THE SUPREME COURT AND THE ANTI-TRUST ACT

Victor Morawetz Discusses the Interpretation and Effect of the Sherman Law---The Sugar Trust Case.

VICTOR MORAWETZ.

At the request of THE NEW YORK TIMES Victor Morawetz, probably the most eminent of present-day authorities on the trust laws, has written the following illuminating article on the interpretation and effect of the Sherman law. It includes a criticism of the Knight case, otherwise called the Sugar Trust case.

In this article Mr. Morawetz combats the idea that the Supreme Court has construed the anti-trust law in such a way as to introduce into the law some novel doctrine inconsistent with the successful conduct of trade. He does except the Sugar Trust case, and undertakes to show that it is both inconsistent with other decisions and wrong in principle. It will be regarded as the fullest exposition of what the Supreme Court really has done in dealing with the trust law that has yet been made.

By Victor Morawetz.

THE Act of Congress of July 2, 1890, commonly called the Sherman Anti-Trust act, contains the following provisions:

"Sec. 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."

"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."

On their face these prohibitions appear to enforce only established doctrines of the common law. Certainly they do not seem revolutionary or in conflict with sound political and economic policies. However, an idea has become prevalent that the Anti-Trust act has introduced into the law some novel doctrine inconsistent with the successful conduct of trade. It has been asserted that, if enforced consistently, the act would revolutionize modern business methods and, by making it impossible to carry on business effectively, would check our industrial progress and restrain the trade and commerce which it was designed to protect. In my opinion, this is a mistake. It is true that there are dicta in some of the opinions of the Judges which, taken alone, may furnish some basis for these views and these fears; but the mere dicta of Judges are not binding as precedents. Only actual decisions control in future cases, and it will be found that, with one exception, the actual decisions of the Supreme Court are consistent with a harmonious construction of the act which would effect its purpose without interfering with any business methods that ever have been regarded as lawful and proper.

The cases arising under the Anti-Trust act may be divided into four classes, viz.:

1. Cases involving contracts, combinations or conspiracies to restrain the trade or commerce of other persons, or of the public generally.

Contracts, combinations or conspiracies by means of physical force, or by means of threats of damage, or boycotting, to prevent other persons, or the public generally, from carrying on trade or commerce are illegal at common law, and it is eminently proper that contracts, combinations, or conspiracies of that character, when in restraint of inter-State or international trade or commerce, should be prohibited by an act of Congress furnishing effective remedies for its enforcement.

The Supreme Court has decided that the first section of the Anti-Trust act applies to contracts, combinations or conspiracies of that character. Thus, in the Debs case (158 U. S., 564) the Supreme Court decided that a combination or conspiracy of certain railway employes to stop the operation of railways that were highways of inter-State commerce was a restraint of inter-State trade or commerce within the meaning of the act. The stoppage or obstruction of the highways of inter-State commerce necessarily operated as a direct restraint of the inter-State commerce of the public generally.

In Loewe v. Lawlor, (208 U. S., 274,) sometimes called the Danbury Hatters case, the Supreme Court decided that a combination or conspiracy by means of a boycott to stop inter-State trade or commerce between certain manufacturers and their customers was in restraint of inter-State trade or commerce. In this case there was not, as there was in the Debs case, a physical obstruction of trade or commerce, but the purpose and the effect of the combination or conspiracy were to restrain other persons from engaging in inter-State commerce by threatening damage to their business until certain demands of those entering into the combination or conspiracy were complied with.

Inter-State trade or commerce also may be restrained by a contract or combination operating as a peaceable trade boycott, without the use of force or threats of damage. In Montague v. Lowry (193 U. S., 38) the Supreme Court decided that the Anti-Trust act rendered unlawful the formation of an association of the manufacturers of tiles throughout the United States and certain dealers in tiles in or near San Francisco, under an agreement that the manufacturers would not sell their products on any terms to persons who were not members of the associations and that the dealers who were members would not sell to non-members except at specified prices that were more than 50 per cent. higher than the prices payable by members. The plaintiffs in the case showed that in consequence of the restraint of their inter-State commerce with the manufacturers, they had been compelled to buy tiles at higher prices from the local dealers. The combination, in this case, constituted inter-State trade or commerce because the combination operated directly upon trade or commerce in tiles and, through the agreement of association, monopolized this trade or commerce for the benefit of the members of the association. The case, therefore, may properly be included in the class of cases involving attempts to monopolize inter-State trade or commerce in violation of the second section of the Anti-Trust act. It should be observed that the decision in Montague v. Lowry is not an authority for the doctrine that individual manufacturers or producers of an article of inter-State commerce cannot lawfully enter into agreements to sell their products to certain dealers and no others, there being no attempt to monopolize a branch of inter-State commerce. Such exclusive trade agreements never have been deemed unlawful as in restraint of trade or as constituting monopolizing, and the court in its opinion pointed out that the case before it was not a case of that character.

