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ANTITRUST—THE REACH AFTER NEW WEAPONS

WALTON HAMILTON† AND IRENE TILL††

The Advisory Opinion

All of the sanctions in the Sherman Act—the plea in equity, the criminal action, the libel on the goods, the private suit for damages—rely directly upon litigation and the courts. In the procedure all that government or private party can do is to make complaint; it is for the judiciary to straighten out the tangled lines of the industrial pattern. The result is a dual system of control: the accusing party does no more than raise the question; its settlement is up to the courts. Such an antiphonal process of administrative initiative and litigious response makes the technology of regulation a very involved process. It is slow, clumsy, inefficient; and it is usually a moral victory, rather than an industrial corrective, which a resort to law will yield.

The reach after new weapons began early in the administration of the antitrust law. The advisory opinion got its toe-hold almost by accident. In 1913, when James Clark McReynolds became Attorney General,[1] an amicable settlement was brewing with the American Telegraph and Telephone Company. As a gentleman dealing with gentlemen, the head of Justice did not insist upon a formal decree and a court sanction. The word of the company was enough. The Department, he stated, would not abate "the insistence that statutes must be obeyed"; it desired "to promote all business conducted in harmony with the law"; it welcomed opportunity to effect adjustments necessary to the "re-establishment of lawful conditions without litigation."[2] In re-

† Professor of Law, Yale University.
†† Economist, Temporary National Economic Committee.

1. Now, of course, Mr. Justice McReynolds.
2. Quoted in Cummings and McFarland, *Federal Justice* (1937) 344.

sponse to such a stimulus, numerous business men descended upon Justice with their problems. The Attorney General was firm in a refusal to confer except in instances in which the Department had taken action. An initial drive to forestall litigation through negotiation failed.

An opening wedge, however, was not easily withdrawn. A going concern is a cosmos of activities and the business executive wants to discover his shortcomings, amend illegal ways, avoid exposure to litigation. Against a pressure so persistent and praiseworthy, resistance gradually gave way. At first the conferences were so informal and occasional that no record is left; by the mid-twenties it was publicly acknowledged by the Attorney General as established practice. It was made clear that a favorable ruling merely promised immunity from immediate prosecution; it had no binding effect upon a later administration. In recent years the trend has been away from "cooperation." The Department's position has been that the government cannot barter away its power to sue in an extra-judicial proceeding.

In spite of such professions, businessmen habitually call at Justice. They seek to secure some inkling of an official attitude toward their practices. If they represent an industry of importance, custom dictates a ceremonial call upon the Attorney General. To raise issues they must go to the head of the Division and are usually referred to officials of lower rank. It is, at the very beginning, pointed out with scrupulous care that nothing said can bind Justice. Yet as interview follows interview, upon the facts disclosed, the official does render a legal opinion. The informal conference has too confirmed a place within the folkways of the law to be excluded from Antitrust. And so insistent is the demand that the Division has been forced to recognize a procedure which—welcomed, sanctioned, or frowned upon—goes on as a matter of course.[3]

3. In an address before the Trade and Commerce Bar Association of New York on March 21, 1940, Wendell Berge, official of Antitrust, suggested a "procedure whereby parties may make full disclosure to the Department about the facts of any activity which they have undertaken or desire to undertake. If the Department finds that such activity violates the law it will so inform the parties who must thereafter act at their peril in the event they disagree with the Department's position. If, however, the Department is not in a position to state positively that the practices are illegal at the time they are submitted, either because of lack of personnel to investi-

The current procedure falls short of the demands of business executives. It marks out a rough limit of tolerance; it reveals, at least for the time, the temper of the personnel charged with enforcement. But it subjects industrial practice to no definitive scrutiny; it gives no assurance that the conferee of today may not become the prosecutor of tomorrow. Assurance, such as it is, comes from an under-official. It carries no sanction that binds; the opinion given is personal rather than official. The conference may in fact create a hazard. It raises an issue, opens or reopens a file, leads to a review of complaints, revives the industry's past, invites an independent investigation.

As currently organized, the Division is in no position to give advisory opinions. Unless the industry is under investigation, there is no one on the staff informed on its practices; no personnel is available for a comprehensive check upon the industrial pattern outlined by business officials. If the request is for advance approval upon a new and untried plan, the difficulties are even greater. Its operation cannot be anticipated; the public interest requires careful observation of its consequences as it swings into action. But with Antitrust concentrated upon cases elsewhere in litigation, staff cannot be spared for this administrative work.

In lending its sanction, Antitrust in fact surrenders its freedom of action. In name it may be at liberty to take such action as later circumstance demands. But good faith has its compulsions; and the presumption runs strongly against prosecution whatever the unforeseen events. If a number of industrial fronts equally invite legal attack, choice is likely to fall upon that which is a stranger to Justice. In litigation, a prior approval by the Government is a card of consequence to the defense; at the very least, it must be explained away. It is, of course, easy to argue that the state cannot sacrifice its indefeasible rights through the negligence of its officials. But in Antitrust, where intent of the parties looms so large in the result, prior clearance of some or all of the acts in question creates serious hazards for the government's case.

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gate or for any other reason, and the parties decide to go ahead with the proposed activity, any future action on the part of the Department would be through civil proceedings."

The Consent Decree

A second piece of machinery is the consent decree. The Sherman Act provides for no such procedure; there is no reference to it in the Congressional debates. It emerged out of the very process of litigation; settlement out of court is one of the oldest of legal usages. Its first use dates from 1906;[4] since that time 142 consent decrees have been written. Of approximately 270 proceedings instituted in equity, over half have resulted in settlements by negotiation.

