing a statutory definition of what kind of violations in what kind of circumstances *should* be followed by an order of divestiture.

Secondly, Congress might define what categories of companies ought to be amputated or broken up. Should they be defined by mere *size* and, if so, size of assets, or volume of sales? Or should this be made different for different industries? And what should be the *limits* on size? Should the offense be measured by a company's importance in its industry? If so, should the test be *position* in the industry (largest, the two largest, three, four or 20 largest?), or by *percentage of the industry* (and if so, *what* percentage?)? And how define industry? All of these measures have disadvantages.

A limit on mere size would make for fewer companies large enough to take sizable technological risks, or to invest in basic or fundamental research. On the other hand, the breakup of the first, or first two, or first three companies, in an industry might be like requiring the railroads to take off all the front cars from their trains. There would still be front cars—and largest companies.

Perhaps most clearly dangerous would be to limit the *proportion* of the assets or sales of an industry that any company might control. Cartels do that. The *Wall Street Journal* has commented,

> [Under] such conditions why would U. S. Steel be interested in cutting prices, assuming it had all the business it could be allowed to do? . . . And if the largest factor in the . . . industry were [thus] removed from the competitive race why would the other producers deem it necessary to hustle themselves . . . ?

To make such a limit in the name of promoting *competition* would seem fatuous. The Sherman Act would come round full circle and meet itself head on.

The third thing which Congress would need to consider about the dismemberment of corporations would of course be an aspect of the same question: what is the ideal length, breadth, and shape of the Procrustean bed on which they are to be measured. In this case, Congress would be dealing in *minimums* instead of *maximums.* To what minimum should the antitrust lawyers be permitted to reduce American industry?

Here again, the danger of weakening competition in the name of strengthening it would come up in as just an acute form. For instance, there is nothing in the law today to prevent the antitrust lawyers, once having won a divestiture decree, from (a) breaking A&P down into 5,000 separately owned stores; (b) breaking the U. S. Steel down into individually-incorporated mills; (c) breaking oil refining down into pressure-and-thermal cracking, catalytic cracking, fractionating, condensing, and boosting plants. In fact, there is nothing in the law on the subject anyway—"period."

Even the onset of such legislation would probably discourage many expansion programs and new developments. The effect would be like the natural reaction of the du Pont management to Antitrust's suit against du Pont for "monopolizing" cellophane. The huge, new expansion programs of the big steel companies to develop new ore and taconite reserves would have to be re-examined carefully, lest in the future they become retroactively illegal. The possibility that Congress might authorize the dismemberment of large "conglomerate" companies (like General Motors, which makes cars, refrigerators, and Diesel locomotives) might not cause GM to quit research on Diesels, which it introduced to the railroads some years ago. But it certainly would cause GM to think twice before launching another such venture not obviously related to the automobile business.

This in turn could be embarrassing to the national defense, as many of Antitrust's trust-busting activities were to the national defense program ten years ago, until they were headed off in 1942 by the Smaller War Plants Corporation Act. Hence, as stated at the beginning of the chapter, the outcome of the present Sherman Act divestiture program of the Department of Justice, is about as uncertain as the prospects of a man playing billiards on an uneven table with an elliptical ball and a lopsided cue.

22. *How the Government Wins Its Cases*

President Truman once said, "I know that it would be easier to catch and jail criminals if we did not have a Bill of Rights. But," he went on, "I thank God every day . . . that that Bill of Rights is fundamental law."

But as far as business and the Sherman Antitrust Act are concerned, the Department of Justice has practically riddled the Bill of Rights. The letter of the law is still there. But the spirit is gone.

Article 4 of the Bill of Rights says:

> The right of the people to be secure in their persons, houses, *papers and effects*, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon *probable cause*, supported by oath or affirmation, and *particularly describing* the place to be searched, and the person or things to be seized.

The Antitrust Division can and has made itself so troublesome to corporations through vague subpoenas for vaguely defined papers referring to vaguely defined charges that the corporation today usually in the end opens all its files, the Antitrust men swarm through, and they carry off or photostat records by the tens of thousands and the truckloads.

Ten years ago Antitrust went through the offices of the Standard Oil Company (N. J.). They took 47,000 documents involving 65,000 separate pages. In the Madison Oil case,[1] they took 18 truckloads of documents from the defendant companies. In the A&P case, as already reported, they examined 2,000,000 documents, photostated 50,000, and submitted 5,000 of these at the trial.

In February, 1950, the Division asked the Sun Oil Company for information on year-by-year sales volume for gasoline, lubricating oils, and automobile accessories in each of the 18 states and the District of Columbia, where it operates, for the period 1929–1949 inclusive, and other information. The company's answer filled 157 pages. The company left only one of 16 questions unanswered; Antitrust wanted the names of dealers whose contracts had been terminated against their wishes during the last 13 years. (This would probably be a goldmine of complaints). The company said Antitrust could have the keys to the warehouse and dig out the names themselves.

Antitrust is not the only government agency that does this. In the late 1930's the Federal Communications Commission's investigators pulled out all the drawers in the telephone company's head office. The cost of the investigation to the government was $1,500,000. AT&T officials estimated it cost the company $2,500,000. The resultant 1939 "Report of the Investigation of the Telephone Industry" was an economic farce. It recommended that AT&T increase depreciation, reduce rates and maintain the dividend—all at the same time.

These "fishing expeditions" are a field-day for Antitrust lawyers. More than one businessman has commented to this writer that "It's too bad businessmen ever learned to write." No batch in the world of tens of thousands of papers would fail to yield some documents which, torn from their contexts and pieced together adroitly, would not make out a bad case against their corporate owners.

Most troublesome of all are the inter-office memos of over-smart subordinates who, to gain favor with their superior officers, make reports of their shrewd disposal of government officials, competitors, and so on, bearing often no relation to the corporation's actual policies.

But there is more trouble to come. The law strictly limits the use of subpoenaed documents to actual court proceedings, where they are admissible only under the legal rules of evidence, which are designed to protect the individual against a powerful government.

But the law does not prevent a Congressional Committee from subpoenaing the documents in turn from Antitrust and spreading them on the record. Nor is there anybody to prevent Antitrust from letting some friendly newspapermen look over the documents. A great deal of inside information about corporations has been published in recent years by newspapermen who have never visited with the victim corporation even by telephone. "They didn't get it from us," corporate officials have time and again told this writer. "They've never been round to see us and they've never even telephoned to check for accuracy."