2. Cases involving contracts or combinations of public carriers to increase the rates or tolls payable by the public in respect of inter-State commerce.

The railways are the principal highways of inter-State trade and commerce. If, as it was decided in the Debs case, a combination or conspiracy by physical force to stop the operation of inter-State railways would be in violation of the first section of the act because in restraint of the inter-State commerce of the public, it would seem to follow, for similar reasons, that a combination or conspiracy, without resort to physical obstruction, to render the transaction of inter-State commerce upon the railways more difficult or more costly would be in restraint of inter-State commerce within the meaning of the act. In the Trans-Missouri Freight Association case, (166 U. S., 290) and in the Joint Traffic Association case (171 U. S., 505, 565, 569) the Supreme Court held that contracts or combinations among railway companies to maintain rates upon competitive inter-State traffic operated as a restraint of inter-State trade or commerce. It was contended that a combination to maintain rates upon competitive business could not fairly be considered in restraint of commerce unless the rates themselves were unreasonable; but the court held that, in such a case, it would not inquire into the reasonableness of the rates and that the combination must be deemed in restraint of commerce because its natural and direct effect was to maintain at a higher level than otherwise would prevail the rates payable to the public as a condition of carrying on inter-State trade or commerce.

These traffic cases are not authority for the doctrine that a contract or combination among merchants or manufacturers would constitute a restraint of inter-State commerce, prohibited by the first section of the Anti-Trust act, on the sole ground that the effect of the contract or combination was to restrict competition among the parties. Railway companies furnish the transportation necessary to enable the public to engage in inter-State trade or commerce. But they are not themselves engaged in inter-State trade or commerce. In the traffic cases the stoppage of competition was in restraint of inter-State commerce and unlawful, not because it restrained commerce of the railway companies which made the contracts or entered into the combinations, but because its effect was to restrain the inter-State commerce of the public by imposing additional burdens upon this trade or commerce. As stated by the Supreme Court, the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail.

In the Northern Securities case the Supreme Court held that a combination to acquire and to vest in a holding company a majority of the stocks of two railway companies operating parallel and competing lines that were highways of inter-State commerce was in restraint of inter-State commerce within the meaning of the first section of the Anti-Trust act. If, as decided in the traffic cases, a combination among railway companies by agreement to maintain rates was in restraint of inter-State commerce within the meaning of the act, because the natural and direct effect of the combination was to maintain rates at a higher level than otherwise would prevail, it seems to follow, as a necessary sequence, that a combination to bring about the same result by uniting the ownership of two parallel and competing inter-State lines would likewise be unlawful, whether the combination be in the form of a corporation, an unincorporated joint stock company, an ordinary partnership, or a trust.

Prior to the decision of the traffic cases there had been many contracts and combinations to maintain rates in respect of competitive traffic, or to divide or to pool competitive traffic; but such agreements never were regarded as practically enforceable, and there is little doubt that even prior to the passage of the Anti-Trust act they were unlawful. Whatever view may be taken of the correctness of the decisions of the Supreme Court in the traffic cases, their importance has been greatly diminished by the enforcement of the laws prohibiting railway companies from granting secret rebates or from departing from their published rate schedules.

It has been contended that uniformity of rates upon competing lines as to traffic between the same points is a business necessity and that under the decisions in the traffic cases the railway companies cannot lawfully consult among themselves for the purpose of establishing this necessary uniformity of rates. In the opinion of the writer the Supreme Court has not decided and is not likely to decide that the Anti-Trust act prohibits competition between railway companies as to competitive business, provided that the companies retain their freedom to modify these rates and do not agree to maintain them. In the traffic cases the restraint of inter-State commerce did not arise from the fact that the railway companies had consulted each other for the purpose of establishing uniform rates, but it arose from the fact that they had entered into agreements or combinations to maintain rates by preventing the several companies from changing the rates as so established.

