"Results of the Standard Oil Decision"

By

Frank B. Kellogg

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Foreword

By

Douglas A. Hedin
Editor, MLHP

The United States Supreme Court issued its decision in the *Standard Oil* case on May 15, 1911. [1] Frank Kellogg, the government's lead counsel, and the Attorney General himself were in the courtroom when Chief Justice White announced the decision dissolving John D. Rockefeller's oil monopoly, as reported in *The Warren Sheaf*, a newspaper in rural Marshall County, Minnesota:

> Before him sat a distinguished audience of the most famous men of the country. Senators and representatives left their respective chambers in the capitol to listen to the epoch-making decision of the court. Most eager to hear were Attorney General Wickersham and Frank B. Kellogg, special counsel of the government, who had conducted the great fight against the Standard Oil. None of the brilliant array of counsel for the corporation or individual defendants were present.[2]

While the victory enhanced Kellogg's national reputation as a "trust buster" and fueled speculation about his political future,[3] it also made him the target of critics. In Washington, D. C., then as now it seems, few good deeds pass without some rebuke. Democrats, who controlled the House of Representatives, launched

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[1] *Standard Oil Co. of New Jersey v. United States*, 211 U. S. 1 (1911).

[2] *Warren Sheaf*, May 18, 1911, at 2.

[3] After Justice John Marshall Harlan died on October 14, 1911, Kellogg was on the short list of nominees to the Supreme Court being considered by President Taft. See *New York Tribune*, December 29, 1911, at 7 ("Harlan's Successor Soon."). Eventually Taft nominated Mahlon Pitney, who was confirmed by the Senate on March 13, 1912.

Despite rumors about Kellogg's interest in the U. S. Senate in 1910, the Minnesota Legislature re-elected Moses Clapp in January 1911. Kellogg waited until 1916 to run successfully for the Senate. He served one term, 1917-1923.

an investigation into Kellogg's fees and expenses in the *Standard Oil* case. Newspapers around the country carried the story:

> F. B. Kellogg, Whose Expenditure In Standard Oil.
> Prosecution Of $23,113.13 Of Government
> Money, Will Be Probed, Chief Investigator.
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> Washington, July 6. —The expenses of Frank B. Kellogg, who represented the government in the trails (sic) of the Standard Oil and Harriman merger cases, are to be given a thorough investigation by the house committee on expenditures in the department of justice. Congressman Beall of Texas, who is chairman of the committee, and his fellow committeemen will begin a rigid probe of Kellogg's voluminous expenditures Friday, July 7. Kellogg, who was the so-called "trust-buster" of the Roosevelt administration drew from the treasury $23,311.67 in expense vouchers. He made the drafts from Dec. 23, 1907, to Feb. 11, 1910. The last mentioned day is about the time the reargument in the Standard Oil case was completed. T. C. Spelling, one time assistant attorney in the department of justice, has been employed by the committee to delve into the matter. He states that the vouchers setting forth the items of expenses incurred by Kellogg will be produced before the committee. The sums for Kellogg's expenses, totaling $23,311.67, were all in addition to the $59,000 in fees paid Kellogg for his work in the prosecution of the Standard Oil suit. [4]

The *New York Tribune* derided the congressional inquiry as "Peanut Politics":

> With regard to the matter of fees, it is perhaps not unnatural that lawyers who never saw a larger retainer than $10 should regard the fees paid to Frank B. Kellogg, Henry L. Stimson and other successful special attorneys for the government as monstrous. [5]

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[4] *The Cairo* (Illinois) *Bulletin*, July 7, 1911, at 1 (photographs of Kellogg and Congressman Jack Beall omitted). The "Harriman merger" case refers to the suit by the federal government against the Union Pacific Railroad Company, which was controlled by Edward H. Harriman. In 1912, the Supreme Court ruled in favor of the government. *United States v. Union Pacific Railroad Co.*, 226 U. S. 61 (1912), *later opinion after remand*, 226 U. S. 470 (1913)(rejecting proposal that stock of the Southern Pacific held by the Union Pacific be distributed to the latter's shareholders).

[5] July 16, 1911, at 5 ("Peanut Politics"). See also, *New York Tribune*, July 14, 1911, at 4 ("Kellogg's Fees Shock Democratic Investigators. Think Trust Buster too Costly").

Other criticism bothered Kellogg enough that he took time to refute it. In June 1912 *The American Review of Reviews* published his article "Results of the Standard Oil Decision" in which he defended of the Supreme Court's order dissolving the oil monopoly and explained why the price of the stocks of Standard Oil subsidiaries rose after the ruling. He wrote as a participant in the case, as a lawyer on the defensive. He concludes with a few lame suggestions on improving oversight of large corporations by voluntary federal incorporation and mandatory federal licensing.