As a device to escape litigation, the consent decree cannot wholly circumvent the courts. Its origin stems from the broad power of equity. The decree, shaped by the immediate parties to the controversy, must receive a judicial blessing. Its legal status is that of a decree written by the court; the violation of its command invites the action for contempt. In theory the part of the judge is that of a master in chancery; he is supposed to lay bare the questions in controversy, and in informed judgment satisfy himself that the agreement does justice between the industry and the public. In fact his role is ceremonial; he brings to the accord a passive spirit and his *imprimatur*. The adverse parties have been in protracted conference; they have arrived at the terms of settlement; they confront the judge with a *fait accompli*. The jurist has only casual knowledge of the issues; he lacks facilities for informing himself; he has no ready norms for testing the fairness of the provisions. He asks a few perfunctory questions; he may make a minor change or two. The lawyers for the government appear satisfied. He accepts the instrument on faith.

The consent decree permits a direct attack upon problems in industrial government. Questions do not have to be transmuted into the alien language of the law; the procedures ordained for ordinary courtroom use do not obtrude with their distractions. The parties meet in informal conference; no weight of intent and harm hangs heavy overhead; fact and value do not have to trickle into the discussion through the conventional rules of evidence. An opportunity is presented to a group of men, sitting around a table, to reach a settlement grounded in industrial reality and the demands of public policy.

4. United States v. Otis Elevator Co. (1906).

In addition, the instrument has a sweep which no process of law could ever impart. It can go beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial order. If the demand is for adjustment within an intricate scheme of trade practices, at least it supplies the instrument. It can reach beyond the persons in legal combat to comprehend all the parties to the industry. It can accord some protection to weaker groups and safeguard to some extent the rights of the public. It can, unlike a decree emerging from litigation, take into account the potential consequences of its terms. It can make its attack upon the sources, rather than the manifestations, of restraint; give consideration to activities which would never be aired in open court; probe into matters which the prosecution could never prove; explore conduct just outside of restraint; follow wherever the trail leads. It can amend usage, create new trade practices, provide safeguards against unintended harm.

As yet such possibilities have been little realized. The consent decree still clings rather closely to the injunction whence it sprang. Its dominant use has been to free dockets from cases against minor industries; and within this narrow domain its concern has too often been with trivial matters. It has been invoked to established industrial order among makers of candy stick, peanut cleaners and shellers, dealers in perforated music rolls, producers of shirting cloth, the poultry trade in New York City, wholesale jewelers, candy jobbers in four cities, manufacturers of rubber heels, dealers in barber supplies, the hat frame industry, a thread company. Some forty cases involve trade associations; in about a dozen of these the members agree to a dissolution of the organization. In all such instances the parties in defense neither deny nor admit the government's allegations. They simply agree, now and forevermore, to refrain from an enumerated list of forbidden activities.[5]

5. Two decrees written in 1940 contain interesting variations. In United States v. National Container Ass'n, an attempt is made to draw a line between price-fixing and activities sanctioned by the courts. The trade association is specifically permitted to gather and disseminate information of the cost of manufacture, to compile and circulate recommended procedures for the computation of selling prices, to promote the application of uniform cost accounting, to discuss such statistics at meetings, to exchange credit information, and to publish data on specific current contracts of sale "for the sole purpose of avoiding interference with such contracts." Since such activities all tend to produce a united front in the industry, the line between

In no more than thirty cases have large corporations been involved. In each instance power was great, issues tangled, a mere list of prohibitions hardly adequate. In 1912 a consent decree struck at the monopoly position of the Aluminum Corporation by voiding several of its contracts. In 1916 the National Cash Register Company was forbidden, directly or indirectly, in whole or in part, to acquire "an essential part of the business, patents, or plant of any competitor without the consent of the court." In 1926 the National Food Products Corporation was ordered to divest itself of ownership in the stock of certain other corporations. In 1920 a procedure against the meat-packers produced a formidable instrument of industrial government. Threatened with federal regulation, the Big Five sought refuge in a consent decree prepared by Justice. It provided, among other things, that the defendants with reasonable dispatch should divest themselves of their interests in public stockyards, storage plants, stockyard terminal railroads and other productive facilities. They were ordered to cease to do business in some one hundred and forty commodities unrelated to their principal activity and were forbidden to own and operate retail stores, or to sell fresh butter and cream. A separation of meat-packing from the irrelevant enterprises in which it had become embedded was to be effected within two years of the date of the decree.

In 1932 a similar pattern of divestment was, with its consent, imposed upon the Radio Corporation of America; and in 1936 upon Columbia Gas and Electric where a trustee was appointed to hold the securities of the affiliates until their disposal. The Ford and Chrysler decrees in 1938 contain a complicated—perhaps an unenforceable—plan for placing independent finance companies on a plane of competitive equality with their own subsidiaries.[6] In 1940 the large typewriter companies were enjoined from securing control of competitors—through stock ownership, purchase of assets or otherwise—without prior consent from the court.[7] The recent consent decree in the optical goods case de-

the legal and illegal gets pretty thin. In United States v. Tile Contractors' Ass'n, an elaborate scheme is established for policing the decree by the labor union.

6. As late as September, 1940, a system of registration—the real implementation of the decree—had not been brought into use. The tardiness has been due in part to a waiting for the outcome in the General Motors case. The consent decrees were made contingent upon the success of the Government in its suit against General Motors.

7. United States v. Underwood Elliott Fisher Co. (1940).

cared void a number of contracts between the Bausch & Lomb Company and a German concern, and forbade the payment of royalties until further order by the court. The decree involving the Southern Pine Association splits up the activities of the trade association; and establishes a separate organization—open to all manufacturers of southern pine lumber without discrimination—for grading and standardization services.

The decrees appear more formidable upon paper than in operation. More than half were written during the twenties when government and business were in close accord. The device lends itself to a lax enforcement of the law. The parties meet informally behind closed doors; the negotiations leave no public record; groups who do not participate are left in the dark. The only information available to inquiring parties is the decree itself; and, although it is filed with the court, its terms can be understood only by the person who intimately knows the industry. As a result the instrument is useful to a sympathetic administration in building up a paper record of accomplishment. Further, the suit in equity carries little opprobrium; the settlement out of court is convenient, involves little expense, and offers little embarrassment to the activities of the defendants.