3. Cases involving contracts or combinations that, without restraining the trade or commerce of others and without monopolizing or attempting to monopolize trade or commerce, simply diminish competition among those contracting or combining.

The Supreme Court never has decided that contracts or combinations of this character are prohibited by the Anti-Trust act. Although dicta may be found in the opinions of the court which, taken without regard to the context, might seem to indicate that the court considered that all contracts and combinations restricting competition in any degree were prohibited by the Anti-Trust act, no such conclusion can fairly be deduced from these opinions when considered in their entirety. In some of the cases the court held that the contracts or combinations in question were unlawful on the ground that they were "in restraint of trade or commerce," and the court did not specifically assign as the ground of its decision that the effect or purpose of the contracts or combinations was to monopolize a branch of inter-State trade or commerce in violation of the second section of the act; but it is apparent that the court did not proceed on the ground that every restriction of competition would constitute a prohibited restraint of commerce, without regard to the degree to which competition was eliminated. If the court had been of opinion that every restriction of competition was in violation of the act, it is not likely that the court would have labored, as it did, to show that the restriction of competition was carried to such an extent as to monopolize trade or commerce. Thus, in the case of the *Addyston* Pipe Company (175 U. S., 211) it appeared that nearly all the manufacturers of iron pipe within thirty-six States and Territories had combined under an agreement to apportion among the members of the combination the trade in iron pipe within the prescribed part of the United States. The purpose of the combination was by establishing a community of interest among the manufacturers to restrict competition among them in transaction as "in restraint of commerce," the transaction undoubtedly constituted monopolizing within the meaning of the second section of the Anti-Trust act, and if the restriction of competition had not been carried so far as to constitute monopolizing in violation of the second section, probably it would not have been adjudged to be illegal. A combination, by a partnership or otherwise, to establish a community of interest among manufacturers controlling only a minor share of the trade in iron pipe probably would not have been condemned.

As pointed out above, the cases involving rate agreements among railway companies are not authority for the doctrine that contracts or combinations among merchants or manufacturers which, without monopolizing commerce, simply restrict competition among those contracting or combining are in violation of the Anti-Trust act. The decisions in the railroad cases were based on the ground that the natural and direct effect of the contracts or combinations was to restrain the trade or commerce of the public by increasing the tolls upon the highways of inter-State commerce.

At common law contracts and combinations of the class now under consideration were not unlawful, with this exception: A contract of an individual not to exercise his craft or trade was held to be unreasonable, contrary to public policy and void, unless the contract was incidental to carrying out some fair and lawful transaction, such as the sale of a business or good-will. This exception was for the purpose of protecting the personal liberty of individuals and in considering the effect of the Anti-Trust act it is not material. That act was not passed to protect individuals against the consequences of their own acts, but, as indicated by its title, was designed to enforce the broad policy of protecting the trade and commerce of the community against unlawful restraints and monopolies. Probably Congress would have no constitutional power to pass a law merely for the regulation of private rights, by prohibiting individuals under criminal penalties from entering into mutual contracts or combinations restricting their own power to engage in inter-State trade or commerce.

Many contracts and combinations that restrict competition simply among those contracting or combining are necessary to the successful conduct of trade and commerce, and such contracts and combinations always have been considered reasonable and proper throughout the civilized world. If such contracts were prohibited by the Anti-Trust act, it would be impossible, without incurring civil and criminal liabilities, to carry on trade and commerce in the United States to any considerable extent. The word "monopolize" has no [illegible] legal or technical meaning. In the year 1623 a statute was passed by Parliament declaring that all grants of monopolies were against the fundamental laws of the kingdom. In commenting on this statute in his Institutes, Lord Coke said, "A monopoly is an institution or allowance by the King, by his grant, commission or otherwise, to any person, or persons, body politic or corporate, pf or for the sole buying, selling, making, working or using of anything whereby any person or persons, body politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." However, although in those early days the word "monopoly" appears to have meant an exclusive right or privilege conferred by law, or by royal grant, and although, in those days, the word "monopolize" appears not to have been used by law makers or by the courts, many acts destructive of competition which, at the present day, would be described as "monopolizing" were unlawful at common law, or were prohibited by statute. (See 4 Blackstone's Com., 158, 159.) In modern times the words "monopoly" and "monopolize" often have been used in their ordinary or popular sense in judicial decisions and in statutes, as well as in general literature.

