

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

During the past two years, the fifty-year-old Sherman Act has achieved a vitality unprecedented in its existence. Its invigoration is due to no amendment of its terms nor to sudden change in the economy in which it operates. What has happened is that the personnel of the agency charged with the Act's enforcement, the Antitrust Division of the United States Department of Justice, has been increased to approximately eight times the size which it had averaged during the preceding fifteen years and the range of its activities has been extended in like proportion.

It was this sudden enlargement of the staff of the Antitrust Division which led to the publication of this issue of *LAW AND CONTEMPORARY PROBLEMS*. To furnish the Division's new personnel a broad acquaintance with its work there was organized within the Division during the winter of 1938-1939 a series of lectures surveying problems relating to the Sherman Act and its enforcement and describing the Division's activities in enforcing a number of the thirty-odd other statutes entrusted to its charge. The response accorded this series led to the decision to bring those lectures dealing with the Sherman Act into form suitable for publication so that they might be available not only to persons later added to the Division's staff but also to the legal profession and the interested public.

With that end in view, the editor of this quarterly was requested last summer to supervise, in association with Edward H. Miller of the Antitrust Division, the preparation of the material for publication in book form. Several of the lectures had been given extemporaneously and existed only as stenographic notes; a number contained confidential matter which had, of course, to be deleted; in some instances the addition of material was called for to bring the discussion abreast of developments subsequent to the time of the original lecture series. But despite the changes required, the original scope and character of the material was not abandoned: it was to remain an introduction to the subject and not to attempt detailed or comprehensive treatment.

As the process of revision progressed, an invitation was tendered to *LAW AND CONTEMPORARY PROBLEMS* to publish the series in lieu of one of its customary symposia. It was recognized that the material could rightly be termed "one-sided," for the purpose of its publication was to present solely the views of those officially connected with the Antitrust Division. However, it should be stated that the opinions expressed are the personal opinions of the authors and, with the exception of the

views of Assistant Attorney General Arnold, are in no sense official. In the decision to accept the invitation, these facts were accorded full consideration. It was felt that the very source of the articles gave to them a special significance. The opinions of those entrusted with the enforcement of the Sherman Act today are of immediate importance to persons who are or may be affected by its application and constitute a datum of fundamental value to the student of governmental control of business activity. Seldom is an equal opportunity to obtain such information presented. We believe this quarterly fortunate in being able to serve as a medium for its publication.

The subject matter of the issue may be divided roughly into two parts: the first dealing with problems of policy and substantive law posed by the Act; the second directed to the procedure of enforcement. The opening article, however, cannot be thus classified, for in developing his views of the function of the Sherman Act in our economy and the objectives and methods of the Antitrust Division's present administration, Assistant Attorney General Arnold makes evident that what a statute is depends in large measure on how it is enforced.

The succeeding article by Walton Hamilton, economist on the Division staff and Professor of Law at Yale, places the Sherman Act in historical perspective. The author traces the course of legal protection to competition from its medieval origins to the present day, noting its adaptation to, and effect upon, the changing industrial pattern and devoting special attention to its role in the development of American constitutional law. Professor Hamilton's article is followed by an article by Charles H. Weston, Division attorney, classifying and briefly analyzing the major Supreme Court decisions concerning the application of the Sherman Act to industrial combinations created either by merger, consolidation and holding company or by trade association activities.

There follows a group of articles dealing broadly with three perplexing problems of special consequence in current antitrust enforcement. The first of these, by George P. Comer, Economic Adviser to the Antitrust Division, discusses the phenomenon of price leadership, the device whereby price uniformities are maintained over wide segments of American industry without recourse to the crude restraints characteristic of the early days of "trustification." The second article, by Joseph Borkin, Division economist, portrays the use of patent rights as a means of restraining competition and notes the steps recently taken with a view to clarifying the relation between the patent laws and the Sherman Act. The third article, by Edward H. Miller, Division attorney, presents the reasons why the Division rejects labor's claim to blanket immunity from the Sherman Act's prohibitions and indicates the limited range of labor activities which are regarded as in violation of the Act.

The enforcement procedures under a statute whose sanctions are imposed only by litigation cannot be blue-printed as can the administrative machinery of a regulatory agency combining executive, legislative, and judicial powers. The major part of the enforcement of the Sherman Act is the preparation and trial of criminal and civil cases in the federal courts, cases which are rivalled for complexity and sheer size

in few other branches of litigation. What is needed to reveal fully the problems of enforcement through proceedings of this sort are case histories. But, however illuminating, the chronicle of a single great litigation, with the detail essential to accurate portrayal, would alone have required a volume. It was necessary, therefore, to deal broadly with the processes and decisions preliminary to litigation, and then to select from the processes of litigation itself, the questions of legal procedure that confront the prosecuting officials.

The handling of complaints of violations of the Act and the conduct of investigations preliminary and incident to further proceedings are discussed in an article divided into three parts, each of which is by an author closely associated with these tasks. The authors are Edward P. Hodges, Chief, and Fowler Hamilton, Assistant Chief, of the Complaints Section of the Division, and Charles L. Terrel, one of its principal investigators.

Where investigation reveals the need for the institution of proceedings, the question remains whether to proceed by criminal action or by civil suit for an injunction. The considerations bearing on this choice are presented in the article following, the author of which, Wendell Berge, is first assistant to Assistant Attorney General Arnold and the latter's alternate on the Temporary National Economic Committee. In this article the author also describes the employment of the consent decree in conjunction with criminal proceedings, an innovation in enforcement procedure which has aroused widespread discussion. The article concludes with a brief comment on the O'Mahoney and Hobbs Bills to add civil penalties to the Act's sanctions.

The two concluding articles of the issue present the legal problems to be reckoned with in, respectively, the conduct of grand jury proceedings and the trial of cases under the Sherman Act. Their authors, John Henry Lewin and Walter L. Rice, have been in charge of, or participated in, many of the notable antitrust cases in recent years. A number of the points discussed are not relevant solely to antitrust cases, and the studies throw light on little known areas of federal criminal procedure.

For the convenience of the reader, the text of the statute upon which this issue is focussed is set forth below.

DAVID F. CAVERS.

### THE SHERMAN ANTITRUST ACT<sup>1</sup>

AN ACT TO protect trade and commerce against unlawful restraints and monopolies.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.<sup>2</sup>

<sup>1</sup> Approved July 2, 1890, 26 STAT. 209, 15 U. S. C. §§1-7.

<sup>2</sup> The provisions added to this section by the Miller-Tydings Amendment, Act of Aug. 17, 1937, 50 STAT. 693, excepting, under certain conditions, resale price maintenance contracts from the operation of the Act, are omitted.

Sec. 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 among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any States or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts<sup>2</sup> of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

<sup>2</sup>The Act of March 3, 1911, c. 231, 36 STAT. 1167, abolished the circuit courts and conferred their powers upon the District Courts.