But weakness does not inhere in the process. If the government is bent upon enforcement it offers an instrument of vigorous attack. Its use must be preceded by resolute court action elsewhere; executives do not willingly shackle their own discretion; they yield only as pressure is put upon them. A vigorous campaign, a large number of suits, a fanfare of litigation sets the stage for its constructive use. The great difficulty lies, not in the capacity of Justice to impose measures, but in its want of technical skill to turn concessions to account. The resort to law necessitates a staff whose training and experience has been in trial work. Their interests are focused by the task of proving charges in open court. It is customary, when negotiations are begun, to assign the shaping of the consent decree to the attorneys already busy upon the case; there are no others at hand conversant with the practices of the industry. The trouble is that materials of a case are not the stuff for creating an instrument of industrial order. The distinctive competence of the resourceful lawyer does not find its easiest outlet in prescribing for the maladjusted industry.

In its procedure the formal position of the government is that the matter is voluntary. It cannot dictate terms; the initiative must come from the industry; its task is no more than to accept a preferred arrangement which accords with the law. In fact, it plays no such passive role. Its representatives start with ideas about what they would like to demand; as the conversations go forward, their notions become articulate. Yet the absence of a reliable picture of the industry, a superficial knowledge of its structure and folkways, and ignorance in regard to the real sources of trouble hang heavy about the conference table. They make for a process of bargaining that is uncertain, speculative, confused. The representatives of the government suggest leads; but across an unfamiliar industrial terrain their footing is insecure, their sense of direction none too certain. They must, for want of detail and perspective, seek guidance from the gentlemen of the industry.

Such a search for an industrial order is rather like the blind leading the blind. At operating a corporation within an industry executives are adept. It is their business and their minds have been conditioned to its tasks. But their viewpoint is that of the single concern and they are little accustomed to think in terms of an entire industry. They lack an over-all view; they are little given to detachment, critical analysis, the consideration of alternative arrangements.[8] So the defendants propose; the government counters; the parties mutually thrust at plans; the ordeal yields an aggregate of isolated prohibitions. At best the agreement which emerges is a make-shift answer to the problem of industrial order.

Nor does Justice really view the consent decree as an instrument of industrial government. The dangers which attend its creation have invoked timidity in exploring its possibilities. The want of an independent source of information, of a clear grasp of industrial practice, of an arsenal of constructive reforms from which to choose, have made officials cautious in committing themselves. The proposed arrangements might be misused; a contingency might render them obsolete; a scheme designed to restore

8. The framing of a consent decree presents to the parties in interest an unusual opportunity to educate themselves in the problems they face. But a lesson that has not been learned cannot be passed on; and without the greater knowledge and the larger vision which the task demands, the opportunity is usually allowed to slip.

competition might in practice prohibit its return. Accident is as powerful as design; the pattern of the industry might change overnight. Practices, which defy its spirit, might be shaped to the very letter of the writ; a sanction accorded to an innocent practice might later be found wrapped around a vicious one. So long as good intent can be affected, a lot of provisions can be made to do the things they ought not to do. And after all, provisions are commitments and the Division is afraid of what might later be discovered within their none-too-certain terms. So the positive gives way to taboo and negation comes in to control proceedings.

A consent decree anticipates the outcome of the suit; the threat of recourse to law has been a factor in its growth. As attorneys shift to conference, the carry-over of a scheme of values from litigation is inevitable. At any moment the defendants may withdraw and throw the government back upon its chances in open court. The handicaps of legal procedure are powerful cards which the defense can play in diluting the decree. When more cases are on hand than can be handled and the prosecution must play for time, it is often constrained to accept terms which will fall short of clearing up the situation. Where sympathy with the plight of the industry prevails in official circles, the concessions secured are usually far less. But, friendly or hostile, the Division confronts a formidable docket, and the best settlement possible frequently becomes a sheer necessity.

Thus the consent decree is largely a device of economy. It spares the defense the expense of a protracted legal campaign; it allows the Division, in some sort of way, to cover an extended front. It is a resort to an informal process of bargaining, an attempt to capture—without incurring the cost—the answer which the legal ordeal would yield. It shifts the focus from the need of industrial reform to the strength of the government's case. A situation may stink to high heaven; yet, if testimony cannot be regimented into proof or if inference must come along to fit pieces into a pattern of restraint, the exaction must be mild. If the companies are small and litigation an extravagance they can ill afford, more can be demanded. If the conduct has been flagrant, a series of solemn commandments can be written. In consequence, litigation and negotiation become alternative means to much the same result.

Oversight without an Overseer

A matter of concern in the current use of the consent decree is its industrial reach. The only parties bound are those named in the instrument. If a company loses its identity through reorganization, the decree may or may not be the kind of a chattel which passes on. Corporations which freshly enter the industry lie beyond its jurisdiction. Save for the vague threat of prosecution—blunted by knowledge that the industry has already been the subject of legal scrutiny—they are at liberty to ignore its terms. Where an industry is half-bound half-free, those who must obey the decree are put at a competitive disadvantage.