There is still more to it. The cases have grown so huge that no judges could ever get through them. The files in the Alcoa case filled one side of the courtroom. In the Cement case, the trial examiner's hearing took three years and produced 49,000 pages of testimony and 50,000 pages of exhibits. (Equal to about 400 books of this size and probably duller.)

There is only one result possible. Judges are human.

As a New York lawyer recently said, "the enormous size to which records in antitrust cases have grown has reached a point where the issues have almost ceased to be *justiciable*."[2] The judges take the government lawyers' word for it. And that word is "guilty."

Article 6 of the Bill of Rights says in part:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed. . . .*"

And this echoes not only Anglo-Saxon common law, but also the complaint in the Declaration of Independence against George III "for *transporting us beyond seas to be tried* for pretended offenses."

But most antitrust cases involve companies whose operations or markets are widely scattered. So Antitrust brings its indictments almost anywhere it wants to. And its choice of "venue" (place of trial) is highly significant.

A cautiously worded statement of this was made some years ago by an Antitrust official. He said, "If there is a choice of jurisdiction, it is advisable to confer with the district attorney in the prospective district and, if possible with the judge, to see whether there are any objections to proceeding there."[3]

So Antitrust brought the first big case against the oil companies in Madison, Wisconsin. None of them produced or refined there and the complaints only remotely involved Wisconsin. But Wisconsin is a state of farmers, with a long record of radical legislation and fear of business. More than that, jurors in the Madison case were warned that it would be a long one and those with much business were let off. Thus, profound and intricate matters of antitrust law and oil industry trade practice were heard by a jury, few of whose members had a high-school education.

Likewise, the automobile financing cases against Ford, Chrysler, General Motors, and the big financing companies were brought in Milwaukee, though the business heads up in Detroit. The Pullman Company, with its head office in Chicago, was indicted in Philadelphia, home of its chief competitor. The Big Three cigarette companies were indicted in Kentucky, where the farmers grow tobacco, though their offices and plants are largely in Virginia and the Carolinas. The A&P was indicted in Dallas, in the home-state of Wright Patman, implacable foe of the chains, and A&P's officers had to travel back and forth the 1,600 miles from the head office in New York (or move to Dallas "for the duration)." The du Pont people, their head office in Wilmington, Delaware, and their chief operations in the East, were indicted in Chicago. Du Pont asked that the venue be moved to Wilmington, but the Supreme Court refused.

The story has already been told [4] of how the judge in Dallas threw out the Antitrust lawyers' case against the A&P because it contained "inflammatory statements" that he wouldn't let be presented to the jury. Yet almost ten years earlier the Antitrust lawyers had been royally bawled out by the Supreme Court itself for the same thing, in the Madison case.

Said the Antitrust lawyers in that case to the poorly educated jury: it is a "terrible thing that a group of influential, wealthy millionaires or billionaires should take over the power, take over the control, the power to make prices . . . malefactors of great wealth . . . eager, grasping men . . . [corporations] who take the law into their own hands . . . without any consideration for the under-dog or the poor man. . . . We are going to stop it, as our forefathers stopped it before us . . . or we are going down to ruin as did the Roman Empire." (The "crime" of the companies had been to steady the price of gasoline during NRA days, at the request of the government, so as to save a number of little independent refiners from going to the wall.)

Said the judge to the jury: ". . . any man of wealth has just as much standing in a court as a man that is poverty-stricken . . . Whether a man be rich or poor, he is entitled to the same consideration in this court . . ."

Said the Supreme Court majority: ". . . appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them. Some of the statements fall in this class. They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor."

And said Justice Roberts dissenting: ". . . I think the closing address of . . . the Government is ground for setting aside the verdict. . . . The final . . . address covers 28 pages . . . about five refer to the facts. . . . The balance consists largely of what the speaker himself characterized as 'clowning,' . . . At many points counsel should have been stopped by the Court. . . ."

A Sherman Act "consent decree" amounts to an agreement between Antitrust and one or several corporations and their officers that these firms will abide by certain rules laid down by Antitrust. It is a civil process and takes only a day in court. In the late 1930's the Antitrust lawyers began using the threat of criminal indictments to extort consent decrees.

An outstanding instance was the so-called "Geiger case" in 1937.

Antitrust had brought criminal charges before a Milwaukee Grand Jury sitting under the late Judge Frank A. Geiger, against the leading automobile and automobile finance companies. Grand Jury proceedings are supposed to be secret. Grand Jurors are not supposed to "even tell their wives" what goes on. Least of all, is it to be revealed to those against whom the city, state, or federal attorneys seek a bill of indictment. Two months after the Milwaukee Grand Jury began hearing the Antitrust Division's charges, the companies involved were invited to Washington by Antitrust. Meantime, it recessed its presentation in Milwaukee.

Cautiously Antitrust lifted the veil of secrecy, enough to show the companies, or at least to make them think, that the jury was "rarin' to indict." But (they were allowed to surmise) if the companies would sign a consent decree, on Antitrust terms, all would be forgiven. This is a hard knuckle to rub in a corporation executive's ribs and was even more so, then, because business officials had not become hardened to having the word "criminal" applied to them.

General Motors refused to accept a consent decree, its counsel explaining that ". . . even under the threat of criminal proceedings [later brought in South Bend] we prefer to have our rights and obligations determined in an atmosphere free from coercion. . . ." When the judge got wind of how his Grand Jury proceedings were being used in Washington he called in all the lawyers, said such a thing was "against all the proprieties," and then and there dismissed the Grand Jury.

The Justice Department then went to the House Judiciary Committee and tried to get the judge unseated. The Wisconsin Bar Association then sent men to Washington, who upheld the judge's personal dignity and called his action "plainly in furtherance of justice." The Judiciary Committee let the matter drop.

Since the war, the Antitrust Division has been writing more and more consent decrees, which have become more and more elaborate. By no means does everything that is written into these decrees represent a writing of commercial practice legislation by the Antitrust lawyers. A part of the promises signed by business are on the nature of "I promise not to stick pins in little children." A New York lawyer recently said:

> One who has studied the consent decrees . . . entered since V-J Day will be horrified by the practices described, unless he is sufficiently sophisticated to know that the Department makes a point of including in consent judgments not only the things which industry has been engaged in doing but the things which it has been suspected or accused of doing; and it then embodies these in elaborate injunctions which are made to appear as if they were present realities.[5]

Article I, Section 9.3 of the Constitution of the United States says, in part: "No . . . ex post facto law shall be passed." That means that a man may not be punished for something which was legal when he did it, but is later made illegal. For instance, under the law passed in January 1934 against hoarding gold, he could not be punished for having hoarded it in 1932.

