ADVANCE SHEET- August 6, 2021

In this issue

President's Letter

The Bar Library today announces the resignation from its Board of Judge Barry Williams and Henry R. Lord Esq., both of whom have rendered distinguished service to the Library and to the Bar, and the election of two new members:

Judge Kevin Arthur of the Court of Special Appeals has been newly elected to the Board.

Benjamin Rosenberg, Esq. of the Baltimore Bar has been newly elected to the Board.

The revival of interest in antitrust policy makes appropriate renewed attention to the ideas and record of George Wickersham, President Taft's attorney general. Along with Robert Jackson and Edward Levi, he may be the most notable modern occupant of that office, though he is now largely forgotten.

Wickersham declared:

"The people cannot permit the uncontrolled centralization of power in private hands," "If it cannot be prevented in one way, it undoubtedly will be in another. I should greatly deprecate the tendency to appeal to the government to fix prices or to regulate and control by intimate details the affairs of great corporations or possibly to become the silent partner in every vast enterprise, and yet this is substantially the condition of affairs in Germany which has adopted the policy of encouraging consolidation but also assumes the supervision and control of all combinations."

Accordingly, he, with President Taft's support, did what Theodore Roosevelt did not do: brought lawsuits against every concentrated private industry, and was credited with having "out-radicaled the radicals." Not for him was Roosevelt's distinction between 'good trusts' and 'bad trusts.' The fruits of his efforts are with us still, in the prevention of railroad consolidation; and in the dissolution of monopolies in the oil, tobacco, meat-packing, explosive powder and

numerous lesser industries. Taft, let it not be forgotten, was one of the framers of the Sherman Act and as Solicitor General in the Benjamin Harrison administration brought the first cases under it. His Addyston Pipe decision in the Sixth Circuit announced a firmer rule than the 'rule of reason' of the Standard Oil case, though he professed himself satisfied with its later modification.

Archie Butt, who was military aide to both Roosevelt and Taft and held both in high regard, declared that Wickersham "had the political sensibility of an ox." Those reflecting on the records of twentieth-century attorneys general, including A. Mitchell Palmer, Harry Daugherty, John Mitchell, Robert Kennedy, and Alberto Gonzales might conclude that we need more such oxen.

Wickersham's record as attorney general was not confined to antitrust. He stood by a U.S. Attorney in Oklahoma who brought what became known as the Grandfather Clause Cases barring the automatic exclusion of black voters. President Taft entertained the hope, not realized, that the Southern states would ultimately tire of conducting dishonest elections mis-using literacy tests. Wickersham also appointed the first black assistant attorney general, William H. Lewis, one of five assistants and the highest-ranking black to be appointed to federal office since reconstruction, sponsored him for membership in the American Bar Association, and stood by him during southern efforts to expel him, writing a personal letter to all 4700 members of the Association. He also vigorously enforced the anti-peonage laws.

His later public service was noted for his chairmanship of the Wickersham Commission, appointed by the Hoover Administration, best known for the equivocation of all but one of its members on the prohibition issue. Its findings, as distinct from its fragmented conclusion, gave force to the movement for repeal. The report was satirized, but succinctly described, by the humorist Franklin P. Adams:

"Prohibition is an awful flop
We like it
It can't stop what it's meant to stop
We like it
It's left a trail of graft and slime
It's filled our land with vice and crime
It don't prohibit worth a dime
Nevertheless, we're for it."

The Commission was appointed, however, not only to examine prohibition but all of federal law enforcement, and rendered 14 separate reports totaling more than three million words, leading the humorist Will Rogers to say that it could be used to "feed goats in Texas." Its report on the 'third degree' and police irregularities was frequently cited in the1960s, helping give rise to changes in search and seizure rules and coerced confessions. Its chapters on police administration fostered professionalization of the police; its chapters on parole, probation, prisons, and criminal statistics were also influential, and its reports on child offenders and deportation are still worth reading.

He was a founder, organizer and first President of the American Law Institute and a President of the Association of the Bar of the City of New York.

His Republicanism disqualified him from direct federal service during the New Deal, but he was Chairman of the Council on Foreign Relations with its auxiliary groups in many cities, which the historian Carroll Quuigley has credited with establishing greater solidarity between the United States and Great Britain and which was a force for interventionism in the 1930s and 1940s.