A shift in trade practices, decreed in the settlement, may have consequences far outside the orbit of the original decree. In destroying established usages it may hurry the demise of the small units precariously perched in the industry. Unless these companies are parties to the decree, they have little voice in the formulation of its terms. Ordinarily the original complainants are informally consulted during negotiations, but no over-all coverage of parties affected by its terms is possible. If repercussions extend beyond the lines of the industry to allied trades, no machinery is available for the expression of their views. In any event the formal document can tell little of how its terms will work in practice. The policy of secrecy accentuates the problem. Conference often goes on when the matter is in the courts, and any publicity might prejudice the government's case. Yet the real issue is affected with a public interest, for it concerns the arrangements under which an industry is to carry on. It ought to be open to all who have a stake in the outcome.[9]

A kindred difficulty is police. The instrument with which to make the commands effective has not yet been forged. So long as the dominant objective of Antitrust is legal victory, the consent decree must remain a way of "closing a case." A result has been reached, the zeal in the cause has been spent, interest moves on. If a decree provides for immediate changes, such as the sale

9. In some of the recent consent decrees the Government has sought to secure the viewpoint of interested outsiders. First, an effort was made to secure representation of opinion in court at the time of the filing of the decree; but in two or three instances judges were reluctant to open their forums to possibly prolonged debate in open hearing. Then the Government experimented with giving publicity to decrees before they went into effect, and issuing a general invitation for comment. There was no response.

of a property, a divestment of shares of stock, the dissolution of a trade association, the file is held open until such steps are taken. After that is done, the matter is adjudicated, the issues are removed from controversy. In the records of Justice the episode is closed; the case has gone to the hall of records; a fresh initiative is necessary to call it once more into action. Nor is an effort made to follow up the decree, observe success and shortcomings in operation, check practical result against intent, determine upon necessary revisions.

The occasional modifications throw into sharp relief its inflexibility. A large number of decrees are decades old; the industry has been made over beyond recognition; the consent decree endures untouched. About twenty-five decrees have been hailed into court. In general the revision has risen to no higher plane than formal change. A command to sell, divest, dissolve has been stayed until a more propitious moment; a concern has been permitted to acquire a negligible competitor; a trade association has been indulged the collection of harmless information; a prohibition has been recast in the light of a later decision of the Supreme Court. Such modifications are made at the behest of private parties; in every instance the purpose has been to liberalize the requirements imposed upon the industry. In but a single case has Justice sought reconsideration because the decree had become unsuited to later conditions in the industry. In the spring of 1939 it moved to vacate a decree entered three years earlier against the Columbia Gas and Electric Company.

In only five instances have proceedings been brought for contempt. In one case fines aggregating $5,500[10] and, in another, $4,000[11] were imposed. A couple of proceedings, involving the moving picture industry, are still in court.[12] It is only the fifth, concerned with the manufacture and sale of cash registers, which has left an engaging chapter in judicial history. The case, in fact, presents in graphic illustration the assortment of difficulties experienced by Justice in attempting to give effect

10. United States v. Southern Wholesale Grocers Ass'n (D. C. N. D. Ala. 1913) 207 Fed. 434. The decree dates from 1911, two years earlier.

11. United States v. National Retail Credit Ass'n (plea of guilty, 1935). The consent decree was entered in 1933.

12. United States v. Barney Balaban (1938), involving consent decree in United States v. Balaban & Katz Corp., entered in 1932; United States v. Fox West Coast Theatres Corp. (1939), involving decree in United States v. West Coast Theatres, Inc., entered in 1930.

to an order of the court. It reveals the weakness of the instrument with which a consent decree must be policed.

The story began in 1911, when civil and criminal suits were concurrently brought against the National Cash Register Company and some twenty-nine of its officials. The criminal action resulted in a verdict of guilty, and jail sentences ranging from nine months to a year were imposed upon twenty-seven of the defendants. The president of the company, one John H. Patterson, was given a one year sentence and fined $5,000.[13] The Circuit Court of Appeals reversed the judgment of the district court for Southern Ohio[14] and the Supreme Court refused certiorari.[15] The opinion of the Circuit Court was so far-reaching that Justice felt it hopeless to go forward. So in 1916, in opposition to the district judge who sat on the case, the government asked for a dismissal. On the same day a consent decree was entered in the civil suit.[16]

The consent decree was rather sweeping. Among other things it enjoined the parties from intimidating competitors and their customers, from wrongfully obtaining the names of their competitors' prospective purchasers, from the theft of business secrets, from wrongful trade practices, from espionage. Hardly was the ink dry upon the decree before complaints began to pour in; the company likewise began to busy itself with the limits of its legal bonds. First it asked the court for a number of interpretations of the text of the decree. Then it went to Justice to ask for modifications. Justice in turn called upon the Federal Trade Commission for an analysis of the operation of the decree. Within two months the company withdrew its request. Meanwhile complaints continued to accumulate and a major competitor, the Remington Cash Register Company, employed a prominent New York law firm to press for action. The evidence accumulated; an Attorney General went and another took his place; in 1925 Antitrust determined to institute proceedings. A major question was who in particular was to be cited for criminal contempt. Salesmen were engaging in prac-

13. United States v. Patterson, 1 *Decrees and Judgments in Federal Anti-Trust Cases* 795.
14. Patterson v. United States (C. C. A. 6, 1915) 222 Fed. 599.
15. United States v. Patterson (1915) 238 U. S. 635.
16. United States v. National Cash Register Co., 1 *Decrees and Judgments in Federal Anti-Trust Cases* 315.

tices which the decree forbade; circumstance pointed to knowledge and complicity by the officials of the company; there was no overt testimony to supply the connecting tissue. Some attorneys in the Division were loath to strike high without the necessary proof. Others believed that proof of actual knowledge, while helpful, was not essential; that it was the business of the company to see to it that their petty officials were law-abiding; that the mere fact of violation was enough to constitute contempt of court. In the end—as so frequently happens—the less hazardous view prevailed and the action was confined to the ninety-two sales agents who had been direct participants in disobeying the court's order.[17]

The company was not at a loss for weapons of defense. As soon as the action for contempt was brought, the corporation was reorganized; it was pleaded that the new legal person was immune to the court order. A like immunity was claimed for persons who were not in the company's employ at the time of the decree. It was also contended that the powers of the court of equity were limited to its district; that the judge could punish for contempt only those salesmen who had operated in the Southern District of Ohio. It was insisted that, unless action was begun within one year of the time the acts occurred, it was barred by the statute of limitations. In the course of the trial, the charges against seventy of the defendants were dismissed because of insufficient evidence. Later, on the ground that the government had not acted in time, the judge dismissed eighteen of the twenty-two who were left.[18] The later ruling was appealed to the Supreme Court which reversed.[19]