In theory, a law like the Sherman Act means the same today as when it was written in 1890. But everybody knows better. Business policies of years ago, which everybody then thought entirely legal, are now considered illegal, *and the interpretation extends backward.* It is as though a man who made a right turn on a red light when it was considered legal, was later punished for this turn when such turns were made illegal.

The statute of limitations would mercifully cut this menace off after three years, if it were not for two things. In the first place, the Supreme Court now allows evidence from the long-dead past to be dug up by the Antitrust Division and used to show a "pattern" or "state of mind" that is then applied to the previous three years. Thus, in the Pullman case,[6] a resolution of the Board of Directors of Pullman in 1870 was relied on in finding the "intent to monopolize."

And, in the second place, antitrust cases often take many more years than three from indictment to final decision; meantime the law is reinterpreted. An example was the Carboloy case, already mentioned, which went as follows:

In 1926, a unanimous Supreme Court sustained General Electric in using a certain type of license contract. In 1928, Carboloy and other companies set up a similar license contract. Antitrust indicted Carboloy in 1941, charging that this contract was illegal. The case didn't finally go to trial until early in 1947. All this time, the doctrine of the 1926 General Electric case had been consistently applied by the lower courts and never shaken in the Supreme Court. But in the year and a half after trial before the judge got round to handing down his decision, the Supreme Court handed down three major decisions (Line Material, Gypsum, and Paramount), sharply narrowing the 1926 decision. Perhaps the judge was waiting to see what the Supreme Court would do. Anyway he found the defendants guilty, largely on the basis of these three decisions, including the president of Carboloy who hadn't been with the company at the time the original contract was made. The Antitrust lawyers asked for jail sentences, but the judge wouldn't go that far.

23. *Arm Chair Economics*

At the turn of the century, in 1899, a timid, retiring college professor at the University of Chicago, named Thorstein Veblen, wrote an extraordinary little book called *The Theory of the Leisure Class.*[1] The "Reign of Gilt" of the 1890's was just tapering off, a period in which the womenfolk of newly rich men drove a hard pace in showing off their money. This generation of women is still caricatured in Jiggs' wife, Maggie, and their daughter. They practiced "conspicuous consumption" and "conspicuous leisure" as they had not been practiced in America since the tobacco planters of the James peninsula moved their daughters into Williamsburgh to get them married. The two phrases are Veblen's, his unique contribution to the American language.

Veblen was bitter about it. A later publisher's blurb called his book "The most embarrassing book that an intelligent person can read," and said that it revealed "the hollowness of our canons of taste, education, dress, and culture, and the emptiness of those habits of life and thought which we like to regard as our strength."

Veblen did not know anything about American business except what he had read. He had never been in it. But he didn't like it, any more than he seems to have liked expensively dressed women or college governing boards, with whom he didn't always get along. And in a brilliant, wordy, polysyllabic, pseudo-objective style he managed to tie together almost inextricably in the minds of his readers the leisure class and the American business world.

This was no mean achievement in this country; though it would have been as plain as day in Europe. He did it by the extraordinary feat of inventing from scratch almost a complete idiom, built round such words as "pecuniary," "predatory," and "parasitic." And these he draped about the neck of American business, where they still stick.

The book did not go too well at first. He wrote several others and then in 1919 he published in the *Dial* a series of articles, which were later reprinted as *The Engineers and the Price System.*[2] By now his attack on business and the profit system had crystallized. His style now sounded somewhat less like an ethnologist studying Hottentots and more like a cross between George Ade and Ring Lardner in the latter's most sardonic moments. Veblen took to capitalizing the phrases "Vested Interests" and "Guardians of the Vested Interests," as opposed to "Production Engineers" and "Production Economists." He advocated a Soviet of Technicians, and thus more than anybody else wove the spell for "technocracy."

His thesis was that the growth of American industry was being rapidly disordered by the "captains of industry" who are "unremittingly engaged in a routine of acquisition, in which they habitually reach their ends by a shrewd restriction of output." He called this "sabotage," but hastened to explain that he didn't mean it wasn't respectable, of course. In this series of essays, America was to be saved from the "Guardians of the Vested Interests" (alias the "captains of finance" or "captains of industry") by the "Production Engineers" and "Production Economists."

"Engineers and the Price System" was not as pert as "Leisure Class." Hardly anybody but intellectuals bought it. The "captains of industry" knew no more about Veblen than Veblen knew about them. Time passed. Came the "New Era." And then came the depression. And now, the stone which the builders rejected, became the head of the corner. It is doubtful if any writer had anywhere near as much influence as Veblen on the economic idiom and strange concepts of business which developed in Washington in the 1930's. Compared to Veblen, Karl Marx wasn't even in the running. Business executives, who started to read "Das Kapital" to find out from where the blizzard started, never knew what hit them.

Veblen's idiom began to crop up in reports of the Securities and Exchange Commission, written by Supreme Court Justice William O. Douglas, then head of the SEC's protective committee study. But it was not so much Veblen's high-sounding language that mattered. It was his ideas. Here were the germs of the ideas of such odious things as "administered prices," "monopolistic competition," and "oligopoly."

Compare these ideas, for instance, with Veblen's remark in "Engineers and the Price System" that the existing business system, "having begun as an industrial community . . . centered about an open market . . . has matured into a community of Vested Interests whose vested right it is to keep up prices by a short supply in a closed market." Is that not, with slight embellishment. the "virulent growth of monopoly power"? Veblen never would have used the word "virulent"; he would take a page to get round such outspokenness; but he made the feeling show through. He wrote as though under a censorship. His followers didn't.

Veblen's ideas spread through Washington like a fashion—or else the intellectuals who had read them came to Washington and became its economic oracles. Beginning in 1934, they began to develop the idea that business was getting more and more concentrated in fewer and fewer hands and that this was not only an evil in itself but that it restricted competition.

In 1938, the Temporary National Economic Committee became a loudspeaker for the broadcasting of such new terms as "concerted action," "common course of action," "dominant position," "economic power," "monopolistic competition," and "oligopoly." The Antitrust Division lawyers, led by Thurman Arnold, were quick to capitalize the new lingo. In their briefs they began to use "dominant position" as a synonym for "monopoly," and "concerted action" and "common course of action" for "conspiracy" and "collusion."