According to common usage in modern times, the phrase "to monopolize commerce" means, by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article. The phrase would not apply to a simple lessening of competition, leaving in existence reasonably competitive conditions; but it would apply to a concentration of control of a preponderating part of the commerce in any article, though competition be not wholly destroyed.

As a rule commerce can be monopolized only as to some particular article or articles, and only at certain places or markets. It never can be monopolized as to all articles at all places. The Anti-Trust act prohibits monopolizing "any part" of inter-State or international commerce. By these words Congress intended to prohibit the monopolization of inter-State or international commerce in any article as to any part of the United States. Thus, as decided in Montague v. Lowry above referred to, a combination monopolizing trade or commerce in unset tiles between a part of California and other States was in violation of the act. However, a combination among all the merchants or all the manufacturers dealing in, or producing, an article of commerce in a particular State or locality would not necessarily be in restraint of inter-State or international commerce or constitute monopolizing inter-State or international commerce. It would not be in restraint of inter-State or international commerce or constitute monopolizing, unless its effect should be to restrain other persons from obtaining a like article through inter-State or international commerce, or should be to concentrate control of such commerce to such a degree as to destroy reasonably competitive conditions.

Although the term "to monopolize" has been in common use for many years, and has been used for more than a century by English as well as American Judges, it must be conceded that the meaning of the term is not so definite as to render it practicable in every case to determine easily and with certainty whether the term applies. In each case the question would be whether there was such destruction of competition and such acquisition of control of commerce as to constitute monopolizing commerce as commonly understood. In many cases the answer to the question would not be doubtful, but in other cases there might be grounds for a difference of opinion. Thus, it seems plain that the term "to monopolize" would not apply to an acquisition of control of less than one-half of the commerce in an article leaving the greater part of the commerce in the hands of competitors; but if control of substantially more than one-half of the commerce in the article was acquired, there might be a difference of opinion whether the elimination of competition had been carried to such a degree as to render the term applicable.

It has been suggested that the test should be whether the restriction of competition and the concentration of control of commerce were carried so far as to become injurious to the public by conferring upon a person or group of individuals the power to control the price of some article of commerce. It should be observed, however, that this test was not prescribed by Congress, and the courts have no right to adopt some test or rule not prescribed by law, merely because this may be clearer and more definite than the language of the statute. It is their duty to enforce the statute as enacted. Moreover, it is doubtful whether the test above suggested would furnish a more definite rule than the statute itself. No doubt, power in a greater or less degree to control prices often is a consequence of monopolizing commerce in an article, but in many cases such a power may be obtained without such acquisition of control of commerce as would constitute monopolizing within the accepted meaning of that word. In many cases the possession of even a small proportion of the supply of an article of commerce would confer power temporarily to control its price, but this would not constitute monopolizing within the accepted meaning of that word. In many cases the possession of even a small proportion of the supply of an article of commerce would confer temporarily to control its price, but this would not constitute monopolizing. The term "to monopolize" would not be applicable unless control of commerce was accumulated to such act to protect trade and commerce against unlawful restraints and monopolies."

If Congress had intended to prohibit all contracts and combinations that in any degree diminish or restrict competition in trade or commerce, it is likely that Congress would have expressed this in the act. But the act does not purport to prohibit contracts or combinations that restrain competition in trade or commerce. The word "competition" does not appear in the act. To construe the first section, which prohibits contracts and combinations "in restraint of trade or commerce," as prohibiting all contracts and combinations that diminish competition in a branch of trade or commerce would give to the phrase "in restraint of trade or commerce" a meaning never before attributed to it by lawyers or by the public generally.

The fact that, by the second section, Congress in effect prohibited contracts, combinations and conspiracies to destroy competition to such an extent as to monopolize trade or commerce indicates that Congress did not intend to prohibit minor restrictions of competition which did not amount to monopolizing. Certainly, in view of the express prohibition of monopolizing, the prohibition of "restraints of commerce" in the first section should not be extended by implication so as to prohibit restrictions of competition which, at common law, were not deemed in restraint of commerce.