Back the case went to the district court. Meanwhile the energies of the government had flagged; it now moved to dismiss twenty of the defendants. Thus of the original ninety-two, two survived the ordeal of interlocutory motions to be tried. In 1928 the District Court found one of them guilty on two counts and imposed a fine of $1,000 on each count. It dismissed the information against the remaining person. In 1929 a motion by Justice for a new trial was denied. As a final blow, in 1931 the

17. Department of Justice files on National Cash Register Co., File No. 60-51-0.
18. United States v. Whiffen (D. C. S. D. Ohio 1927) 23 F. (2d) 352.
19. United States v. Goldman (1928) 277 U. S. 229.

decree was modified to permit National Cash Register to acquire Remington Cash Register, the very company which throughout the twenties worked aggressively for the enforcement of the decree. Since 1916 violation of the decree had been flagrant, yet the net result of all efforts was a fine of $2,000 against a single salesman.

The ordinary antitrust suit has problems enough. The follow-up in contempt, in addition, presents difficulties all its own, many of them new to the courts. What is the precise meaning of the language of the decree? How are set terms to be accommodated to a changing pattern of trade practices? In the hierarchy of an industry whom does it bind? How far does its jurisdiction extend beyond the persons, natural and artificial, who are named in the instrument? Along the various planes of corporate officialdom, how much of knowledge and of participation must be proved? If violation is virtually compelled by the necessity of meeting competition from companies not named in the decree, what then? If new practices are devised as a way around the prohibitions, has there been contempt? How long must the government wait after a decree has been entered before bringing an action? And how long can it pause after the overt act before losing its right to strike? What if, in the interval, the industry has been quite transformed in technology, structure, trade practices, markets and wares? What if only a few among many former units are now bound?[20]

In five cases involving divestment proceedings, trustees have been appointed pending the disposal of the stock.[21] A major difficulty here has been the spasmodic interest of Justice. The decree usually antedates the current administration; the attorneys who handled it are gone or to them it has grown cold. Their knowledge has been submerged beneath the materials of more recent cases; the intangibles have left little trace behind in the

20. A move has lately been made towards easier administration of consent decrees. A provision, embodied in all recent decrees, grants to Justice access to all books and records. Reports upon the operation of the decree may also be required. The provision holds real possibilities. For the first time the files of the offending company are open without roundabout of grand jury and subpoena. The great weakness is that the Division lacks the facilities for the follow-up essential to keep the decree alive.

21. United States v. New York, N. H. & H. R. R. (1914); United States v. Swift & Co. (1920); United States v. Fox Theatres Corp. (1921); United States v. Rand Kardex Bureau (1926); United States v. Columbia Gas & Electric Corp. (1936).

records. All that remains alive of the industry, its trade practices, ancient pattern of restraint, is a bulking and silent file over which — as a ghost of a case closed — hovers the decree. In isolation, and without the Division's lawyers to prod, the trustee takes his course. He is more responsive to pressures which are current than to those that are gone; to the flesh and blood that bears down upon him than to volitionless files. He is driven forward—or stopped in his tracks—by a personal interest. His task is to speed the sale of securities in his hands; his stake in a job which expires when his duty is done bids him await a favorable market. As a result, a company may maintain its equity for years after it has been ordered by the court to divest itself of the holdings. In any event the immediate counts for more than the remote, and the trustee tends more and more to take the industry's view of the matters he handles.

All the difficulties appear in the classic of consent decrees, that against the meat-packers.[22] The agreement of 1920 provided, among other things, for an immediate disposal by the Big Five of their interests in public stockyards. They were likewise required to separate themselves from concerns dealing in various canned products. At the outside the process of divestment was to be completed within a period of two years. Almost at once the packers began an attack upon the decree to which they had voluntarily consented. The first move came from off-stage; the California Cooperative Canneries appealed to the Attorney General for modification.[23] Then, as a third party, they asked to intervene, went into court, and moved that the decree be vacated on the ground that it disturbed their contractual relations with a party to it. The Canneries had a ten-year contract for the sale to Armour of all their products it might require. A clause provided that, in case of government interference, Armour was free to abrogate the contract on sixty days notice. At the time the Canneries were heavily in debt to Armour. Whether the Canneries acted on their own motion, or whether they were prompted by the packers, is a moot question. The trial court decided for the government and was reversed on appeal. The Court of Appeals declared that the Canneries had lost valuable assets with-

22. United States v. Swift and Co.
23. Department of Justice files in United States v. Swift & Co., File No. 60-50-0.

out a right to be heard; that there had been a taking of property without due process of law.[24]

In 1924, while this matter was still pending, Swift and Armour filed their own motions to vacate the decree. They argued that the packers had denied violations of the antitrust acts; that there was no genuine case in controversy; that the court lacked jurisdiction to enter the decree; that the Attorney General had no power to exclude persons from a legitimate business. A number of ancillary attacks were made on the decree—its vagueness and generality, its comprehensive character, its want of factual support. The trial court, feeling itself bound by the appellate ruling in the Canneries case, suspended the decree. In such a matter, a definite ruling could come only from the highest court, and in 1928 and 1929 the Supreme Court found no merit either in the direct attack by the packers[25] or in the collateral attack upon the decree by the Canneries.[26]

The packers, however, were prepared for this legal pitfall. In 1930 they again embarked upon litigation—this time to secure modification of the decree. Their complaint was a woeful series of corporate wrongs; their prayer for relief—finite in the instance—asked in the aggregate for a virtual scrapping of the instrument. Their argument postulated a revolutionary change in economic conditions, the rise of the grocery chains, their need for diversifying their business, the necessity for retail outlets, the economies in distribution direct from process to consumer, the utility of all of this to the consumer, its compatibility with the ideal of competition. In the trial court the packers won a partial victory, which again was lost in the Supreme Court.[27] In 1932, a period was written to twelve years of litigation; the letter of the decree and the position of the parties had not been changed one bit.