After a while they got the judges using such phrases, though only in the course of their opinions, but not as a premise on which they based their decisions. But this gave more weight to the arguments of the Antitrust lawyers and finally, starting with the Alcoa case, the courts began talking "economics" in lieu of law: in other words, this brand of "economics" began to become the law.

Thus, the ideas about business of a timid but brilliant professor who didn't know anything about it, but did know how to cast a spell, are now becoming the law of the land. Unhappily, the chief reason is ignorance, or what the public opinion pollsters call a "vacuum of information." These ideas seem to have been developed largely by people who don't know anything about business except from reading books about it by other people who don't know anything about it.

A single instance must suffice. The foremost critic of the oil industry today—or at least the most feared by the industry—is Professor Eugene V. Rostow. He wrote a book recently at Yale on the oil industry, as part of a series of "Studies in National Policy" being made by members of Yale's Departments of Economics and of Political Science and its School of Law.[3]

Funds for the project were furnished by the Carnegie Corporation and the Ganson Goodyear Depew Memorial Fund. The author is Professor of Law and a member of the Graduate Faculty of Economics at Yale University. The study, according to the jacket "considers in detail proposals for reorganizing the oil industry under the antitrust laws in the interest of achieving the social, economic, and political advantages of more competition."

Oil men promptly began to peruse this "study," and were appalled by the errors. A subcommittee of the Oil Industry Information Committee assembled a thick folio of "errata" in the book. Typical comments were the following:

Rostow: The strong, separate regional Standard Oil companies, all integrated, and almost entirely non-competitive, . . .

Committee Comment: (1) The Standard Oil Company (Kentucky) and the Standard Oil Company of Kansas are not integrated units today. (2) Contrary to the above statement . . . there are at least two of the original Standard Oil companies competing in every state of the union, there is an average of almost 4½ of the original companies in each state, and in some states there are as many as 6 of the original companies in direct competition.

Rostow: . . . the measure of refining capacity is . . . an arbitrary one, being the amount which could be produced if all the refineries worked a one shift day, six days a week.

Committee: Refineries of necessity must operate 24 hours a day, seven days a week except for planned shutdowns.

One oil man, reviewing the book in the Yale Law Journal, called it ". . . unencumbered by the fundamental facts . . . so many erroneous statements it would require a book . . . to recite them . . . fantastic! . . ."[4]

Lowell Mason, the incorrigible minority on the Federal Trade Commission, recently said "When I hear bureaucrats talking about conscious parallelism of action, when I hear them say we must save commercial business . . . bunk has at last reached its saturation point."[5]

24. *The Folklore of Trust-Busting*

This book has been written in the New Hampshire woods. One evening the author took a walk, by the pale of the moon and without flashlight, down an old familiar road. It was a pleasant road that he had walked down many a time in the sunlight. But in the darkness, the trees and fence posts looked like hobgoblins waiting to reach out for him. An old apple tree off which he had picked many a juicy apple looked like a savage and dangerous enemy.

And he thought about how the everyday business world is transformed, when some people talk about it, into a darkness peopled by hobgoblins in the form of predators, plunderers, parasites, and "vested interests"—great shapeless horrors in top hats, with pink, clutching hands, monopolists, oligopolists, and greedy corporations. An octopus waves his tentacles from Wall Street, and big bad corporate wolves lie in wait with long teeth for Little Business. The theme of this bedtime horror story is that the public, the consumer, the wage-earner, and/or little-business are like Little Red Riding Hood carrying her basket of groceries through the wood. "Why, Grandma, what great big teeth you have!"

It is a Jack-the-Giant-Killer story, in which Big Business is always the Giant, and business-baiting Congressmen play the role of Jack; it is a David-and-Goliath story in which Big Business is the arrogant Goliath and government lawyers play David with his sling-shot. For back of all this legislation and interpretation and economic theory is the fear of big—meaning powerful—privately owned corporations. It is against *them* that Congress wrote the Robinson-Patman Act, that the Federal Trade Commission has attacked quantity discounts, freight absorption and good-faith price competition, that the Supreme Court has invented the crime of "monopoly power" and that the Department of Justice has attacked the A&P.

Back of all this queer law and queer economics is the queer feeling that large successful businesses are a danger to the community. Everything they do, in this dark-of-the-moon frightened view, is a threat. If they raise prices, it hurts the consumer. If they lower prices, it hurts the little competitor. If they expand, they are getting too big; if they don't expand, they are sabotaging the country's growth for their own ulterior monopolistic purposes.

Americans have long been ambivalent about bigness. They have loved it and feared it. On the one hand they have built and boasted of the biggest buildings, the biggest canals, the biggest factories, and the biggest railroad systems, steel mills, power plants and assembly lines in the world. On the other hand, since the days when Andrew Jackson broke up the second Bank of the United States, they have feared the big corporations that have made these things possible. In the 1880's, it was the railroads they feared most; in the 1890's, the trusts; in the 1900's, J. P. Morgan. Then it was Wall Street, and now it is "big business" in general.

Previous chapters have described attacks on an almost unbelievably long series of American business practices, methods, and forms of organization. Superficially it would seem that it is these specific practices, methods and forms of organization which are questioned. But like the child who saw the king walk by in his imaginary clothes and naively said, "Why, he has nothing on at all," so the layman is likely to conclude, "Why, there is nothing right about business at all." And such, in fact, appears to be the case. The attacks are on such variegated things that they appear to be merely parts of one all-out attack, not really on what successful businesses *do*, but on what they *are;* not on their *sins*, but on their *power to sin.*

Thus attacks on at least 18 different aspects of American business have been discussed in this book. They are, with the chief source:

Quantity discounts	Morton Salt case
Delivered prices	Cement case
"Good-faith" price-competition	Detroit gasoline case
Matched prices	Cement case
Exclusive dealer contracts	California Standard case
Resale-price-maintenance	Ethyl Gasoline case
Lack of resale-price-maintenance	Detroit gasoline case
Keeping ahead of competitors	Alcoa case
Possession of power to exclude competitors	Tobacco case
Possession of leading positions in industry	Tobacco case
Price leadership	Congressional attacks
Administered prices	Congressional attacks
Vertical integration	Schine, Paramount, A&P cases

Horizontal integration	A&P case
Obtaining lower prices and transmitting to consumer ..	A&P case
Cutting prices to get volume .	A&P case
"Uneconomic" profit rates ..	A&P case
Mere size	Griffith case, Congressional attacks

It is hard to see how any firm of importance in America can fail to be guilty of violating some, if not most, of these canons or interpretations. In other words, if these things are all wrong, American business is all wrong and can be made right by nothing short of utter tear-down and re-assembly along totally different lines. (And the results, it might be added, would be such as to make the authors of the Sherman Antitrust Act turn over in their graves.)