We include in this issue the summary he prepared of his antitrust activities, a later chapter from his book The Changing Order (1914) on Results of the Trust Dissolution Suits, and the wikipedia article on his protégé William H. Lewis

George W. Liebmann

Who Are - Bar Library Board Of Directors

If any of you find yourself on Jeopardy, and in the midst of the category on The Library Company of the Baltimore Bar the answer is "George William Brown; James Mason Campbell; George W. Dobin; Hugh Davey Evans; John Van Lear McMahon and I. Nevitt Steele," the question is, of course, who were the first Board of Directors of the Library after its founding in 1840. Now, if you have read the President's Letter above, and there is absolutely no reason to pass over something written by Mr. George W. Liebmann and then read something by me, you

will know that the latest two individuals to join a long and distinguished line of Bar Library Board of Directors are the Honorable Kevin F. Arthur of the Court of Special Appeals of Maryland and Benjamin Rosenberg, Esquire, founder and Chairman of Rosenberg Martin Greenberg.

Judge Kevin F. Arthur is a graduate of the University of Maryland, College Park, B.A. (philosophy), 1982 (phi beta kappa) and the University of Maryland School of Law, J.D., 1987 (order of the coif, national law school honor society; John L. Thomas prize). Upon completion of law school he clerked for Judge John C. Eldridge, Court of Appeals, 1987-88. Judge Arthur joined the firm of Kramon & Graham, P.A. in 1988, becoming a Partner in 1996. He would remain with the firm until his appointment to the Court of Special Appeals in 2014.

Judge Arthur is a Member of the American Bar Association, 1988-; Maryland State Bar Association, 1988- (appellate practice committee, 1997-; civil pattern instruction committee, 1998-; committee on laws, 2006-); Fellow, Litigation Counsel of America; Life member, Maryland Bar Foundation, Inc.; Fellow, American Bar Foundation; Member, Serjeants Inn, 2004-. He is the author of, *Finality of Judgments and Other Appellate Trigger Issues* (3rd ed. 2018) and co-author, "Final Judgments and Federal Interlocutory Appeals" in *Appellate Practice for the Maryland Lawyer*, P. Sandler, A. Levy & S. Klepper (5th ed. 2018).

Before joining the Court of Special Appeals, Judge Arthur was named by Best Lawyers in America (2008-2014) and Super Lawyers (2007-2014).

Benjamin Rosenberg, Esquire, is the founder and Chairman of Rosenberg Martin Greenberg. Prior to the founding of his firm he was with Venable LLP, a firm he joined upon his graduation from the University of Maryland School of Law, J.D. (1969), and at which he would become a Partner. Mr. Rosenberg received a B. A. from the Johns Hopkins University (1965). Recognized as one of the preeminent litigators in Maryland, he handles major cases in state and federal trial courts and has argued many significant appeals. He is a fellow of The American College of Trial Lawyers and the Maryland Bar Foundation. Mr. Rosenberg has been named one of Maryland's top litigators in Chambers USA: America's Leading Lawyers for Business and is one of Maryland's top commercial litigators in Best Lawyers in America. He was also recognized as one of the top ten lawyers in Maryland in the 2007, 2010, 2011, 2015, 2016, 2017, 2018 and 2019 editions of Maryland Super Lawyers, and was the top ranked lawyer in the state of Maryland in the 2017 and 2018 edition of Maryland Super Lawyers. He has received awards almost too numerous to mention including The Daily Record, Leadership in Law and the Legal Aid Bureau, Champion of Justice.

Mr. Rosenberg served on the Appellate Judicial Nominating Commission of Maryland from 1995 through 2014 and has previously served on the Judicial Compensation Commission of Maryland and the Review Board of the Attorney Grievance Commission. He is a past member of the Board of Governors of the Maryland State Bar Association and was formerly Co-Chair of the Maryland Legal Aid Bureau's Equal Justice Council.

