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INTERPRETATION OF ANTITRUST LEGISLATION

When a legislative body undertakes a fundamental change in the structure of society, it is wise to simply set forth general principles, and let the courts make the specific applications which will become crystallized into detailed rules. The wisdom of this method of proceeding is indicated by experience in the development of our constitutional law—it is the peculiar genius of the common law system that the courts are able to develop the law efficiently in this manner. In entering upon the control of monopolistic practices in the economic system through the Sherman Antitrust Act, Congress therefore wisely contented itself with the setting forth of general principles. In general the same approach has been followed in other antimonopolistic legislation.¹

However, in the course of time the judicial decisions upon the subject have gradually produced a confused state of the law which makes it difficult, and at times almost impossible, for businessmen and their counsel to chart a safe course. On the one hand, Congress and the courts tell the businessman that he must compete; on the other hand, the Federal Trade Commission is constantly telling him, in the form of complicated restrictions, what he must not do when he competes. It is becoming increasingly difficult for him to chart a course between Scylla and Charybdis, and many a business plan has come to grief in the attempt. The statutes provide for fines, imprisonment and injunctions in actions brought by the Department of Justice, cease and desist orders in proceedings of the Federal Trade Commission, and treble damages and injunctions through litigation brought by private parties.

Formerly, judicial decisions furnished the practitioner with at least some trustworthy landmarks. In the first place, they laid down the basic principle that our common law heritage could be drawn upon as a guide to what was lawful and what was unlawful.² In the second place, they provided reasonably reliable precedents on cardinal points. Thus the *Steel* case was respected authority that size was not per se an offense;³ the *Cement* case was assurance that stabiliz-

1. The statutes in the field of antitrust law embraces in general the antitrust laws as that term is defined by Congress, e.g., the Sherman and Clayton Acts, supplemental legislation such as the Federal Trade Commission Act, and various amendatory acts. See generally 15 U. S. C. § 1, (1940) *et seq.* (Where detailed provisions are resorted to, as in the Robinson-Patman Act, they are largely unintelligible.)

2. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Federal Trade Comm. v. Gratz*, 253 U.S. 421 (1920).

3. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

ing activities between competitors were not necessarily unlawful,⁴ and the *G.E.* case promised recognition of the Constitution's guarantee of exclusive rights to the patents.⁵

In recent times a marked change has occurred in the economic philosophy of the executive and judicial branches of the government, which has caused them to question much of their previous thinking on the legality of business practices. The judicial and administrative landmarks of the past accordingly are being subjected to the most critical review, and in the course of this enforcement officials and courts have frequently departed from their predecessors views.

Envincing a critical attitude toward one of the newer efforts, Mr. Justice Douglas, on behalf of himself and three other justices, recently said of the *G.E.* case :

"This Court, not Congress was the author of the doctrine followed in that case. The rule it sanctions is another of the private perquisites which the court has written into the patent laws. See *Special Equipment Co. v. Coe*, 324 U.S. 370, 383. Since we created it, we should take the initiative in eliminating it."⁶

The current critical review of antitrust law has created a state of confusion in the antitrust field which some have characterized as bordering on anarchy. Even during periods of fairly static economic thinking, discrepancies and contradictions and occasional reversals have occurred in the decisions. When sharp and comprehensive breaks with the past occur, however, and each member of the judiciary assumes the independent role of an original lawgiver, the discrepancies, contradictions and reversals are multiplied many fold. Old landmarks have become wholly unreliable, and even current precedent is subject to the timetable caveat of change without notice.

The present unreliable status of old precedent is illustrated by the *Line Material*⁷ and *South-Eastern*⁸ cases. In each, precedent overwhelmingly favored the defendants, yet in each the defendants lost.

4. *Cement Manufacturing Protective Ass'n. v. United States*, 268 U.S. 588 (1925).

5. *United States v. General Electric Co.*, 272 U.S. 476 (1926).

6. See Mr. Justice Douglas, concurring in *United States v. Line Material Co.*, 333 U.S. 287, 321 (1948).

7. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

8. *United States v. South Eastern Underwriters Ass'n.* 322 U.S. 533 (1944).