For the roots of this distrust we may look to politics. And for some analysis of them we may perhaps borrow some lore from the psychiatrists. Politics is largely the expression of emotions rather than logic. And emotions are the psychiatrists' business—especially the emotions that arise out of fear and the ones that conflict with each other.

The psychiatrists find two syndromes, or sets, of emotions which seem to fit the case here. One is paranoia and the other is what they call "compulsion neurosis." Paranoia is the "illusion of persecution." And it seems to take mass form in such mass illusions as fear of capitalists, of the Jews, of Wall Street, of the Catholic Church, of the "liquor interests," of the "Vested Interests," of the New Deal, of the Square Deal, or of Big Business.

Paranoid fears have two conspicuous characteristics in the individual and the same thing seems to be true in the mass. In the first place, they are vague, profound, and almost inaccessible to reasoning. They are almost like the fear of apple-trees and odd-shaped fence-posts in the night. But in the second place, they seem somehow to involve the projection on the person or group feared, of hostile, guilty or dangerous feelings that the paranoid cannot accept or admit in himself. "I hit him because he intended to hit me," is the classic example. Everybody has a bit of this in his make-up, as indicated in the old saying, "You can judge a man's faults by what he criticizes in others."

If there is anything to this, it seems to fit the case at hand. The burden of the attack on business is that it has too much "power." But it goes, almost without saying, that insofar as the attack succeeds, it puts and will put tremendous new powers in the hands of the very government lawyers who are spearheading the attack.

The "compulsive," in psychiatric idiom, is the idealist who feels that he is unusually bad but who, paradoxically, intends in the future to remake himself into something unusually good. He is compelled by an inner drive to hitch his wagon to a star and to try constantly to perfect himself. It is as hard for him to satisfy himself as it is for a business man to satisfy a government lawyer. He is inclined to expect other people to keep likewise forever trying to "improve themselves." If they won't, as is usually the case, he will often try to do it for them himself. Though he is honest, reliable, and a hard worker, people usually consider him 'hard to get on with.' They may *admire* him, but they don't particularly like him; and the feeling is often mutual. So the "compulsive" is usually somewhat lonesome, and feels somewhat unappreciated.

The pattern of the present attack on business seems to have been conceived in an attitude similar to that of the "compulsive" toward himself. Those who have it tend to view the "present system" as unusually bad, but they tend to assume that it could be resolved into something unusually good. If the operators of the system seem inclined to feel that the system isn't completely bad and that, after all, it naturally gets a little better every day, these economic perfectionists are alarmingly eager to take on the responsibility of perfecting it themselves. (It is interesting to note in this connection that Dr. Freud, the grandfather of modern psychiatry, drew many of his early concepts and analogies from the field of politics, such things as repression, freedom, self-government, censor, the "lawless instincts," the "Id" and so on.)

Still another source for the feelings of many intellectuals, supporting the current attack on business, may be a sort of secularization of the theological dualism of many Protestant churches. In the nineteenth century, many people believed firmly that the world was a battle-ground between two great personal Powers: God and the Devil. The one was wholly Benevolent, the other wholly bad.

"What was not of God, was of the Devil."

The modern fashionable thinker seems to have changed the subjects, but to have retained the same general idea. Government, spelled with a capital "G," seems to have acquired the halo, as omnipotent, omniscient, and above all benevolent; while Business, also spelled with an initial capital, seems to have acquired the horns, as greedy, short-sighted, and probably malevolent. It may perhaps be significant that many leaders of the modern attack on business are the sons of Protestant ministers who did not follow their fathers into the ministry. The faith and the intensity remain, but the vision has become earthy and somewhat degraded.

Such people seem to feel in their bones that every attack on business, particularly against large corporations, is another battle for Good against Evil in a permanent crusade. They tend to divide the world into the essentially good and the essentially bad people.

The result often tends to deteriorate into a hair-raising melodrama, solemnly but erroneously called "economics," in which the good people are all good and the bad people are all bad. All the economic "sins" of restricting output, raising prices, cutting prices, and, in general, chiseling, cheating, and squeezing are vices solely of the villains; and all the known economic virtues are hung like haloes around the heads of the good people, who can do no wrong, or who, if they do wrong, at least mean well.

Nobody ever says this. But a lot of people seem to feel this way, especially about government officials, on the one hand, and business managements, on the other.

25. *Conclusion*

The present situation cannot last. It involves a preposterous contradiction in American ways of getting things done. The morals of the business community and the findings of law of the federal courts are in head-on collision. Almost straight through the fabric of American business, what is honorable and useful by one standard is criminal by the other.

The paradox has not yet come to the public's attention for two reasons. In the first place, the law moves slowly. It takes years for some antitrust cases to move through the courts. Neither the Department of Justice nor the Federal Trade Commission have been getting a fraction of the money from Congress that they would need to take up all the cases that, on its face, the present interpretation of the antitrust laws would enable and even require them to prosecute.

In the second place, the battle has so far looked merely like a battle between lawyers over technicalities. The Detroit workman, stopping to "gas up" for the weekend on his way home Friday night, could not know that the question whether a good-faith price-discrimination rebuttal under Section 2(b) of the Clayton Act does or does not apply to Section 2(a) might make a difference of a half-cent a gallon in his purchase. The consumer has had no inkling, until A&P began to spread its case before the public, that it was *his pocket-book* over which the battle was raging.

Since the essential purpose of all the variegated attacks has been to hamper the more successful business for the benefit of the less successful business, the result has been not to clarify the law, but to dissolve it. When the millions of words are boiled down dry, what is left is merely a rule that the bigger companies are almost invariably wrong on some count or other and the little companies almost invariably right. The result is that nobody knows what is legal and what isn't. The law is what the government lawyers say it is. And they are essentially interested not in *what* is done, but in *who does it.*

The purpose of the attack, in the last analysis, is to stop the clock and turn it back. It would keep the distribution industries the way they are, discourage technological innovation, break down the modern integrated company, hamper and baffle the normal processes of price reduction, and upset the stability and security that the really big companies achieve through their widespread diversification and innovation.