In addition to becoming a member of the Bar Library Board, Mr. Rosenberg is a Member of the Board of Directors of the Enoch Pratt Free Library & Maryland State Library Resource Center (2012-), serving as Chair (2017-2020); a Member of the Baltimore Jewish Council (2012-) and Co-Chair of the Equal Justice Council (2005-). He has previously served on the

Boards of the Walters Art Museum (in addition to serving as a Trustee he founded the William T. Walters Associates); the Associated: Jewish Community Federation of Baltimore and the Bryn Mawr School.

Joe Bennett

Squandered Money or Money Well Spent?

Today is Friday, August 6, making it the first Friday of the month. Although as a good Catholic "boy" First Friday has always had a special significance, of late I am ashamed to admit, it is about spending the day with Francis Albert Sinatra on Sirius channel 71. My mantra had been, you have to pay for television and just about everything else, I was not going to pay to listen to the radio. That was before we bought a new car several years ago which came, of course, with a year's subscription to Sirius Radio. I suppose all of you know the rest of the story.

There are still things I have a hard time understanding such as why there are ten cars in the drive thru at Dunkin. I always feel like yelling over to them that magic word "Keurig!" I

suppose all of us have thoughts on why other people are foolish for spending their money on ...

Well, there is one purchase, I daresay investment, that anyone would be hard pressed to argue is anything but money well spent, and that is a Bar Library membership. A membership allows you access to unmatched collections as well as Westlaw databases that range from what you would expect, cases, statutes and regulations, to what you might not, such as briefs, jury verdict material and West texts and treatises. The printed material may be borrowed and used in your very offices, Westlaw may be accessed through your own laptops by way of wi-fi. Just cut and paste what you need into your very files or documents.

A Library subscription is also about Library services. Whether it be utilization of the M.V.A. search service, faster and cheaper than you are likely to find anywhere else; telephone reference; the e-mailing of material; use of the Library's rooms for meetings to depositions: as a membership Library, our sole purpose is to provide you with what you need.

The events over the past year and a half have made all of us evaluate the way we do things and contemplate whether there might be a better way. The slowing down of the courts and a concomitant diminution of income for firms and practitioners, has led to just about everyone thinking about how to save money, to maximize every dollar. When you can access what the Library has to offer for less than the cost of a yearly supplement to most publications, do you begin to see what I meant by "money well spent?" Please consider investing not just for yourself but for those who over the past year and a half have come to depend on the Library in a way they had not in years.

Take care and I hope to see you soon.

Joe Bennett

George Woodward Wickersham

THE ADMINISTRATION'S ANTI-TRUST RECORD.

Mr. MANN said:

Mr. SPEAKER: Under leave granted to me to extend my remarks in the RECORD, I include as a part of my remarks an address by Hon. George W. Wickersham, Attorney General of the United States, delivered at Milwaukee, Wis., as follows:

The Sherman Antitrust Act of July 2, 1890, was enacted by a Republican Congress in an effort to effectively check the growth of business combinations which threatened the destruction of the cardinal principle of our American institutions, namely, equality of opportunity to all under the protection of law.

Senator Edmunds, in an article published in the North American Review for December, 1911, has described the thoughts and intentions of those who framed and procured the enactment of that law. They nearly unanimously agreed, he says—

that to secure freedom and equality and protection for the commerce that the Constitution had authorized Congress to regulate, the safest and surest way was to denounce the disturbance of it in the simplest and all-embracing terms, without qualification or exception; fair play and justice for all, favors for none.

The broad and just policy of the framers of the Constitution—

He says—

was to provide for the protection of trade and commerce with foreign nations and among the several States, and monopolies thereof, etc., against evils that had afflicted the people in the experience of civilized mankind in hydraheaded forms.

And, he adds, the Judiciary Committee believed that the well-known principles guiding the courts in the application and construction of statutes would lead them to give the words of the act a beneficial and remedial interpretation, rather than an injurious and technical one, hurtful to any honest trade, as well as out of harmony with the beneficent spirit and policy of the whole act.

During the three years of the administration of President Harrison remaining after the passage of this act, four civil suits and three criminal prosecutions were brought under it. Only two of these were of general importance. The one against the Sugar Trust, known as the Knight case (156 U. S., 1), was not tried until after the expiration of Mr. Harrison's administration. During President Cleveland's second administration it resulted in a decision adverse to the United States, which was affirmed by the Supreme Court in an opinion from which Justice Harlan dissented, setting forth in his dissent, with his customary vigor, a construction of the statute which is substantially the same as that adopted by the court in 1911

in the decisions of the suits against the Standard Oil and the Tobacco combinations.