Therefore, the first section should be construed as prohibiting only contracts, combinations and conspiracies to restrain the liberty or power of others, or of the public generally, to carry on inter-State and international commerce freely and without hindrance. The second section should be construed as dealing with the subject of competition and as prohibiting contracts, combinations or conspiracies to destroy competition to such an extent as to constitute monopolizing as hereafter defined.

4. Cases involving attempts to monopolize, or combinations or conspiracies to monopolize any part of inter-State or international trade or commerce.

In construing and enforcing the Anti-Trust act the principal difficulty is to determine the precise meaning of the words "to monopolize" as used in the second section of the act. The question is not whether industrial monopolies are harmful or beneficial to the community, or whether the Anti-Trust act embodies a sound economic or governmental policy. Judges cannot properly allow themselves to be influenced by public opinion or by views upon questions of economic expediency or of State policy. It has been urged that the meaning of the term "to monopolize" is so vague and so uncertain that the statute in its present form cannot be enforced. There may be good ground for reaching this conclusion with respect to the enforcement of the criminal provisions of the act. However, the fact that in some cases it may not be clear whether a particular transaction constitutes monopolizing commerce within the meaning of the act seems not to be a sufficient reason for refusing to enforce the act in other cases which clearly are within its terms. (Compare Waters Pierce Oil Co. *vs.* Texas, 212 U. S., 86, 211.) Few statutes and few rules of law are so well defined as to render their application in border-line cases free from uncertainty or doubt. Under a complex civilization the lawfulness of acts often must be made to depend upon complex conditions and cannot be determined by simple rules that can be applied without the exercise of discretion and in a more or less mechanical manner. As has been pointed out by the Supreme Court, even in giving effect to constitutional provisions, questions of degree often are the controlling ones (Wisconsin Railroad Co. vs. Jacobson, 179 U. S., 301). Similarly, in determining the lawfulness of acts of individuals it often is necessary to pass upon questions of degree, or to determine what, under all the circumstances of a given case, is reasonable. Thus, the courts may be called upon to pass upon the reasonableness of railway rates, having regard to a multitude of conditions, including the relative adjustment of rates between different localities. Such an inquiry commonly would present practical difficulties at least as great as those presented by an inquiry whether a given transaction destroyed competition in inter-State trade or commerce to such an extent as to put an end to reasonably competitive conditions and to constitute what is called "monopolizing."

During the last Presidential campaign Mr. Bryan proposed in effect to define as an unlawful monopoly any combination controlling more than 25 per cent. of a branch of trade or commerce. Such an arbitrary rule, however, probably would not lead to greater certainty, inasmuch as the percentage of control would fluctuate, and it would be exceedingly difficult, if at all practicable, to determine the percentage of an entire industry or branch of trade at any one time concentrated under common control. Moreover, such a rule would not prove just or wise in all cases. No doubt it would be desirable to define the term "to monopolize" so clearly and definitely as to render it easy to determine its application in any case that may arise; but it is very doubtful whether such a definition can be framed. A statutory definition probably would give rise to as much uncertainty and litigation as the term "to monopolize," and judicial decisions would be necessary to define the definition itself. The safer and better course seems to be to let the courts, in light of common understanding of the word "monopolize," ascertain the precise meaning of the statute by determining its application to individual cases as they arise. The question in each case would be whether there was such destruction of competition as to put an end to reasonably competitive conditions.

The Anti-Trust act prohibits not only the monopolizing of any part of inter-State or international trade or commerce but also every attempt to monopolize and every combination or conspiracy to monopolize. An attempt to monopolize, or a combination or conspiracy to monopolize, would be unlawful, although it may not have proved successful in actually accomplishing its purpose. However, it is obvious that there can be no attempt to monopolize, and no combination or conspiracy to monopolize, unless there be an intent or purpose to effect a monopoly or unless the necessary result of the acts of the parties would be to create a monopoly, in which event the intent or purpose to monopolize would be implied.