Kellogg discussed the aftermath of the Court's decision, not its reasoning. He does not touch the most controversial aspect of that decision — that the Sherman Act only barred "unreasonable" combinations.[6] The "rule of reason" quickly became the focus of discussion and criticism by congressmen, lawyers and scholars. At the annual convention of the Minnesota State Bar Association in July 1911, Pierce Butler, a St. Paul lawyer, staunchly defended the Supreme Court's narrow construction of the statute because it incorporated the common law. His paper is of interest today mainly because he joined the Court twelve years later. His "Decisions of the Supreme Court in the Standard Oil Company and Tobacco Trust Cases" is posted in the Appendix.

An excerpt from Rudolph J. R. Peritz's *Competition Policy in America, 1888-1992*, published in 1996, follows Butler's commentary. He sees that the rule of reason was intended to protect individual liberty of contract and freedom of trade from government intrusion (notions that can be found in Butler's piece). He writes:

> This common-law rhetoric of liberty effected two important changes in antitrust jurisprudence. First, the new majority was willing to allow trusts, even though they were private agreements that restrained competition. Moreover, such "good" trusts reflected the positive social and economic benefits of individual liberty. Second, it was a particular impulse toward liberty that animated that willingness, a negative liberty turned to stopping government regulation of private market transactions among traders. The Rule of Reason represented a diminished investment in equalizing private market power, a discounted interest in promoting the positive liberty to pursue any vocation or livelihood, as well as a heightened concern for curbing governmental power. [7] •

[6] Justice John Marshall Harlan dissented from the majority's use of this common law concept to interpret the statute.

[7] Rudolph J. R. Peritz, *Competition Policy in America, 1888-1992* 52 (Oxford Univ. Press, 1996).

Prosecuting the Case against Standard Oil, 1910

From David Bryn-Jones, *Frank B. Kellogg: A Biography* (1937).

THE AMERICAN REVIEW OF REVIEWS

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RESULTS OF THE STANDARD OIL DECISION

BY FRANK B. KELLOGG

(Special counsel for the United States in the Standard Oil cases)

THERE is much discussion in the public press as to what has been accomplished by the decree in the Standard Oil case. In my opinion that decree accomplished everything that it is possible to accomplish under the Sherman Act. The law does not authorize the court to confiscate the property of combinations or trusts (except property in transit); it authorizes an injunction to restrain violations of the act. The decree in this case enjoined the violation of the act it dissolved the Standard Oil holding company and separated the subsidiary corporations. It went further, it prohibited the individual defendants, the corporations, their officers and agents from continuing or carrying into further effect the combination ad judged illegal, and from entering into or performing any like combinations or conspiracy the effect of which would be to restrain commerce in petroleum and its products.

The injunction also prohibited the defendant corporations until the discontinuance of the operation, of the illegal combination, from engaging or continuing in commerce among the States or in the Territories of the United States. It also enjoined them from making any express or implied arrangements together, or with one another, like that enjoined, relative to the future control and management of any of the defendant corporations. The result is that not only was the combination condemned and declared illegal, but the defendant companies, some thirty-seven in number, which were thus dissevered, were prohibited from making any express or implied agreement relative to the control of the several companies as one harmonious whole. The decree went further than any decree has ever gone in any court, under the Sherman Act.

WHAT WAS THE STANDARD OIL COMPANY?

The Standard Oil combination consisted of one holding company, holding the stocks of and controlling the thirty-seven corporations engaged in all branches of the oil business all parts of the country. The testimony showed that this vast aggregation of actions dominated the oil business, dictated terms to its competitors, and, in many stances, actually crushed them out and di them from the business. It also had influence over the railroads, receiving rebates and other preferences in transportation which its competitors did not enjoy. These unfair methods of competition and preferences were exposed in this case, and during the prosecution and since the decree and the independent oil manufacturers have had free and open opportunity to engage in business and have prospered, without being clubbed to death by inordinate capital.

UNFAIR PRACTICES DISCONTINUED

The severing of the Standard Oil combination prevents it from acting as one great aggregation with all its powers to raise and lower prices, to control the oil industry, to crush out its competitors.

A gentleman interested with the independent manufacturers and thoroughly familiar with their business recently writing me of effect of the Government prosecution said:

"From their (the independents') standpoint, comparing present conditions in the oil business with the conditions of 1904 and 1905 when the activity of the Government first began in the matter investigating and publication, there is no doubt but what the independent interests have been aided and bettered by what the Government has done. The rigor of monopolistic control and abuses certainly has been broken by the proceedings of the Government through all its departments, but especially through the dissolution suit.