So long as cases were in the courts, the packers made no effort to divest themselves of equities in forbidden companies. Then in 1931, eleven years after the command had been given, Armour hastened to obey the order of the court. Its interest in

24. California Cooperative Canneries v. United States (App. D. C. 1924) 299 Fed. 908.
25. Swift & Co. v. United States (1928) 276 U. S. 311.
26. United States v. California Cooperative Canneries (1929) 279 U. S. 553.
27. United States v. Swift and Co. (1932) 286 U. S. 106.

the General Stockyards Corporation was disposed of to three companies owned by members of the Armour family. When corporate gears are disengaged, personal ties may still abide and it seems probable that so fictitious a divestment still leaves the order of the court unfulfilled. The Swift Company showed no such precipitate haste. In 1932, in accordance with the mandate of the Supreme Court, the trial court appointed a trustee and directed that gentleman to dispose of the proscribed holdings in Libby, MacNeil and Libby within one year. In 1933 the defendants asked for a further period in which to rid themselves of their interest in the canning company. The court refused and directed the trustees to see that the block of stock found its way into hands legally competent to hold it. In 1936 Swift divested itself of a part of its investment in stockyards.

The months dragged on. In the spring of 1939 Justice, its patience exhausted, sought to force disposal of Swift's interest in the large canning concern. It attempted to secure from the court an order to the trustee calling for bids. This action was vigorously contested on the ground that market conditions did not warrant sale of the stock. During the summer the judge called the parties to his chambers and announced that he had decided to grant the motion. He would, however, refrain from taking public action until the defendants had been accorded a reasonable time to dispose of the holdings. Shortly thereafter the sale was made and in November of that year the court approved a plan for the disposal of the Swift stock. Thus, after nineteen years of litigation, an important provision in the packers' consent decree was at last given real effect.

The innovation of the consent decree has made its modest addendum to the Sherman Act. If experience has ripened into so little of novelty, at least strands have appeared upon which a fabric of administrative control may be woven.

Towards an Administrative Base

A movement away from litigation, and towards an administrative base, seems inevitable. Justice has, against its will, been forced to grant a skeptical indulgence to the advisory opinion. It has, to speed its work along, been compelled to make a cautious use of the consent decree. Each is still a blunt tool in the early stage of development; each needs to be shaped into a nimble instrument of control.

In other domains the advisory opinion has been converted into the administrative ruling. It is argued that rule-making ought to be domesticated to use in Antitrust. Its informal process is simplicity itself. The representatives of a trade come to Justice with their program. Negotiations are entered into. The resulting agreement is virtually a contract between the industry and the government. The companies pledge behavior in accordance with the terms of the document. Justice promises immunity in respect to the enumerated practices.

The argument is persuasive. The single standard of the Sherman Act does well enough as a norm; but reason dictates its accommodation to the circumstances of particular industries. Litigation is too ponderous for the case by case approach; the administrative ruling seems to meet the need for a more flexible and expeditious remedy. It promises alike to free business enterprise from unnecessary legal hazards and to bring its activities into closer accord with the law. It opens the door to executives honestly in quest of advice. It lifts the cloud of uncertainty beneath which businessmen must now launch their ventures. Surely it is within the realm of reason that persons vitally concerned be informed in advance about the meaning of the statute; and if they act in reliance upon such advice, the consequent fault is not theirs.

Advance clearance also promises to raise the level of enforcement. The appearance of businessmen is voluntary. They come on their own business rather than as defendants. No stigma of potential crime attaches to their presence; no presumption of guilt has become an article of faith; the industrial landscape is not read in terms of a hypothesis of monopoly. In a spirit of amity the parties can address themselves to the practical problems in the industry. The process accommodates itself to the volume of traffic. A matter at issue can go forward at a fraction of the former cost; the expenses, even of inquiry, would be materially reduced by the cooperation of business.[28] With the

28. It can be plausibly argued that the outlay incurred keeping an industry orderly and within the law is a necessary cost of production. If so, the expenses essential to such a control might be borne by the trades concerned or by industry generally. The resulting betterment in the mores of business might well pay its own way. A precedent is offered in the office of the Coordinator of Transportation, 1934-1936. The expenses of Commissioner Eastman's establishment were logically assessed against the railroads.

funds at its disposal, Antitrust could supervise a far larger segment of the national economy.

In its result the administrative ruling approximates the consent decree addressed to positive remedies. Both go beyond a listing of prohibitions; sanction is given to a code of industrial behavior. The government and industry in cooperation spell out a line of business activity which is believed to accord with public policy, and in the furtherance of which immunity from prosecution is promised. The essential difference is that one arises from the initiative of businessmen, the other from the threat of litigation by the government. The one can be used where industrialists are anxious to secure clearance on their trade practices, the other where they are loath to act and the incentive must come from the enforcement agency.

At the very threshold stand a series of questions. Exactly what is an industry? What are the limits of its coverage? Are producers of special products to be crowded off into an association of their own? Suppose that the by-product of one industry competes with the main product of another? What of a case like rayon against silk, where the products of separate industries compete? How is representation to be secured from all who have a stake in the result? How is the group to be kept constant, when parties in interest vary from question to question? How are the rights of minority groups to be protected? Of firms that live along the fringes? Of outsiders to whom a connection is necessary to carry on? As interest becomes more and more remote, where is the line to be drawn? Amid a babble of tongues what chance is there of a real accord? Would the decree bind only those who signed on the dotted line? What of the recalcitrant ten percent whose activities would frustrate the result?[29]

How, too, in shaping the decree, could questions of policy be avoided? Would Justice encourage the advance of technology and the elimination of the unfit? Would it promote a highly dynamic economy in which every concern had forever newly to make good? Or would it, in recognizing demands for economic security, keep the little fellow in business? Could it, in

29. In quite a different set-up N. R. A. had to face many such problems. Had the experiment continued for some time, its experience might throw much light upon the path ahead. As it was, the great mass of these questions did not get answered; they were not even adequately raised.

the face of pressure from organized petty trade, escape "the politics of industry"? How could it avoid freezing the existing industrial structure with all its waste and extravagance? Could it keep industries open to all who wished to take their chances? Or would it, by sanction and injunction, create vested interests within an enduring frame-work of business? As the years passed, would the impact of its decisions tend towards a more efficient, articulate, purposeful economy? Would it in time be compelled to abandon competition for a more "realistic" philosophy? It is easy enough to extend such questions, immediate and remote, into a real catechism. But their import is clear enough. They indicate how uncharted is the way of formal control, how great the obstacles to be faced, how many the distractions to be avoided, how easily the end may be lost in concern with the instance.