In Chapters 5 and 6, it was pointed out how the Federal Trade Commission, by confusing "injury to competition" with "injury to competitors," was thereby softening competition at the consumer's expense. But the consumer will also have to pay for the attacks of the Department of Justice, under the Sherman Act, on the Big Three's and Four's of industry, on vertical and horizontal integration, and on plain bigness in business. They, too, are attacks aimed at protecting the small competitor, not the consumer, as the government briefs and court decisions amply indicate, and the consumer will have to pay for them.

These attacks hit not only the consumer, they jeopardize the national defense. This is not merely because, if continued with the present rate of success, they would require a complete disorganization and reorganization of American business during a national emergency. The American public is not likely to let them go that far. It is because the armed forces need, for their proper supply and industrial support, "dominant companies," integrated companies, and very big companies, as well as little companies. They needed them in World War II, they need them now, and they will need them in the future. The breakup of the leading integrated companies and the divorce, divestiture, or dissolution of the biggest producers and distributors, whether integrated or not, is a luxury the country cannot afford. Its "great concentrations of economic power" in American industry are more essential to the nation's defense than its great concentrations of administrative power in Washington.

The new interpretations of the antitrust laws endanger the political structure of the country. They disintegrate the law, making it a respecter of persons, which tends to be no law at all. They upset the balance of power between Congress and the courts, by judicial legislation, which is a usurpation of Congress' role. Whatever "power" they take away from business organizations will not revert to the people but is automatically being appropriated by government agencies.

An United States Senator stated over 70 years ago:

> I do not dread these corporations as instruments of power to destroy this country, because there are thousands of agencies which can regulate, restrain and control them. But there is a corporation we may all dread. That corporation is the Federal Government. From the aggression of this corporation there can be no safety if it is allowed to

go beyond the well-defined limits of its power. I dread nothing so much as the exercise of ungranted and doubtful powers by this Government. . . .[1]

A newspaper sold on the streets of London a hundred years ago said: "The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised . . . springs the tyrannical usage which generations of wise and good men may hereafter perceive and lament and resist in vain. . . ."[2]

And the Governor of a great state once said:

> Were it possible to find master minds so unselfish, so willing to decide unhesitatingly against their own personal interests or private prejudices, men almost God-like in their ability to hold the scales of justice with an even hand, such a government might be to the interests of the country. But there are none such on our political horizon, and we cannot expect a complete reversal of all the teachings of history.[3]

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[3] Address before Section of Judicial Administration of American Bar Association, Seattle, September 8, 1948.

[4] 80 Congressional Record 9419, June 15, 1936.

[5] Paul v. Virginia, 75 U. S. (8 Wall.) 168, (1869).

[6] U. S. v. Southeastern Underwriters Association, 322 U. S. (1944).

[7] Kirschbaum v. Walling, June 1, 1942.

[8] Anderson et al. v. Mt. Clemens Pottery Co., 328 U. S. 680 (1946).

[9] Bay Ridge Operating Co., Inc. v. James Aaron, et al., 334 U. S. 446 (1948).

[10] In 1949 the Supreme Court set aside the conviction of Harold Christoffel for perjury before a Congressional committee, because there was some evidence that only eleven Congressmen, two short of a quorum, heard the lie that he was not a Communist. The Court disregarded prior decisions and the custom and practice of Congress for over 150 years that a quorum is presumed to continue unless a point of "no quorum" is raised.

[11] U. S. v. Hutcheson et al., 312 U. S. 219, page 245, Justice Hughes joining.

[12] Nye et al. v. U. S. et al., 313 U. S. 33, page 57; Justices Hughes and Roberts joining.

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Chapter 2: *EVERYBODY OUT OF STEP BUT THE GOVERNMENT LAWYERS*

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[4] Civil Service Committee, February 13, 1947.

Chapter 3: *THE ARGUMENT OVER WHETHER THERE IS AN ARGUMENT*

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[2] Address before Boston Conference on Distribution, October 26, 1948.
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[4] Reported in the N. Y. *Journal of Commerce*, November 9, 1948.
[5] Reported in the N. Y. *Journal of Commerce*, November 20, 1948.
[6] Speech before City Club of Denver, December 28, 1948.
[7] *U. S. News & World Report*, Interview, copyrighted November 25, 1949. (This and other interviews, so indicated, are quoted from copyrighted material in *U. S. News & World Report*, an independent weekly magazine on national and international affairs, published at Washington.)
[8] *Proceedings of Symposium, Section on Antitrust Law*, New York State Bar Association, January 25, 1950, page 37, C.C.H. (Commerce Clearing House, Inc.).
[9] Friedrick Hayek, *The Road to Serfdom*, Chapter 6. London: George Rutledge & Sons, Ltd., 1946.
[10] Dickinson, "Legal Rules: Their Function in the Process of Decision," 79 *University of Pennsylvania Law Review*, 833, 846–847 (1930). See also Pound, "The Theory of Judicial Decision," 36 *Harvard Law Review* 940, 957 (1923).

[11] Message to the Joint Session of Congress, January 20, 1914.

[12] *Economist,* April 10, 1948, page 574, col. 2.

Chapter 4: *THE MORTON SALT CASE* [1]

[1] F.T.C. v. Morton Salt Co., 334 U. S. (1948).

[2] The heart of the Sherman Act lay in two sections in the following words:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal . . .

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor, . . ."

[3] Goodyear had sold about $120,000,000 worth to Sears at a profit of about $7,000,000, but had made about $20,000,000 on the sale of about the same amount to independent tire dealers.

[4] Goodyear Tire and Rubber Co. v. F.T.C., 101 F. 2nd (C.C.A. 6th 1939) cert. denied, 308 U. S. 557 (1939).

[5] S. Rep. No. 1502, 74th Cong., 2nd Sess. 4.

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[6] U. S. v. Aluminum Company of America, 148 F. 2nd. 416 (1945).

[7] Interview, *U. S. News & World Report,* November 11, 1949.

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[2] Address before Public Relations Association of America, December 6, 1950.

[3] U. S. v. United States Steel Corporation, 251 U. S. 417 (1920).

[4] U. S. v. United States Steel Corporation, 251 U. S. 417 (1920).

[5] U. S. v. Swift and Co., 286 U. S. 106 (1932).