"I think I can safely say that the practical methods heretofore employed by the then monopoly have almost entirely disappeared, such as the acquiring of information concerning competitive shipments now forbidden by federal statute and by the statutes of many States, the employment of bogus companies, the cutting of prices below cost for the purpose of driving out competition,

securing the countermanding of orders acquired by competitors, misrepresentation of goods, and in fact nearly the whole category of unfair methods set out in the Government's suit have disappeared from the arena of competition."

THE GOVERNMENT'S POWER ASSERTED

Another thing which has been accomplished is that the Government has demonstrated that it is bigger than any corporation and can legally control aggregations of capita organized under State authority. In my opinion it is not and should not be the desire of the American people to destroy any industry, but to control it; not to destroy capital but to regulate it, for large aggregations o capital are necessary to many branches of business. But wealth is one of the greatest powers known in the world. It should be controlled so that it will not be used to the injury of the people. The highest development of civilization will be attained by keeping open to individual enterprise the great avenues of commerce and industry so that every man, with reasonable capital, ability, and industry, may safely embark in some branches of industry with the hope of being something more than the employee of a corporation.

FEDERAL AUTHORITY ESTABLISHED BY THE COURT

I do not contend that the machinery of the courts is adequate for the regulation of large corporations any more than that the machinery of the courts is adequate to control the banking facilities and railroads of the country. It is no part of the duty of courts to lay down rules for the future management of corporations and business; that is the duty of the legislature. The court acts upon the condition presented. Especially is it true that the criminal laws are totally inadequate and inappropriate for such regulation.

The decree of the court was necessary to establish the power of Congress and the power of any regulative body like a commission which Congress might establish. This battle had to be fought first because these corporations, entrenched behind State charters, claimed immunity from federal control. It would have been idle to legislate further upon this subject until the power to do so and to enforce legislation was clearly sustained by the Supreme Court, as it has been done. I have often said that Congress should now, in the light of these decisions, establish a commission something like the

Interstate Commerce Commission and license corporations and large aggregations of capital under strict supervision and control.

I am aware that the control of the forces of industry and of capital is a very delicate and difficult task; and it has agitated and divided the sentiment of peoples since the dawn of civilization, on the one hand to preserve the independence and freedom of enterprise necessary to the growth and development of commerce, and on the other to repress those selfish desires for wealth and aggrandizement which in all times have animated man.

WHY STANDARD OIL STOCKS WENT UP

It is complained in the public journals that since the decree of dissolution the value of the stocks of the Standard Oil subsidiary companies has vastly increased upon the market, and some people assume that the cause of this is some defect in the Government decree. As a matter of fact nothing is further from the truth. The reason for such increase is perfectly plain to those familiar with the Standard Oil organization.

Prior to the Government prosecution the Standard Oil Company was a close corporation. It never published any statement of its assets and business even to its stockholders. All the public knew was that the Standard Oil Company stock (the holding company) paid a dividend of about 40 per cent, per annum, and its market value was regulated by those dividends. Its earnings were double this sum, but only a few insiders knew that fact. With less than one hundred millions of capital stock it had, in 1906, $261,061,811 surplus, and since that time, for five years, it has been piling up more surplus at the rate of probably forty million dollars per annum, so that its total assets at the time of the dissolution undoubtedly amounted, on the books of the company, to over $600,000,000. What the real value was beyond the book value, no one knows to this day. Until the dissolution, in December, 1911, the stocks of the thirty-seven subsidiary corporations had never been sold on the market. They were in the treasury of the Standard Oil Company of New Jersey, the holding company.

ASSETS AND EARNINGS DISCLOSED BY THE GOVERNMENT

The Government, in the course of the trial, for the first time disclosed the large assets and earnings of these various companies, collectively and individually. But the reports of the trial were not, of course, generally distributed, and only gradually did the facts filter through the minds of the investing public. Moreover, so long as the suit was pending the stocks of the parent company naturally sold for much less in the market by reason of the uncertainty as to the outcome of the suit. When the Standard Oil Company was dissolved and these subsidiary corporations stood upon their own foundations, and as their stocks began to be dealt in upon the market, gradually the amount of their assets became known and the stocks increased enormously in value.

A FEW CONSPICUOUS INSTANCES

For instance, take the Standard Oil Company of Indiana. When the Government instituted the suit all that was known about the Standard Oil Company of Indiana was that it had a million dollars of capital. The Government showed that in 1906 this company had $24,373,937 of net assets, all, except the one million dollars, made out of the business of the company in addition to its dividends declared, and was, then earning at the rate of over $10,000,000 per annum. Is there any wonder that, when this company's stock came upon the market and the public gradually became aware of the enormous amount of its assets arid earnings, it increased in value? This was the most conspicuous instance of increase; but there were many others.