It should be observed that the second section of the act does not in terms prohibit "monopolies" or declare monopolies to be unlawful. It only declares it to be unlawful to monopolize or to attempt, combine or conspire to monopolize. The verb "to monopolize" implies action taken by eliminating competition to create a monopoly. If a person or corporation should acquire a monopoly in a branch of trade or commerce without taking any action by the elimination of competition to create the monopoly, this would not constitute monopolizing or attempting to monopolize. Thus, if a person or corporation should develop an entirely new industry or branch of trade, there would not be monopolizing, though there be no competitors. So also, if a person or corporation should obtain a monopoly of an existing branch of trade or commerce by economy of production or successful trading, and not by combining with competitors, or buying them up, or by practices indicating a purpose through the destruction of competitors to create a monopoly, this would not be monopolizing within the meaning of the act.

It has been argued that as the statute makes it illegal to monopolize any part of inter-State or international commerce every act tending to create a monopoly likewise is made unlawful, and, therefore, that every contract or combination in any degree diminishing competition in an inter-State or international commerce is unlawful, though taken alone such diminution of competition would not create a monopoly or constitute monopolizing. This argument indicates loose reasoning or confusion of ideas. The meaning of the words "tending to create a monopoly" is not clear; but if these words mean something different from the words of the statute, the courts cannot read them into the statute

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a restriction of competition between competitors in a branch of trade may not of itself constitute monopolizing, it may be part of an attempt, combination or conspiracy to monopolize, and therefore in violation of the statute. But if a restriction of competition of itself does not constitute monopolizing and is not part of an attempt, combination or conspiracy to monopolize, it cannot by any correct use of language be called "tending to create a monopoly" and it cannot be declared unlawful on the ground that a subsequent additional restriction of competition by the same parties or by others may constitute monopolizing in violation of law. An act which is not prohibited by law cannot be declared by the courts to be unlawful because subsequent independent acts of a similar character may be unlawful.

It is clear that, in the Anti-Trust act, Congress intended to use the word "monopolize," not in some disused or technical sense, but in the sense in which it commonly is understood at the present day. Accordingly, in a number of cases the Supreme Court decided that the Anti-Trust act renders unlawful contracts or other combinations, by the destruction of competition to secure for the benefit of certain individuals or groups of individuals control of inter-State trade or commerce in any article which is the subject matter of trade or commerce.

However, in United States vs. E. C. Knight Co., (156 U. S., 1,) sometimes called the Sugar Trust case, the Supreme Court seems to have held that, notwithstanding the Anti-Trust act, a manufacturing company producing an article of inter-State commerce may lawfully purchase the manufacturing plants and businesses of all its competitors in the same business, although the effect of the purchase may be to monopolize the manufacture and sale of an article of inter-State commerce and consequently to monopolize inter-State commerce in this article. It appeared that the American Sugar Refining Company had purchased the control of four independent sugar refining companies, paying therefor by transfer of shares of its own stock; that refined sugar was an article of inter-State commerce; that all the companies were engaged in interstate commerce in refined sugar; and that by such purchases the American Sugar Refining Company acquired nearly complete control of the business of manufacturing and selling refined sugar throughout the United States. The Supreme Court held that this transaction was not in violation of the Anti-Trust act.

The precise grounds upon which the Supreme Court based its decision in the Sugar Trust case are not stated clearly in the opinion delivered by the Court. Apparently, however, the Court based its conclusions upon the following propositions: (1) that commerce succeeds to manufacture and is not a part of it, and, therefore, although a combination or conspiracy to control the business of manufacturing an article of inter-State commerce may tend to restrain inter-State commerce, the restraint in such case would be only an indirect result, however inevitable, and whatever may be its extent; (2) that, under the power to regulate commerce, Congress can only prescribe the rules by which commerce shall be governed and cannot regulate the use or the disposition of property, or prohibit monopolizing a manufacturing business, merely because ultimately inter-State or international commerce may be affected; (3) that in view of these constitutional limitations Congress did not attempt by the Anti-Trust act to deal directly with monopoly as such, or to limit and restrict the rights of corporations or of citizens of the States in the acquisition, control or disposition of property, or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted; (4) that the contracts and the acts of the defendants related exclusively to the acquisition of certain refineries and the business of refining sugar in Pennsylvania and bore no direct relation to commerce between the States or with foreign nations; and (5) that, although the instrumentality of inter-State commerce was necessarily invoked to dispose of the products of the refineries, it did not follow that an attempt, even though effectual, to monopolize the manufacture of refined sugar was an attempt to monopolize the trade or commerce in refined sugar, the proofs failing to indicate any intention to restrain inter-State trade or commerce.