The uncertain status of even current precedent is underscored by the controversial *Cement* case. Three years earlier the Supreme Court in the *Corn Products* and *Staley*⁹ cases had gone out of its way to deny that it was condemning all basing point systems, explaining carefully in the first case, for example :

“We think this legislative history indicated only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.”¹⁰

The court nevertheless ruled three years later in the *Cement Institute* case that :

“. . . the combined effect of the two cases was to forbid the adoption for sales purposes of any basing point price system.”¹¹

Statutes have been construed in an original manner. The equitable provisions of the Norris-LaGuardia Act have, by an imaginative quirk of statutory construction, been held to amend the criminal sanctions of the Sherman Act;¹² and the exculpatory provisos of the Robinson-Patman Act on “meeting competition”¹³ and “for services rendered”¹⁴ have been effectively read out of the statute.

Consistency has lost certain of its virtue. The majority in the *Hartford-Empire* case¹⁵ emphasized the necessity for reviewing lower courts, while the minority criticized such review; yet substantially the same majority on substantially the same issues in the *National Lead* case¹⁶ urged abstinence from review, while the same minority took the position that lower courts sometimes made mistakes.

Terminology has frequently become inexact. Thus a single trader was held guilty of a “boycott” in the *A&P* case.¹⁷

Decisions have been reached, furthermore, by most unusual divisions of the Justices of the Supreme Court. One Justice wrote

9. Federal Trade Commission v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945).
10. *Corn Products Co. v. Federal Trade Commission*, 324 U.S. 726, 737 (1945).
11. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 723 (1948).
12. United States v. Hutchinson, 312 U.S. 219 (1941).
13. Standard Oil of Indiana v. Federal Trade Commission, 173 F.2d 210 (7th Cir. 1949).
14. Biddle Purchasing Co. v. Federal Trade Commission 96 F.2d 687 (2d Cir. 1938), *corr. denied*, 305 U.S. 634 (1938); and Great Atlantic Pacific Tea Company v. Federal Trade Commission, 106 F.2d 667 (3d Cir. 1939), *corr. denied* 308 U.S. 625 (1940).
15. *Hartford-Empire Company v. United States*, 323 U.S. 386 and 324 U.S. 570 (1945).
16. United States v. National Lead Co., 332 U.S. 319 (1947).
17. United States v. The New York Great Atlantic & Pacific Tea Co., 273 F.2d 79 (7th Cir. 1949).

the court's opinion in the *Associated Press* case¹⁸ in general terms; another Justice wrote a concurring opinion attempting more specifically to explain the Court's opinion; another Justice questioned this explanation but offered no specific alternative; and others wrote dissenting opinions. In the *Line Material* case¹⁹ no Justice was able to endorse the Court's opinion except the Justice who wrote it.

We should not criticize re-examination of the dead hand of precedent. Some precedents perhaps were appropriately laid at rest; and still others perhaps should be.²⁰ As for the complaint of confusion—when law goes through an evolutionary phase of development in order to conform to new conditions, confusion may be the inevitable price that must and should gladly be paid therefor.

The most serious objection that may properly be leveled at this evolutionary process is directed to its retroactive aspects. A client may in good faith conform closely to what his attorneys believed to be the law. He may even file his agreements with the government. Nevertheless, years later the court—in order to enunciate new law—may retroactively condemn those bona fide transactions and impose ex post facto penalties of cancellation of contracts, confiscation of patent rights and divestiture of important business interests. This new law may even evolve in criminal actions.²¹

Mr. Justice Cardozo once proposed that such judicial process of evolution should be prospective only in a manner analogous to statutes.²² May not the courts, in evolving new concepts of social justice through the medium of the antitrust laws, thus properly safeguard the rights of the individual as well as those of society? Must retroactive punishment necessarily accompany judicial progress? This difficulty does not arise when the government contents itself with asking for an injunction in a civil suit.

Legal counsel should approach a problem in this field on the theory that the applicable law has never been definitely adjudicated. The courts are presently engaged in the legislative process of evaluating old and creating new law in the antitrust field. The rulings of the administrative agencies as well as those of the courts must be minutely examined. Although the Supreme Court of the United

18. *Associated Press v. United States*, 326 U.S. 1 (1945).

19. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

20. *See, e.g., Arrow Hart & Hegeman Electric Co. v. F.T.C.*, 291 U.S. 587 (1934).

21. *United States v. South Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944).

22. Hall, *Selected Writings of Cardozo* 35-37 (1947).

States is the final authority, the decisions of the lower Federal courts and of the Federal Trade Commission on matters on which the Supreme Court has not spoken are most significant as indicating current trends in legal and economic thinking. Consent judgements negotiated by the Department of Justice are also of great interest. The most convenient means of access to these is the Trade Regulation Services.