The other important proceeding brought under President Harrison was a suit against the Trans-Missouri Freight Association, which resulted, in March, 1897, (just after the expiration of

President Cleveland's term), in a decision upholding the law as applicable to a combination of railroad companies formed for the purpose of controlling rates of transportation in interstate commerce.

During Mr. Cleveland's administration five civil suits and two criminal prosecutions were brought under the act. One of the former involved substantially the same question, in a somewhat different form, as that presented in the suit against the Trans-Missouri Freight Association. This was a suit against the Joint Traffic Association, which was decided in favor of the Government in the lower court, and during President McKinley's administration was argued and decided in the Supreme Court—also in favor of the Government. Another case of importance was the suit against the Addyston Pipe & Steel Co., which was instituted in December, 1896, and decided adversely to the Government during Mr. Cleveland's administration; was appealed to the Circuit Court of Appeals in the Sixth Circuit, and there argued and decided in favor of the Government during the administration of President McKinley (Judge William H. Taft writing the opinion), and during the same administration was taken on appeal to the Supreme Court, where the latter decision was affirmed.

This case gave to the antitrust law its first comprehensive application to the then widely prevalent forms of combinations between manufacturers to suppress competition among themselves and to choke off all outside competition. Judge Taft's opinion was adopted in its entire scope by the Supreme Court. The evidence in the case showed that all of the manufacturers of sewer pipe in a considerable number of States had combined together, and when any city, county, or other public works required the use of sewer pipe, and proposals were called for, these manufacturers got together and agreed among themselves who should have the contract; the only genuine bid put in would be that of the concern thus designated to receive it, the others interposing fictitious bids so arranged as to necessarily secure the contract to the one agreed upon. The whole purpose of the combination was to prevent any real competition between the parties to the agreement in some 36 cities respecting the manufacture and sale of cast-iron pipe, and to put the purchasers and consumers of pipe in the district within which the members of the combination operated entirely at the mercy of this combination. The court held that the whole agreement was in plain violation of the Sherman law, and that the defendants must be enjoined from taking any action pursuant to it.

The first proceeding brought under the act during the administration of President Roosevelt was the suit against the Northern Securities Co., in which Attorney General Knox secured a decision of far-reaching importance, holding that a combination to control two parallel and competing lines of interstate railroad by means of the acquisition of a majority of the capital stock of each, and the placing of the same in a holding corporation whose stock was issued in exchange was an unlawful com-

53926—11273

bination in restraint of trade and would be enjoined under the

Sherman law. To the plea that competition between the two railroads had not yet been affected, the court answered that the power to control or destroy that competition at will, acquired through the Securities Co., was sufficient to establish a contract or combination in restraint of interstate trade and commerce.

During the seven and one-half years of Mr. Roosevelt's administration 44 proceedings in all were brought under this act—18 civil suits, 25 criminal indictments, and 1 proceeding by seizure of property, in course of transportation from one State to another, alleged to be owned by an illegal combination in restraint of trade. Of these, a civil suit against Swift & Co. (beef packers of Chicago) resulted in a decision in the Supreme Court, rendered January 30, 1905, which affirmed an injunction granted by the lower court, framed for the purpose of restraining defendants from carrying out an unlawful conspiracy between themselves and various railway companies to suppress competition and to obtain a monopoly in the purchase of livestock and the selling of dressed meats. Criminal indictments brought against the same defendants and others engaged in the same business and alleged to be parties to the same conspiracy resulted in the indictments being quashed by the circuit court upon a plea of immunity based upon a showing that in securing the indictment the Government had made use of information furnished to the Bureau of Corporations under such circumstances that the court held the defendants were protected from having it used against them as evidence in a criminal proceeding.

An indictment against the MacAndrews & Forbes Co. and others, as constituting an unlawful trust in licorice and licorice paste, used in the manufacture of tobacco, resulted in the very extraordinary conclusion in the circuit court in New York of the conviction of two of the corporations indicted, and the acquittal of the officers of the corporations who had exercised the practical control over them in the performance of the acts for which the corporations were convicted.