The process of negotiation also demands its safeguards. The businessman wants advice before the fact; the government demands security for its plighted word. If both are to be satisfied the judgment must be based upon a knowledge that anticipates the future. An open file on an industry should precede by many months the formal raising of any question. It should be kept up-to-date, be available at any moment. All information relative to trade usage should be gathered, arranged, indexed. But, if facts are to shape judgment, analysis must convert them into understanding. The administrative agency must become familiar with the industry; it must know intimately its structure, products, markets, technology, folkways, balance of large and small units, affiliations with other trades, place in the national economy. It should possess norms with which to test the good faith in proposals submitted, envisage their practical operation, evaluate them as remedies for current maladjustment. It should not have to seek its data from the corporations before it. Its access to independent sources of information would eliminate the fear of entering into an agreement blindfold.

The character of the decree which results must accord with its function. In a world of good and bad, an eternal ban can be laid against a practice that is evil; in a court of equity it may be perpetually enjoined. But the affairs of an economy are doomed to change and the perspective shifts with the increase in understanding. In the current state of knowledge, a definite

code for an industry is out of the question. The agreement can at its first writing be little more than a tentative hypothesis for the conduct of an industry. Every measure which it contains is subject to correction; either party should at any time for good cause have the right to move for amendment.

Its use demands a constant oversight of the operation of the trade. In the past a serious problem has been the follow-up of decrees. If their terms had been adequately policed, the story of antitrust enforcement would be far less a series of sporadic episodes. Justice cannot afford to win hard-fought battles only to allow victories to be eaten away by inaction. It hardly suffices to cure the patient if he is to be permitted to relapse into disease. It does little good to outlaw a practice if a substitute is permitted to achieve the same objective. The void in making the law work can be overcome only by a regular check-up.

Thus the consent decree and the administrative ruling become instruments of government. Their initial provisions would reflect the best of current knowledge and belief. But they should be subject to amendment as practice, circumstance, and expanding knowledge may suggest. A breach of the terms should be a civil offense, reached by a simple administrative process, and remedied by mandate or punished by fine. To such an instrument a tentative official assent would be accorded. Justice could not protest activities which conform to its terms, but it could at any time move for their revision. Save for conduct that lay clearly without the law, firms would not have to carry on under permanent injunctions which they are powerless to lift. As the operation of the industry might demand and so far as the public interest would allow, any provision could be modified.

It is useless to minimize such a task of public oversight. The concern of most other supervisory bodies is with a narrow domain or a single aspect of an industry at work. In comparison to agencies concerned with the railroads, the merchant marine, corporate securities, the task would be gigantic. Antitrust would have to operate over almost the total area of the national economy. Certain provinces would be excluded or rarely demand attention. The trades local in character are beyond its scope; for many parts of the economy—motor transport, railroads, the staples of agriculture — Congress has made other provision; where competition is operative there is no need of supervision;

aspects of industrial practice fall more properly within the orbit of the Federal Trade Commission. But, with due regard to every limit set by local charter, legislative exception, adequacy of regulation by the market—the domain is broad and still largely unexplored. It is idle to attempt to bring it under the authority of the Sherman Act all at once. There can be no immediate escape from the hit or miss approach of the individual case. A rough formula should determine the industries selected for immediate attention. Its terms should be departure from the competitive standard, the harm to competitors and consumers, the place of the trade in the national economy.

The Task of Re-Tooling

To the newer process the Antitrust Division would have to be regeared. Administration would be pivoted upon Sections charged with industrial analysis and the formulation of rulings and decrees. The task of the former should be to capture a picture, in clean-cut perspective and comprehensive detail, of the industry in operation. Against the background of structure and pattern of usage, the sources of maladjustment should be laid bare. If every case leads to an adequate diagnosis, the results should prove cumulative. Even under an *ad hoc* approach, little by little the topography of the national economy will emerge. Industries may range themselves into types; a trouble-spot may be matched against others of its kind; fault lines will be discovered in the economy along which disorder may be expected. A growing body of experience will be at hand upon which to draw as occasion demands.[30]

The Decree Section should be concerned with remedies. Its task is constructive; its work begins where that of the other division leaves off. Its proposals must be grounded in adequate analysis; but they involve choices between alternative schemes of arrangement which imagination must help knowledge to predicate. Its concern is in a sense the technology of industrial order. As inventors further the economic arts, its office is to create and improve the devices and procedures through which an industry

30. It has been suggested that Justice farm out its work of investigation to another agency. Since an inquiry is shaped to the purpose it serves, this would compromise its work. Besides neither the Federal Trade Commission nor the Department of Commerce is equipped in objective, tradition, or personnel for a work of such character and magnitude.

maintains order, carries on, does justice between the several parties concerned. To turn its work to account it must engage in a constant oversight of the decrees which it has to administer.