In evaluating the effect upon the law of judicial opinions in the antitrust field, the reasoning, as distinguished from the decision on the facts before the court, is particularly important. The actual holdings are usually *sui generis* and affected by special factors not common to subsequent cases. Thus the decision in the *Associated Press* case²³ was influenced by the famous private controversy between two Chicago publishers; and the *Columbia Steel* decision²⁴ was in large part necessitated by the Attorney General's *Geneva Steel* opinion therein referred to.

Dicta are often more important than the holdings. *The Trans-wrap* case,²⁵ for example, approved patent licensing which exacted reciprocal exclusive licenses from a license, but this approval was couched in language usually viewed as outlawing this coercive practice for all practical purposes. The heated controversy in the *Cement Institute* case,²⁶ to give another example, involves significantly its dicta and not its holding.

The burden of proof is theoretically upon the government, but for all practical purposes it rests upon the defendants attempting to justify the transactions involved. Formerly the burden actually was upon the Government, to demonstrate both that the antitrust laws were applicable to the particular business transactions, and that those laws were violated thereby. The courts did not assume automatically that all business was reached by these federal laws,²⁷ nor that certain business phenomena such as price uniformity—unless explained—were conspiratorial.²⁸ The antitrust laws are today automatically assumed to apply to business transactions in the absence of some extraordinary showing by the defendant. Intrastate business is brought within the net by a most liberal interpretation of its effect upon interstate commerce. Judicial decisions in the past de-

23. *Associated Press v. United States*, 326 U.S. 1 (1945).

24. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

25. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947).

26. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

27. *Federal Baseball Club of Baltimore Inc. v. National League*, 259 U.S. 200 (1922).

28. *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

cing that a business was not subject to the antitrust laws can not now be relied upon.²⁹

Indeed there seems to be in the making an almost foolproof method of shifting the burden of proof in antitrust cases to the defendant. On the one hand, if the case involves a single defendant, that defendant is usually of appreciable size. This size in and of itself is said to indicate a potentiality for wrongdoing requiring justification.³⁰ On the other hand, should the case involve a number of defendants, there is necessarily present uniformity of action of some nature, under elementary operation of the law of the market place. This uniformity—whether of price³¹ or other action³² similarly is viewed to indicate wrongdoing requiring justification by the defendants. Where a defendant is of large size and uniformity of prices exists, the defendant is substantially assumed to be guilty until he proves to the contrary.

The “rule of reason” has traditionally governed the interpretation of the antitrust law. To-day, however, its position is being shaken. Certain transactions are held unlawful *per se*,³³ such as

price fixing,³⁴ patent tying³⁵ and boycotts.³⁶ Other transactions, if the Government has its way, are to be added to this list, such as exclusive sales agreements.³⁷

The antitrust laws, moreover, even when interpreted in accordance with the rule of reason, are not always found today to favor the same reasons that appealed to previous judges. The current interpretation of the rule of reason was perhaps most succinctly summarized in the *Giboney* case, in which the court said that in the absence of an express statutory exemption: “. . . violations of antitrust laws could not be defended on the ground that a particular accused combination would not injure but would actually help manufacturers, laborers, retailers, consumers, or the public in general.”³⁸

29. *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

30. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

31. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

32. *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

33. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

34. *United States v. Sacoay-Vacuum Oil Co.*, 310 U.S. 150 (1940).

35. *International Salt Co. v. United States*, 332 U.S. 392 (1947).

36. *Fashion Originators Guild of America, Inc., v. Federal Trade Comm.*, 312 U.S. 457 (1941).

37. *United States v. Standard Oil of California*, 78 F. Supp. 850 (S.D. Cal. 1948).

38. *Joseph Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

Although the rule of reason is no longer a sure guide, it still has some vitality, and will continue to be applied in the antitrust field.

In conclusion, the antitrust laws consist largely of judicial decisions, and these today are currently being reappraised, with attendant uncertainties to all concerned. The future enforcement of the antitrust laws is believed to depend, to a considerable degree, upon whether or not we have continued prosperity. If we do, we should have continued strict enforcement of these antitrust laws. With a depression, however, enforcement of those laws will, as before, inevitably be relaxed in the interest of stability. To illustrate, the antitrust laws are said to forbid any competitive price tampering,³⁹ but when prices are spiralling downwards and bankruptcies are mounting upwards, resort will necessarily be had to many stabilizing activities.

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39. *United States v. Sacony-Vacuum Oil Co.*, 310 U.S. 150 (1940).