Take another, instance. The Southern Pipe Line Company is a comparatively small company, formerly with. $5,000,000 of capital stock, since increased to $10,000,000. Its rate of profit from pipe-line business on its net assets in that business ranged from 102.1 to 278.1 per cent. per annum. During the seven years from 1899 to 1905, inclusive, vast sums were charged on the books as having been paid out to a trusted employee of the company. The Government discovered two balance sheets—one in regular form, showing the true earnings ranging from three to four millions annually, and the other showing each year enormous payments to this employee, the aggregate being $22,131,160, and leaving very small apparent

profits, or even losses. Extraordinary efforts were made by the Government to prove what became of this money.

The Government placed upon. the stand the comptroller and two directors of the Southern Pipe Line Company, also the employee in question, the comptroller of the Standard Oil Company of New York, and. others. None could or did explain what became of this enormous sum.

Take another case. The Continental Oil Company, with $300,000 of capital stock had, in 1906, assets of $1,301,515, and profit for that one year of $575,044. Its stock is now selling on the market at about $900 per share. The Solar Refining Company, with capital stock of $500,000 had, in 1906, assets of $3,708,899, and earnings of $1,258,519. Its stock is now selling at about $700 per share. The South Penn Oil Company had in 1906, $2,500,000 in capital; its assets amounted to $14,915,185. Its stock is now selling at about $690 per share.

These assets were those shown on the books at the close of business for the year 1906. To them must be added the surplus earnings for the years from 1907 to 1911, the time of the dissolution, which were large, and we therefore have assets far beyond anything ever dreamed of by the public. No corporation ever existed in this country with such earning capacity or such secrecy in its business. To be sure, these figures were in the record in the Standard Oil case as early as 1907, but the public did not know it and certainly did not appreciate the enormous value of the assets in the treasuries of these subsidiary companies.

FEDERAL INCORPORATION AND LICENSE

The fault is that the Government never has had adequate supervision or control over large aggregations of capital with the proper publicity which follows such control. What Congress should now provide for is a voluntary system of federal incorporation and a compulsory system of federal license of large corporations engaged in interstate business. Such a license could be issued upon condition that the corporation comply with the terms and conditions of the act of Congress providing therefor; and the first and most essential of these conditions would be proper publicity of the business and affairs of such corporations. This would work for the benefit of the stockholders as well as the general public.

It is sufficient here to say that such a license law should make clear just what corporations shall be permitted to engage in interstate commerce and under what conditions. When licensed, so long as they comply with the terms of the license and the acts of Congress, they should be protected in their right to do business so that there may be security and certainty in the right to engage in commerce. The law should also provide that, if such corporations engage in unfair methods of competition for the purpose of obtaining a monopoly, their charter or license shall be forfeited. The object, of course, should be to regulate and prevent the abuses of large aggregations of capital, keeping open the opportunity for all men fairly and with equal right to engage in commerce. •

APPENDIX

Article Pages

APPENDIX ONE

The proceedings of the Minnesota State Bar Association at its annual convention in Duluth in July 18-19, 1911, were transcribed by a stenographer and later published as a hardback book. The following appeared on pages 69-76 of the published proceedings:

MR. PIERCE BUTLER (of St. Paul): Mr. President [James D. Shearer], gentlemen of the Bar, I hope that the fact that I, too, feel obliged to resort to manuscript will not be considered as any evidence of combination or conspiracy in restraint of open and reasonable debate between myself and Brother [Joseph Bell] Cotton. And before I read what I have very lately committed to paper, I warn you that there may perchance appear some evidence that Brother Cotton burglarized the store-house of my intelligence. (Laughter.)

DECISIONS OF THE SUPREME COURT IN THE STANDARD OIL COMPANY AND TOBACCO TRUST CASES

The importance of the decisions of the Supreme Court in the Standard Oil case and in the Tobacco Trust case, not only to the persons interested as owners in these great business enterprises, but also to the government and to the public generally, is so great as to command universal interest and justify discussion at meetings of Bar Associations.

The Sherman anti-trust law construed and applied in these cases has been in force since 1890. The act in substance provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade is illegal, and that every person who shall monopolize or attempt to monopolize, or combine or conspire with others to monopolize, any part of interstate trade or commerce is guilty of an offense.

Prior to these decisions the act was not well understood by the profession, and it was thought of with great apprehension by businessmen engaged in legitimate activities, lest it should be so applied as to destroy all corporate aggregations of capital, modern methods of production, distribution and business organization,

all of which are of undoubted value to producers and consumers alike when employed honestly with due regard for the rights of competitors and of the public, but which have frequently been used selfishly and ruthlessly to destroy others and to extort enormously from the people.