An indictment against the Virginia-Carolina Chemical Co. and others in Tennessee was quashed on a plea in abatement. A civil suit against the American Tobacco Co. and others in New York resulted in a decree in favor of the Government against certain of the defendants, and the dismissal of the bill by the circuit court against the individual defendants and the British corporations engaged in the combination. Of the 44 proceedings brought, 8 civil suits resulted in decrees for the Government, 4 criminal prosecutions in verdicts of guilty, in 6 the defendants interposed pleas of guilty, 2 were quashed on pleas in abatement or in bar, 5 dismissed, and verdicts were rendered for the defendants in 3 cases. Sixteen cases, civil and criminal, were pending when the Taft administration came in, one of which, to wit, the proceeding against the American Tobacco Co., was on appeal to the Supreme Court.

The Republican platform of 1908 referred to the prosecution of illegal trusts and monopolies as among the great accomplishments of the Roosevelt administration, and declared that the Sherman antitrust law had been a wholesome instrument for good in the hands of a wise and fearless administration.

53026—11273

Mr. Taft, in his speech of acceptance of the nomination for the Presidency, pledged himself to the enforcement of this law.

The judges of the circuit court in the Tobacco case had differed in their views of the construction of the law, one of them giving to it a literal interpretation, which, if adopted by the Supreme Court, would have made its enforcement impossible. He interpreted the language of the statute, in the light of the opinions of some of the justices of the Supreme Court in previous cases, to mean that any agreement which in any way, however slight, should operate to interfere with or restrain competition in interstate commerce was condemned by the act, and that no matter what the result upon commerce, if competition was in any respect impeded, the condemnation of the statute must be applied.

In his speech of acceptance Mr. Taft expressed his opinion that no such construction was ever in the contemplation of the framers of the statute and his belief that the Supreme Court would so hold, and that if it did not so hold the statute should be amended.

The state of the law at the beginning of the present administration was, therefore, that the act had been held applicable to railroad companies as well as to other corporations and individuals; that combinations of dealers in commodities the subject of interstate commerce to suppress competition among themselves, fix prices, and exclude others from entering the field of competition with them and all other contracts or combinations among particular dealers in a commodity, where the direct and immediate effect of the contract or combination was to destroy competition between themselves and others, so that the parties to the contract or combination might obtain increased prices for themselves, amounted to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price were continually being made; that it was not enough that the mere tendency of the provisions of the contract should be to restrain competition, but that where its direct and immediate effect was such restraint upon that kind of trade or commerce which is interstate the statute applied; that combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition are against common right and constitute crimes against the public.

At this time—March, 1909—it is safe to say that every intelligent lawyer, and every person who sought to ascertain the real state of the law, must have known that agreements in the form of pools between competing manufacturers and dealers, fixing prices, controlling the amount of business which each might do, providing for fictitious bids through agreements among the prospective competitors to so arrange their bidding that an agreed person would have to receive the award, and combinations of competitive railroads by means of stock-holding corporations were condemned by the act.

The questions remaining open were, first, how effective the act was to reach the great aggregations of formerly competitive producers and dealers, individual and corporate, who, through intercorporate stock holding, mergers, consolidations, and otherwise, had acquired so great a control over a particular line of

industry as to enable them to dominate it and to exclude or admit competition as they might choose upon their own terms; and, secondly, whether that construction of the law was correct which had been given to it by some of the judges in the circuit court in New York in the Tobacco case, and in the opinion of some of the justices of the Supreme Court in other cases, to the effect that any combination, etc., which in any respect operated to restrain to any degree a preexisting competition in interstate commerce was necessarily condemned by the act.

During the present administration these questions have been pushed to authoritative and ultimate decision. In the three years since the inauguration of President Taft all of the 16 causes left pending by the last administration have been disposed of except 2, which have been argued and submitted in the Supreme Court of the United States and are now awaiting decision, 2 now on the docket of that court, shortly to be reached for argument, and the suit against the Powder Trust, in which an interlocutory decision was rendered by the circuit court in Delaware in June, 1911, in favor of the Government and against the defendants and which is about to be brought before the circuit court for final decree. Of the remaining causes, the Standard Oil case was argued early during the present administration in the circuit court and decided in favor of the Government, was taken to the Supreme Court on appeal, and, after two arguments in that court, decided entirely in favor of the Government. The Tobacco case was twice argued in the Supreme Court, and a decision rendered reversing that of the circuit court and awarding a comprehensive decree in favor of the Government, under which that great combination has been disintegrated into 14 separate and distinct companies, under circumstances and conditions which will effectively prevent a continuance of monopolistic conditions.