The decision in the Sugar Trust case was one of the earliest decisions under the Anti-Trust act, and, in the opinion of the writer, cannot be reconciled with the subsequent decisions of the Supreme Court. In a number of subsequent cases the Court decided that Congress had constitutional power to prohibit, and by the Anti-Trust act did prohibit, the monopolizing, or attempting to monopolize, or combining or conspiring to monopolize inter-State trade or commerce by means of contracts or trade arrangements among competitors; yet it is clear that Congress has no greater power to prohibit the making of contracts that are sanctioned by State laws than to prohibit the acquisition or use of property sanctioned by State laws. In the Northern Securities case the Court decided that Congress had power to prohibit, and by the Anti-Trust act did prohibit, a combination restraining inter-State commerce by acquiring and vesting in a holding company a controlling amount of the shares of capital stock of two railway companies owning parallel and competing inter-State lines. Similarly in the Sugar Trust case the property acquired consisted of shares of capital stock of competing companies.

The Court appears to have assumed that the question was presented whether Congress had constitutional power to regulate a manufacturing business or the acquisition or the use of property for manufacturing purposes merely because ultimately the products of the business might become the subject matter of inter-State commerce, or because the property might be used in such a manner as to affect inter-State commerce. Undoubtedly the Court was right in holding that Congress had not that power; but no such question was involved in the case. The only constitutional question was whether Congress had power to prohibit individuals and corporations from restraining or monopolizing inter-State commerce. If Congress had constitutional power to prohibit parties from restraining or monopolizing inter-State commerce, it followed as a matter of course that Congress could prevent them from effecting the prohibited result by any method or contrivance. The fact that Congress was not vested with power to regulate the business of manufacturing, or the acquisition and use of property for manufacturing purposes, did not prevent Congress from regulating and protecting inter-State commerce in the products of manufacture. Few acts are unlawful without regard to their effect or purpose; and combinations and conspiracies often seek to accomplish their unlawful purposes by indirect means. Congress would not be helpless to prevent parties from restraining or monopolizing commerce by indirect methods; but, surely, there can be no more direct, or more effective, or more permanent way of monopolizing inter-State commerce than by buying up all competitors in the business of producing some article of inter-State commerce and of carrying on inter-State commerce in this article.

The question remains what remedies should be applied by the courts if parties have monopolized or have attempted to monopolize a branch of inter-State or international trade or commerce. If the monopolization has not been consummated, the proper remedy seems to be an injunction restraining the parties from carrying into effect their unlawful scheme. If, however, the monopolization has been consummated by vesting competitive businesses in a corporation, an unincorporated association or a trust, the proper remedy would seem to be an injunction restraining the corporation or unincorporated association, or the trustees of the trust, from continuing to monopolize trade or commerce in violation of the law, and by requiring them under penalties to undo their wrongful acts by selling, or by distributing among their individual shareholders, members, or beneficiaries so much of their property and business obtained from former competitors, or shares of stock in companies previously competing, as may be necessary to restore reasonably competitive conditions in the monopolized branch of trade or commerce.

Such construction and such enforcement of the Anti-Trust act, in my opinion, would carry out its true intent and purpose and would be for the best interests of the whole country. A decision following the supposed authority of the Sugar Trust case and holding that the Anti-Trust act does not prevent the effective monopolization of inter-State trade or commerce by combining or vesting in a corporation the plants and businesses of practically all manufacturers and sellers of an article of inter-State commerce surely would not be accepted by the people of the United States as a final solution of the trust problem. Such a decision probably would result in an imperative popular demand for legislation of a socialistic character and possibly it might lead to an amendment of the Constitution. Governmental regulation of corporations and trusts as to their organization and their methods of conducting business, while leaving them the fruits of monopoly, would not be accepted as sufficient. The demand would be that those who have monopolized a branch of trade or commerce shall be deprived of the fruits of monopoly, either by Government regulation of the prices of commodities, or by exercise of the taxing power of the Government. The evils and dangers that would result from such legislation cannot be overestimated. Therefore those who are interested in our great industrial combinations or trusts should consider carefully the question whether such a decision would place them ultimately in a better or in a worse position than a decision requiring, as above suggested, the restoration of reasonably competitive conditions.*

* Some of the views expressed in this article were first expressed by the writer in an article published in the Harvard Law Review for May, 1909.

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