It is said that the language of the act is very plain, that there is no room for construction, that the law should be enforced as written, and that in these decisions the court has improperly and unwisely read something into the act which was not there written. Its literal construction and strict enforcement against all within its application seemed right and wise to some who hoped by these means to eradicate the evils which abounded to an alarming extent. It was thought by many that the prior decisions of the Supreme Court indicated, without doubt, that the act must be read according to its letter and the duty of the government, through the Department of Justice, to enforce it impersonally and unsparingly was undoubted.

If the act is to be taken literally its scope is very wide indeed. It has been frequently contended that by the literal enforcement of the act, honest men, conducting their affairs justly with reference to the rights of competitors and of the public, might, at the election of the prosecutor, be adjudged to be criminals and convicted and punished as such, and that the very freedom of commerce, which it has always been the policy of the nation to foster, would be destroyed by the very act passed to promote and preserve it untrammeled. It was also claimed that the statute instead of being an instrument of destruction, the enforcement of which would thwart its very purpose, was a beneficent one to preserve the freedom of commerce and the liberty of every one freely to engage in trade, as well against his own contracts, unreasonably restricting his freedom, as against the wrongful conduct of others, and that the statute applied to the commerce within the jurisdiction of the Federal government *only* the doctrines of the common law, and that the words used in the act must be given their *legal* meaning, and further, that if given a literal construction, it was void, because Congress, as it was said, had no power to denounce as crime ordinary business transactions which always have been recognized as proper in trade and valid at common law, and also because the act contained no specifications by which it could be understood, and because no one could know beforehand whether his business was lawful or a crime. It has also been urged that, even if valid for the purposes of the application of a civil remedy, it is nugatory as a

criminal statute by reason of its uncertainty and indefiniteness, whether or not the word “unreasonable" or “undue" be read into the act.

Mr. James C. Carter in the Joint Traffic Association case contended before the Supreme Court that if literally applied it would embrace:

Organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages.

The formation of a corporation to carry on any particular line of business by those already engaged therein.

A contract of partnership or of employment between persons previously engaged in the same line of business.

The lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop.

The sale of good will of a business with an agreement not to destroy its value by engaging in similar business.

In the Tobacco case Mr. W. M. Ives added other instances:

Chambers of Commerce, Boards of Trade, and Exchanges that prescribe the rates of commission and compensation for various services.

A farmers, or workingmen's co-operative purchasing association which restrains in the sense of reducing or limiting the business of local tradesmen, putting an end to competition among buyers.

A department store owned by a corporation and doing a money order business.

An agreement by two or more persons which makes it more difficult for a third person to remain in competition with them.

And Circuit Judge Lacombe, sitting at the trial of the Tobacco case said: “The act may be termed *revolutionary*, because, before its passage, the courts had recognized a restraint of trade, which was held not to be unfair but permissible although it operated in some measure to restrict competition." And further,— “Size is not the test: Two individuals who may have been driving rival express

wagons between villages in two contiguous states, enter into a contract to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not." And notwithstanding, the trial court failed to find any condemnatory facts against the Tobacco Company, under its construction of the law, it felt constrained to adjudge it a violator of the act.

It seems to be true that this theory of construction would have made the act embrace within its condemnation most, if not all, of the classes of organizations enumerated above and this without any regard to their effect upon the freedom of the individual to trade, or upon commerce or the public. All of these arrangements may be, and probably usually are, consummated and carried on in a wholesome and honest furtherance of commerce, resulting advantageously to the public, but it is also undoubtedly true that they may be employed to destroy or monopolize trade, to spoliate competitors and to oppress others.

Did Congress intend, by the use of this comprehensive language, which on its face appears not to be ambiguous, to destroy *all* in order to make certain of punishing the *evil*?

Courts may properly and frequently do resort to construction even though the language of an act is plain, if its literal reading leads to an absurd result or manifestly works injustice. Instances need not be cited. Possibly one or two may be excused. For example: A statute providing for the punishment of one, who willfully breaks down a fence or enclosure in the possession of another, was held not to apply to the willful breaking of the fence enclosing the land of the accused, the possession of which was wrongfully withheld by another.

The old case may be recalled in which a statute, providing that "whoever drew blood in the streets should be punished," was held not to apply to the surgeon who drew blood in the streets to relieve one fallen in a fit.

The Supreme Court has often applied this rule. In the earliest period it said: “So, if the literal expression of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done. "

An act of Congress prohibits the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States. A church made a contract with an alien residing in England by which he was to remove to New York and enter into its service as pastor. Pursuant to the contract he did so remove and entered upon such service. It was claimed that the contract was in violation of the act and the circuit court so held. The case was appealed to the Supreme Court. The act of the corporation was held to be concededly within the letter of the law for the relation implied service on one side and compensation on the other.