A suit brought to enjoin the merger of the New York, New Haven & Hartford Railroad with the Boston & Maine Railroad was dismissed after the State of Massachusetts had passed legislation expressly providing for this merger under provisions designed to protect the public interests; and in view of the clear proof that the railroad systems of the respective companies were supplementary and contributing to each other rather than competitive and that the union under one management was in furtherance of no restraint of trade.

During the present administration, up to February 1, 22 civil suits have been brought and 40 criminal indictments found under the Sherman law, making in all 62 proceedings, civil and criminal. In the criminal prosecutions demurrers were sustained to 4 indictments; pleas of nolo contendere (the equivalent to a plea of guilty) entertained to 11 indictments, involving 80 or more defendants; in 1 case defendant plead guilty; 8 out of 12 defendants were convicted on one indictment after trial by jury, and their conviction affirmed by the court of appeals; and 13 criminal prosecutions are pending. In the civil suits judgment was rendered for the Government in 1; in 3 the defendants have submitted voluntarily to comprehensive decrees granting the relief sought by the Government; 2 were

dismissed; and 16 are now pending.

Investigations by the department have resulted in discovering the existence of very many forms of combinations to control

and restrain commerce among the States and with foreign nations, which completely justify the wisdom of the framers of the Sherman law in dealing with the subject in such broad, comprehensive language that no form of device which results in unduly restraining the current of trade and commerce among the States or with foreign nations, or in the unfair monopolization of such commerce in any line, or in the attainment of power to control a vast proportion of any particular business at will and to destroy or permit competition as it may seem to the interests of the possessors of that power, can escape the condemnation of the statute.

A brief review of the nature of the cases brought during the present administration will best illustrate the value to the whole people of the existence, and the necessity for the enforcement, of this law in the protection of that equality of opportunity which is declared by the platform of the Republican Party to be the right of every American.

The first proceeding brought was an indictment against some of the officers and agents of the American Sugar Refining Co. for conspiring to secure control of the stock of a Pennsylvania corporation which was about to engage in the manufacture of sugar on a large scale, and which, by reason of this conspiracy, was prevented from so doing; this prevention continuing down to the time of the finding of the indictment, although affirmative action of the defendants at any time might have released the restraint and permitted the business to be set under way. A valuable decision was secured from the Supreme Court in that case to the effect that where the purpose of a conspiracy is a continuing one, resulting in a continued restraint upon interstate commerce, the statute of limitations does not begin to run until the restraint is ended.

Other forms of violation of the act struck at by the different proceedings had are (1) conspiracies to monopolize all the interstate and foreign commerce in any particular line by acquiring control of competing corporations through stock ownership in a holding company, or otherwise, and thus acquiring a power over an entire industry so dominant as substantially to put the industry entirely at the mercy of the combination. In this class are included the suits brought against the American Sugar Refining Co. and its subsidiary companies, and that against the United States Steel Corporation and its subsidiary companies.

(2) Agreements between producers of foodstuffs, fixing prices, and dividing business among themselves in agreed proportions, thus destroying all competition between them. The indictments against members of the Swift, Armour, and Morris corporations, now on trial in Chicago, were based on the charge of combinations of that character. Of the same nature were the charges upon which an indictment was found and a bill in equity brought against the National Packing Co. in the northern district of Illinois, which preceded the indictment of the different

members of the great packing concerns. A demurrer to the indictment was sustained by Judge Landis, and was followed by a further investigation and a more comprehensive indictment of the individuals now on trial, and the bill in equity was dismissed by my direction when the defendants sought to use it as a means of obtaining delay in the prosecution of the

criminal case. The same character of agreement was involved in the suit against the Southern Wholesale Grocers' Association, in which the defendants, after some negotiation, voluntarily submitted to a decree enjoining them from entering into and carrying out agreements not to sell to any buyer not a member of the Southern Wholesale Grocers' Association, and not listed in a book published by the association containing an official list of the wholesale grocers within certain States, and enjoining them from publishing or circulating such list, etc.