[6] American Tobacco Company v. U. S., 328 U. S. 781 (1946).

[7] U. S. v. Columbia Steel Co., 334 U. S. 495 (1948).

[8] U. S. v. L. C. Griffith, 334 U. S. 109 (1948).

[9] Speech of Assistant Attorney-General Herbert A. Bergson, January 25, 1950, "Antitrust Law Symposium," C.C.H. page 86. He said, "In seeking to dissolve this company we do not predicate our case on the size of the defendant company, which measured in dollars and cents is very small, but which from the standpoint of position in the industry is so great that it possesses monopoly power."

[10] U. S. v. Trenton Potteries Co., 273 U. S. (1927).

[11] American Column & Lumber Co. v. U. S., 257 U. S. (1921).

[12] Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. (1914).

[13] U. S. v. Addyston Pipe & Steel Co., 175 U. S. (1899).

[14] American Tobacco Company v. U. S., 328 U. S. 781 (1946).

[15] U. S. v. Griffith, 334 U. S. (1948).

[16] Note the words of Justice Douglas in the Griffith case, "Monopoly power . . . may itself constitute an evil and stand condemned . . even though it remains unexercised."

Chapter 9: *THE "VIRULENT GROWTH OF MONOPOLY POWER"* *

* Douglas, individual dissent, Standard Oil Co. of California, v. U. S., final paragraph. *Op. cit.*

[1] Peter F. Drucker, "The Care and Feeding of Small Business," *Harper's Magazine*, August 1950.

[2] Jersey and General Motors.

[3] Rufus S. Tucker, "Concentration and Competition," *Journal of Marketing*, February 1940.

Chapter 10: *OLIGOPOLY*

[1] Interview, *U. S. News & World Report*, September 23, 1949.

[2] Assistant Attorney-General Herbert A. Bergson, reported in *U. S. News & World Report*, September 30, 1949.

[3] *Concentration of Productive Facilities, 1947, in 26 Selected Industries.*

[4] Statement before the Subcommittee on the Growth of Monopoly, House Judiciary Committee, July 13, 1949.

[5] U. S. v. Trenton Potteries Co., 273 U. S. (1927).

[6] Cement Mfgrs. Assoc. v. U. S., 268 U. S. 588 (1925).

[7] *Webster's New International Dictionary*, 2nd ed. Springfield, Mass., G. & C. Merriam Company, 1947.

[8] Interstate Circuit v. U. S., 306 U. S. (1939).

[9] Laurence I. Wood, "The Supreme Court and a Changing Antitrust Concept," *University of Pennsylvania Law Review*, February 1949, Vol. 97, No. 3, page 330.

[10] American Tobacco Company v. U. S., 328 U. S. 781 (1946).

[11] Eugene V. Rostow, "The New Sherman Act," 14 *University of Chicago Law Review*. Chicago, University of Chicago Press, 1947.

[12] Laurence I. Wood, *ibid.*, page 339.

Chapter 11: *CONCENTRATION AND COMPETITION*

[1] B. Bradford Smith, "Facts About 'Concentration' and Profits in the Steel Industry." Statement Prepared for the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, April 26–28, 1950.

[2] *Ibid.*, page 2.

[3] Peter F. Drucker, "How Big is Too Big?" *Harper's Magazine*, June, 1950.

[4] It is perhaps noteworthy that the President, in his statement quoted in the previous chapter about concentrated industries, does not say that they *do* restrict production and so on but only that they *can.*

[5] Benjamin F. Fairless, address before Baltimore Association of Commerce, April 21, 1950.

Chapter 12: *MONOPOLISTIC COMPETITION*

[1] Canto XCIX, *Rubaiyat*, Edward Fitzgerald, translator.

[2] "Memorandum for the President's Committee on Business and Government Relations," Submitted by a Special Committee of the Section on Antitrust Law of the New York State Bar Association, July 10, 1950.

[3] Aetna Portland Cement Co. v. F.T.C., 157 F. (2nd) 1946).

[4] *Ibid.*, page 563.

[5] *Ibid.*, 568.

[6] Pevely Dairy Co. v. U. S., 178 F. (2nd) 363 (1949).

[7] Antitrust Law Symposium, New York State Bar Association, 1949, Edwin B. George, of Dun & Bradstreet, Inc., pages 55, 57. C.C.H.

[8] Address, Charles Sawyer, Harvard Club of Boston, June 10, 1950.

[9] Competition in Steel, David F. Austin, Report to the House Judiciary Subcommittee, 1950.

[10] Remarks, Boston Conference on Distribution, October 26, 1948.

[11] Edward H. Collins, New York *Times*, Monday, May 8, 1950.

[12] H. Thomas Austern, Antitrust Law Symposium, 1949, page 42; C.C.H.

Chapter 13: *ADMINISTERED PRICES*

[1] Statement of John D. Clark before Subcommittee on the Growth of Monopoly, House Judiciary Committee, July 13, 1949.

[2] Walter F. Crowder, Chief of Special Research and Analysis Section, Bureau of Foreign and Domestic Commerce, United States Department of Commerce; TNEC Monograph No. 27, *The Structure of Industry*, Part V, Chapter V, "The Concentration of Production in Manufacturing."

[3] *Ibid.*, page 395.

[4] Dr. Alfred C. Neal, vice-president, Federal Reserve Bank of Boston, *Industrial Concentration and Price Inflexibility*, page 140, published by the American Council on Public Affairs in cooperation with Brown University.

[5] Dr. Gardiner C. Means, "Industrial Prices and Their Relative Inflexibility," Senate Document No. 13, 74th Congress, First Session, January, 1935.

[6] *Ibid.*, page 9.

[7] Dr. Rufus S. Tucker, *American Economic Review*, Volume XXVIII, No. 1, March, 1938, page 42.

[8] Judge Major, in Aetna Portland Cement Co. v. F.T.C., 157. F. (2nd) 565 (1946).

[9] W. Jablonski, "Petroleum Comments." New York *Journal of Commerce*, September 15, 1949.

[10] Sidney A. Swensrud, now president of Gulf Oil, quoted in TNEC Monograph No. 39-A, page 49.

[11] Charles Sawyer, Secretary of Commerce, Address, Harvard Club of Boston, June 10, 1950.
[12] Dr. Peter Drucker, *Harper's Magazine*, June 1950, page 75.
[13] *Wall Street Journal*, August 23, 1949.