Justice Brewer in the course of a luminous opinion said: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its maker. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which flow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." The judgment of the lower court was reversed. (143 U. S. 457).

Justice Peckham in the Joint Traffic case said: "The act of Congress must have a reasonable construction or else there will scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing on interstate commerce, and possibly to restrain it." (171 U. S. 68).

President Roosevelt said of this act that "Full enforcement of the law would destroy the business of the country" and that it would make "decent men violate the law against their will." If it is true, as indeed it seems to be, that a literal construction of this act would lead to absurd results and great injustice, when applied to ordinary and normal business arrangements, the court not only had the right but it was its duty to depart from "the rule of the letter which kills."

In the Standard Oil case the Government contended that the offending corporations were held together by agreements which were void at common law, and further that whether or not void prior to the passage of the act, the arrangement became illegal on its passage; that "the thing inhibited is the

restraint of interstate commerce." "The thing to be accomplished is the maintenance of freedom of trade. The exercise of an individual right, disconnected from all other circumstances, may be legal, but, if taken together with other circumstances, may accomplish the thing prohibited." It was claimed that any contract in restraint of trade which *tends to monopoly* is prohibited, and that Congress did not have in mind monopoly of the kind formerly granted by executive or legislative authority, *but combinations which tend, or are reasonably calculated* to bring about the things forbidden by the act.

The meaning of the word "monopoly" was illuminated by the history of the times, and the anti-trust decisions prior to 1890, and it was said that "the monopolies most commonly known in this country were those acquired by combination (by purchase or otherwise) of competing concerns. It was conceded that the purchase of a competitor, *standing alone as a separate transaction*, was the exercise of a lawful right. It appears, at least from the result of the case, that it was not necessary, in order to prevail, for the Government, in either case, to contend for a stricter reading of the act, or any reading which would lead to the results stated in the illustrations herein before given. By the briefs in both cases it was made clear that the act ought to apply when the direct result or tendency of the prohibited things, that is, the contract, combinations, etc., is *material obstruction*, hindrance, or restraint of interstate commerce. It was strongly urged that the word "unreasonable" ought not to be read into the act, and it was added that "this does not render the prohibitions applicable, merely because commerce *is in some way affected*, or to transactions always enforceable, and never to be regarded as objectionable from any standpoint. This Court has never declared unlawful those ordinary business arrangements always sanctioned at common law, and wholly outside of the mischief intended to be prevented. Any act, however, although entirely innocent when standing alone, may be criminal if a part of an unlawful plan. "

The Government criticised as "extreme" the construction expressed by presiding Judge Lacombe in the lower Court, and refused to support it, and it was said that "the statute is intended to foster, not destroy, business operations universally regarded as promotive of the public welfare," and dismissed as untenable the suggestion that the law denounces as criminal every party to any sort of contract which eliminates any independent dealer in interstate commerce, however insignificant.

The facts in both cases abundantly established by the proofs, clearly brought them within the rule contended for by the Government, and it seems to us that there was really no ground for the grave apprehensions widely felt that these cases if decided in favor of the Government would become precedents for the literal construction and application of the act, leading, as it was urged by eminent counsel, to absurd results and general business disaster. A sensible and reasonable view of the facts which were established by great industry and marshalled with great skill, makes it plain, now at least, that the cases must be held to be clearly within the purview of the act, under any possible construction.

It seems that the contentions of the parties, the uncertainty in the minds of business men and members of the Bar, together with the misapprehension of the lower Court of the meaning and effect of its former decisions, and a just regard for the great interests directly involved, as well as those liable to be affected, fully justified the Court, even if possible to decide the case without so doing, in considering at large the text of the act and its meaning. The time had come when the people of the country wanted to know, and there were many weighty reasons why they ought to be permitted to know, the opinion of the Court of last resort with respect to the meaning of this act. Among the criticisms of the decision it is said that the construction given introduced the word “unreasonable" into the act, leading to uncertainty in its enforcement, and amounting to judicial legislation; that the Court has done what it had heretofore said it could not properly do, what Congress has refused to do, and what the President advised ought not be done. A careful study of these decisions indicates to my mind that these criticisms are unjust, and that in point of fact the Court has not read the act as if the phrase “restraint of trade" were “unreasonable restraint of trade" or "undue restraint of trade" or the like.