An institution can hardly drive so far without creating an antithesis between its inherited form and its assumed office. As a division of Justice, the task of Antitrust has been that of prosecutor; as an arbiter of arrangements under which an industry is to carry on, it has stumbled into an administration office. The tasks should not be confused; and, to their separation the process of negotiation should be placed—where in function it has already drifted—outside the Antitrust Division. Justice should be left free to inquire, to complain, to move for a remedy —activities in strict accord with its distinctive competence. But the Decree Section should be freed from its ancient bondage to litigation, given its independence, fitted out with all the requisites of its office. The public control of business awaits the creative work of the administrative agency.

Judicial review should be by way of a specially constructed industrial court of five or seven members. They should be as competent in the ways of industry as they are learned in its law. All protests against administrative rulings whether by Justice or by a private party, would go to this bench. From it appeal would lie directly to the United States Supreme Court. The court, like any federal tribunal, would sit at law and in equity. In the exceptional case, it would sit *en bloc;* the run of mine business would be dispatched by a single judge. As occasion demanded, it would hear criminal actions, refer issues to the jury, impose penalties. It would more often sit in tort and assess against corporations and their officials the appropriate fines. In the policing of decrees, a host of minor or major violations would be brought before it. It would issue injunctions, order divestment and dissolution, devise codes of fair conduct.

At present it is a matter of chance in what district an antitrust suit is brought. The case stands apart from the run-of-mine grist of the judicial mill; the judge's ability to keep his footing over an unfamiliar terrain is a matter of accident. Under the new arrangements cases would go to a court experienced in industrial matters. A host of scattered suits would be garnered into a single docket. In time there would emerge a "code industrial" possessed of such focus, breadth and consistency as human

nature and the changing circumstances of industry would allow. Its decisions would come to constitute for business a flexible law of public control.

A Final Caveat

At its beginning the Sherman Act was public policy in respect to business. Today it is one of a number of acts in which public policy is recorded. Then it was the legal weapon for the control of business; now it is a single instrument in the arsenal of regulation. It is still the dominant expression of public purpose, and other measures are still written as qualifications or special cases. But legislation already upon the statute books is grounded upon other assumptions; and economic creeds, other than competition, have arisen to dispute its foundation. Nor is the area in which industrial fact accords with its presumption as large as once it was. Almost everywhere the free and open market has lost its primitive simplicity; nowhere does it operate in the complete and automatic way once glibly assumed. In a word, the world has grown up, industry has compromised competition with its folkways, the sovereignty of antitrust in public policy is no longer absolute.

Antitrust is a symbol of democracy. It is an assertion that every industry is affected with a public interest. Quite apart from its operation, it keeps alive within law and public policy a value which must not be sacrificed or abridged. It asserts the firm, the trade, the economy to be the instrument of the general welfare. If the fact falls short of the ideal, the call is to amend the fact rather than abandon the ideal. It may be that in many industrial areas, the free and open market has been compromised or is forever gone. Still its norms of order and justice endure to serve as standards for performance under another arrangement. In matters where the market can be restored to its economic office, there should be caution in substituting administration. A hazard to the common good attends the enlargement of personal discretion.

No matter how competent the agency, informed persons shudder at the replacement of the open market by personal discretion. Only the impotence of competition to do what is expected of it invites the change. A case for the shift is wanting unless safeguards can be contrived to replace those which the minority group, the consumers, the interests interlocked with

the industry, are forced to surrender. The administrative agency invites the very invasion of economic power which the competitive market is supposed to be proof against. It is played upon by all the pressures which powerful groups can muster into service.

Other ventures have not pointed an alluring way. The commissions have been very effective in closing public utilities to outsiders; they have been far less successful in assuring fair charges to the users of their services. Their rigidities have discouraged experimentation with price which might have brought power and light within the reach of lower and lower income groups. The Interstate Commerce Commission has been swamped beneath a deluge of detail. Save for the brief life of the Coordinator's office, it has spent little energy upon a forward plan for the railroads. The various agricultural controls—corn, milk, wheat, sugar, cotton, tobacco—have been very sensitive to the plight of the farmers, negligent of farm labor, and indifferent to the general public who must pay the bill.

The NRA, brief as was its life, staged a full dress performance of the hazards of the administrative process. Wide powers were granted—to become sanctions under which the strategic group could lord it over the industry. The strong were served under the affectation of protecting the weak; managerial privilege was entrenched under a pretense of fairness to the little fellow and to labor. Rules were written, presently to be smothered beneath a flood of exceptions; the vague clauses in codes were made to mean what interested parties wanted them to mean; "emergencies" were invoked to justify orders which otherwise would have been intolerable.

Such dangers, always imminent, may be forestalled. But vigilance must not relapse for even a moment. The question of privilege is seldom directly put; it emerges in a score of disguised issues. A scheme to restrict output is presented as a limitation upon the hours of labor. A cost formula for price is invoked to allow the little fellow to recover his expenses. A reduction of capacity is intended to do no more than bring it within hailing distance of what the market will take. A provision, fair upon its face, operates to the detriment of a firm whose progressive ways have been an embarrassment to the industry. The barrage of pressures is so persistent—the writing of a spe-

cial rule, the invocation of an emergency, the declaration of an exception—that the staunchest official has difficulty in withstanding it. It emerges in forms so innocent that he must be forever alert lest his resolution be outflanked. The impulses from the privileged are omnipresent and strong; the voice of the unorganized, weak and faltering. To catch the perspective the administrative agency must supply its own amplifier.

Such a move is no more than the next step. As change obeys its dynamic urge, the result may be a restatement of the problem of public control. Trends are already manifest of which this proposal takes little account. But their lines must be more sharply defined before that can become the concern of national policy. The stress and strain in industrial structure proceeds from a clash which runs deep. At the moment a triple demand is being laid upon the national economy—it must take the turbulent course of events; it must assimilate a medley of public controls long overdue; it must provide an adequate national defense. It may well be that here is more traffic than the system of free enterprise can carry. But if competition belongs to an interlude in history—a lull between ages of unlike authority—only its events can reveal the next stage.

The task of keeping industry the instrument of the commonwealth is as arduous as it is everlasting.