Chapter 14: *INTEGRATION*

[1] U. S. v. Northern Securities Co., 193 U. S. 197 (1904).
[2] Dr. Walter Adams, testimony before the Monopoly Subcommittee of the House Judiciary, July, 1949.
[3] Eugene V. Rostow, "The New Sherman Act," 14 *University of Chicago Law Review*. Chicago, University of Chicago Press, 1947.
[4] In fact most of them have gotten out of most of their retail marketing.
[5] Schine Chain Theatres, Inc., et al., v. U. S., 334, U. S. 116 (1948).
[6] U. S. v. Paramount Pictures, Inc., 334 U. S. 131, 144 (1948).
[7] Standard Oil Company of California v. U. S., 279 U. S. 1104, footnote (1948).

Chapter 15: *INTEGRATED WE STAND*

[1] Edwin S. Hall, former General Counsel, Standard Oil Company (N. J.). From a speech given before the Tennessee Oil Men's Association, Chattanooga, June 14, 1949.
[2] W. S. Farish, testimony before TNEC, Part 17, pages 9748–9749.
[3] J. Howard Pew, TNEC hearings, Pt. 14, pages 7188–7191.
[4] Dr. Robert S. Wilson, president Pan American Petroleum & Transport Company, TNEC hearings, Part 15, page 8373.
[5] Interview, U. S. *News & World Report*, November 11, 1949.
[6] Simons, Henry C. "*A Positive Program for Laissez Faire*," 33 University of Chicago Press, 1934.
[7] TNEC Monograph 39-A, pages 12–13.
[8] "U. S. Court Refuses to Break Up Alcoa," New York *Times*, June 3, 1950.

Chapter 16: *THE GREAT ATLANTIC & PACIFIC TEA COMPANY*[1]

[1] 173 F. 2nd. 79.
[2] Fashion Originators' Guild v. F.T.C., 312 U. S. 457 (1941).
[3] Schine Chain Theatres v. United States, 334 U. S. 110 (1948).
[4] Interview, *U. S. News & World Report*, November 25, 1949.
[5] Quoted in the New York *Times*, December 10, 1949.
[6] Morris A. Adelman, *Quarterly Journal of Economics*, May 1949, page 252.

[7] *Yale Law Journal*, Vol. 58, No. 6, May 1949, page 975.
[8] Corn Products Company v. F.T.C., 324 U. S. 726 (1945).
[9] F.T.C. v. Staley Manufacturing Company, 324 U. S. 588 (1925).

Chapter 17: *A STRANGE NEW DEFINITION OF "MONOPOLIZE"*

[1] Government Brief, pages 87, 94, and 7.
[2] Government Brief, pages 110, 837.
[3] Government Brief, Court of Appeals, page 373.
[4] Interview, *United States News & World Report*, December 30, 1949.
[5] Cassady & Grether, "Locality Price Differentials in the Western Retail Grocery Trade," *Harvard Business Review*, 190 (1943), page 296.

Chapter 18: *THE ATTACK ON BIGNESS IN BUSINESS*

[1] Speech to the graduating class of Washington College at Chesterton, Maryland.
[2] Dissenting opinion, U. S. v. Columbia Steel Co., 334 U. S. 495 (1948).
[3] Testimony before Special Subcommittee of House Judiciary Committee, Nov. 30, 1949.

Chapter 19: *THE JOB OF BIG BUSINESS*

[1] Crawford H. Greenewalt, testimony before Special Subcommittee on the Study of Monopoly Power of the House Judiciary Committee, November 15, 1949.
[2] Interview, *U. S. News & World Report*, December 30, 1949.
[3] Crawford H. Greenewalt, president of E. I. du Pont de Nemours & Company, interview, *U. S. News & World Report*, September 16, 1949.
[4] A highly significant question was the following, asked of du Pont's president: "Is it not true that you have two or three departments, and you can compensate yourself for your losses in Department A by your profits in Department B and C?" Answer: "That is quite correct, sir." Chairman: "And if an individual goes into business, and he has one department, he has to sustain his entire losses and cannot get compensation for those losses in any . . . other department. That is . . . one of the advantages of bigness, is that not true?" Answer: "Indeed, yes."

Note that this is essentially the same question, of the "subsidization" of one department with the "profits" from another, raised in the case of vertical integration (Chapter 14) and in the case of A&P's vertical and horizontal integration. It is the obverse way of putting the diversification of risks.

Chapter 20: *BIG CORPORATIONS AND PEOPLE*

[1] It may be said that "pure research" is the reproductive system of the big corporation and "applied research," or "production research," is the womb in which its next generation of products is developed.

[2] Eugene Holman, Address before Economic Club of Detroit, November 8, 1948.

Chapter 21: *"BREAK 'EM UP"*

[1] Paramount, Schine, Griffith, Cresent Amusement, 323 U. S. 173 (1944).

[2] Schine Chain Theatres v. U. S., 334 U. S. 110.

[3] U. S. v. Columbia Steel Co., 334 U. S. 495 (1948).

[4] Standard Oil Co., of Calif. v. U. S., 337 U. S. 293 (1949).

Chapter 22: *HOW THE GOVERNMENT WINS ITS CASES*

[1] U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).

[2] Thurlow M. Gordon, Antitrust Law Symposium, 1949, page 84. C.C.H.

[3] John Henry Lewin, "The Conduct of Grand Jury Proceedings in Antitrust Cases," *Law and Contemporary Problems*, School of Law, Duke University, Winter, 1940, Vol. VII, No. 1, page 115.

[4] See Chapter 16.

[5] Bethuel M. Webster, Antitrust Symposium, 1949, page 82. C.C.H.

[6] U. S. v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943).

Chapter 23: *ARM CHAIR ECONOMICS*

[1] Reprinted, Viking Press, New York, 1931.

[2] B. W. Huebsch, Inc., 1921.

[3] Eugene V. Rostow, *A National Policy for the Oil Industry*. New Haven: Yale University Press, 1948.

[4] J. Howard Marshall, president, Ashland Oil & Refining Company and former Chief Counsel, Petroleum Administration for War, *Yale Law Journal*, June 1948.

[5] Address before American Steel Warehouse Association, Inc., April 27, 1950.

Chapter 25: *CONCLUSION*

[1] Benjamin Hill, United States Senate, 1878.
[2] Quoted by Professor John Jewkes in foreword to *Ordeal by Planning.*
[3] Franklin D. Roosevelt, 1932.

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