It seems to me that the situation, and substance of the decision is this: The phrase used in the act was known at common law and had a definite and ascertainable meaning for centuries in England and in America long prior to and at the time of the passage of the act. While the Courts had never given a comprehensive or hard and fast definition to the phrase, but had uniformly left the determination of its meaning to the decisions of actual cases, as they arose, as they have done with reference to many other words and phrases, it cannot be said that its meaning was unknown, uncertain or variable, and it is at least clear that the

phrase, “contracts in restraint of trade" did not embrace every conceivable arrangement within the literal meaning of the words.

At common law monopolies were unlawful, because restrictive of individual freedom, and injurious to the public. It was deemed that the freedom of the individual to deal in the necessaries of life was unduly restricted where the nature of the transaction was such as to show intent to bring about an undue enhancement of price, which is one of the evils which results from monopoly. And to protect the freedom of the individual in his own behalf and the public interest as well, his own contracts, when an unreasonable restraint upon himself as to his trade or business, were held to be void. These restraints were treated as coming within the rule against monopoly and they were sometimes called monopolies, and it seems that monopolies were sometimes spoken of as restricting the due course of trade, and as in restraint of trade. It was because of the evils of monopoly that *undue* — not absolutely all — restrictions of competition were forbidden or treated as illegal, and it seems that only such arrangements as would justify the inference that they were made with wrongful intent toward the public to restrain the due course of commerce, and to enhance price, fell within the condemnation of the law. The statute was drawn in the light of the common law, and because of the many possible forms of contracts and combinations which might be made, inflicting upon the public the evils intended to be corrected. Congress wisely employed general rather than specific language, not intending to condemn the things which had always been considered wholesome and lawful, but to prohibit any scheme however ingenious, which gave rise to the presumption that the evils of monopoly were imminent, if the scheme were effectuated. In applying the act therefore, it is right to take into account and be guided by the meaning of the phrase as known to the common law. By the standards of reason the common law determined whether a contract unduly restricted the freedom of individuals to trade or interfered with the due course of trade, exposing the public to the evils associated with monopoly, and if so, it was, *in the language of the law* “a restraint of trade" and void. So, any contract, combination or conspiracy if made — not for the lawful purpose of promoting trade, but rather to unjustly enhance price, or to secure a position with reference to the particular commerce enabling those engaged in the arrangement, at their will, to impose upon the public the evils attending monopoly, is “a restraint of trade" within the meaning of the act. It seems that the standard adopted by the decision is whether or not, in any given case, the

arrangement under examination amounts to a restraint of trade, as that phrase was understood in this country at the time of the passage of the act. It was pointed out in the decision that a literal reading of the act would result in holding that in no case involving a contract pertaining to interstate commerce could any question arise as to whether or not such contract in fact restrained trade, and that it must either be held "that every contract, act or combination of any kind or nature, whether it operated as a restraint of trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce." * * * Or on the other hand, it must be held "that as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates, could be ascertained — the light of reason — the enforcement of the statute was impossible because of uncertainty." It appears that the ultimate question is not whether the contract, in fact constituting a restraint in trade, — may be upheld because the Court deems the restraint a reasonable one, but rather whether the contract amounts to a restraint of trade at all, within the legal meaning of that phrase. As I read the decision, it is not for the Court to change the standard fixed by the statute, but only to measure the facts in a given case by the standard. To do this the meaning of the phrase, as known at common law, must be held in mind. The Court expressly disclaimed any intention to substitute judicial discretion for legislative definition, by excusing a restraint of trade found to exist, upon the theory that itis expedient and reasonable to do so. Its only duty is to determine whether the facts in a given case bring it within the "generic enumeration" contained in the statute.

It was said "that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute. "

It seems that the Court adopted no new method of reading the law, and that a careful examination of the decisions will show that the well established rules of statutory construction have been faithfully followed; that the act has not been emasculated or impaired; that the public policy which it was intended to promote has been carried out; that no form of contract or combination or device

or scheme to effect monopoly, or to accomplish the evil intended to be prevented by an act, can escape condemnation of the law.

[Mr. Butler's paper was listened to with the closest attention and greeted with great applause.]

APPENDIX TWO

Professor Rudolph Peritz' *Competition Policy in America, 1882-1992* is a sweeping study of the legal, political, economic and intellectual currents that shaped and reshaped competition law and policy in this country from the 1880s to the 1990s. Kellogg wrote about the *Standard Oil* decision as a triumphant litigator; Butler, a lawyer in private practice, applauded it because it embraced common law understandings of such terms as "monopoly" and "contracts in restraint of trade"; and Peritz, a superb historian writing eighty-five years afterward, levied a withering assessment of its immediate effects on the industry and noted that it led directly to reform legislation three years later — the Federal Trade Commission Act and the Clayton Act:

> The practical effects of the *Standard Oil* decision were distressing. Senator Reed (D.Mo.) reported during the Clayton Act debates that the so-called rivals created in the oil industry produced even more wealth for their shareholders in fragmented form than they did as the Standard Oil Company of New Jersey. Indeed, Standard's offspring enjoyed unregulated regional dominance in most sections of the country. Moreover, both the oil and tobacco trusts' offspring were still engaging in predatory pricing and other forms of unfair competition against independents. Thus, in material terms, the dissolution was actually consistent with Justice White's dissenting opinion in *Northern Securities* (1904), which argued against federal regulation of an individual's purchases of property, regardless of the effects on competition. Here, property ownership — in the form of holding shares of "the Standard" — was not disturbed. The shareholders of the old Standard now held all shares of the new Standard miniatures, all of them still managed by the old Standard's executives. Thus, despite the dissolutions, there was no

effective change in market power or economic substance. The decrees imposed changes in form but did not distribute wealth or market power from miniatures to their trading partners or rivals. Given the continued predatory practices of the miniatures, the Rule of Reason had fostered absolutely no practical improvements in the quantity or quality of competition. In practical effect, the *status quo ante* survived intact.

However, reactions were not uniform. In the Taft Administration, for example, policy makers directing the influential Bureau of Corporations simply celebrated a doctrinal change they had advocated so fervently for years, even before the agency's creation during the preceding Roosevelt Administration. It was well known that the Roosevelt administration, through the Bureau of Corporations, had initiated the practice of granting antitrust immunity to "good" trusts and other large corporations. Nonetheless, outside the Bureau and its corporate constituency, the *Standard Oil* opinion evoked outrage, not only in the muckraking press but also in the federal and legislatures. Within a few weeks of the opinion's publication, progressives in Congress, together with citizen Louis Brandeis and others fearful of "reasonable" trusts, held first private meetings and then public hearings.

Opposition to both Court doctrine and a corporatist executive provoked legislative action at both the state and federal levels. Between 1911 and 1913 twenty states quickly passed new antitrust provisions—some of them statutes and others constitutional amendments. Then, early in Woodrow Wilson's first term, Congress passed the Clayton and Federal Trade Commission Acts.

No one doubts that the 1914 antitrust legislation was passed in reaction to the judicial Rule of Reason. As Senator Reed (D.Mo.) recounted in the congressional debates, "All will remember when the Supreme Court wrote the word "reasonable" into the Sherman Act. When that decision was announced it was recognized as being of a revolutionary character. It struck the country as being a deadly blow to trust litigation." . . . .

It is evident that the Rule of Reason provoked a political response founded in the tenets of competition. What has not been clear before, however, is the significance of the two statutes' explicit language of "competition." Whether prohibiting conduct producing

"substantial lessening of competition" under the Clayton Act or "unfair methods of competition" under the Federal Trade Commission Act, this explicit competition rhetoric signaled congressional movement away from the Court's common-law jurisprudence founded in the values of "property" and "freedom of contract." The Clayton Act regulated a set of well-known practices, while the FTC Act created a new agency to identify and enjoin unfair commercial conduct. Both statutes sought to expand the enforcement powers of federal agencies and, in the process, bridle the Court's headlong rush into laissez-faire.

In institutional terms, the legislation seemed designed to rein in not only the judiciary but also the executive branch: The Clayton Act would control judicial discretion by defining a list of specific antitrust violations, including price discrimination and anti-competitive mergers. The second statute would replace the corporatist Bureau of Corporations with an independent Federal Trade Commission, envisioned as a true interstate commerce commission, empowered to define and regulate unfair competition — that is, the abuse of economic power.

But it would be wrong to conclude that the 1914 statutes simply reintroduced Senator Sherman's and the Literalists' commitments to "full and free competition." Rather, the visage of competition was changing. The Rule of Reason regime and its constellation of assumptions and beliefs about the proper legal standards for commerce were illuminating a new vision of competition, different not only from the Literalist image of independent entrepreneurs but also from the buccaneering, cutthroat practices of John D. Rockefeller, Edward Henry Harriman, and their contemporaries. The 1914 statutes would take meaning from the new notions of "enlightened competition" or "open competition," which embodied a belief that some cooperation among rivals would produce a better kind of competition.

Further, the Rule of Reason Court of the years between 1910 and 1930, under Chief Justices Edward D. White and William H. Taft, did not hesitate for a moment to distinguish between public and private restraints of trade. That distinction rested upon a libertarian conception of segregated private and public spheres, as well as an expanding notion of private property that defined the margin

between them. The result was a bifurcated treatment of commercial regulation, treatment founded in the view that free competition meant freedom from government administration, but not freedom from concerted private administration of markets. [8] •

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[8] N*ote 7, at 64-66* (citing sources).