This case is one of a number of similar cases, in some of which the attendant circumstances show more distinctly intentional and viciously unfair trade than in others. These agreements seemed to have for their principal purpose the preventing of retail dealers from purchasing the goods in which they deal directly from the manufacturer and the compelling of them to buy from the middleman or jobber. Such agreements were condemned by the Supreme Court of the United States in the case of Montague *v.* Lowry (193 U. S., 38) as early as the year 1903, and every lawyer has known, as every merchant who has consulted counsel must have learned, that such agreements are absolutely contrary to the provisions of the Sherman Act. Nevertheless we have found such agreements among the wholesale grocers, among the lumber dealers, and even among the publishers of magazines and other periodicals. We have a series of five proceedings against various associations of lumber dealers instituted for the purpose of relieving that industry from the artificial restraints imposed upon it by the various lumber trade associations through the country. These associations, of which there are at least nine in different parts of the country, are made up of retail lumber dealers. The evidence collected by the department seems to show that they have divided the lumber trade by ordered classifications into (1) manufacturing, (2) wholesaling, (3) retailing, and (4) consumer; that by means of written and verbal agreements, adopting resolutions in conventions, by-laws, constitutions, and interchange of correspondence this classification has been established for the purpose of eliminating competition—except as between local retail yards—for the benefit of the contractor, thus forcing the consumer to buy at retail prices from regularly established yards, regardless of the amount required, and also to purchase lumber from the retail merchant in his vicinity, when, but for the unlawful combination, he could buy from another dealer in another State at reduced prices; also to prevent him from buying lumber from any wholesale dealer, and to prevent any wholesale dealer from selling to anyone falling within the classification of consumer. This combination appears to have been carried out, and to have accomplished its purpose through

been carried out, and to have accomplished its purpose through blacklisting and arrangements preventing members of the wholesale association from selling to dealers who do not meet the requirements of the retail association.

(3) Then there have been proceedings against a number of ordinary crude pooling arrangements of the kind that were formerly very prevalent in this country. For instance, 9 indictments found in New York against 83 persons engaged in the wire industry were based upon agreements between substantially all of the manufacturers in the country of certain

53926—11273

kinds of wire, whereby they organized themselves into associations, pooled their business and divided it on an agreed percentage basis, appointed a supervisor to conduct the operations of the pool, put a deposit in his hands of a sum of money to be applied in payment of fines and penalties in case any member violated the provisions of the pool agreement, and where anyone exceeded his agreed percentage of the business made good to the other members the excess, and established and maintained a fixed schedule of prices at which alone they sold. The operation of these pools continued until a very recent date, and the grand jury in New York found no difficulty in indicting the various defendants who engaged in them. Almost all of them have interposed pleas of nolo contendere, and have been fined in amounts averaging $1,000 each, except that the defendant, who was supervisor of the pool, was fined $45,000.

(4) The prosecution of a number of individuals who undertook to corner all the free cotton remaining of the crop of 1903, thereby so greatly enhancing the price to the spinners as to prevent a number of them from buying at all, and thus restraining interstate commerce, is now before the Supreme Court on appeal from a decision of the circuit court in New York sustaining a demurrer to the indictment, upon the ground that, while such pools are undoubtedly unlawful at common law and immoral, the case did not present a direct restraint on interstate commerce.

(5) One of the rankest cases of combination in restraint of trade presented was that of the manufacturers of hand-blown window glass. Practically all of the manufacturers—83 in number, manufacturing 98 per cent of this product—entered into contracts with a company constituted for the purpose, whereby each producer agreed to sell his entire output of hand-blown glass to this company and not to sell to any other person or corporation, by means of which the entire market in that commodity was controlled and the price was increased within a year upward of 100 per cent. The indictment of these defendants was met by pleas of nolo contendere, which were accepted by the circuit court in Pittsburgh, and fines imposed; since which the agreements have been abandoned and the business restored to its former basis, which was followed by a substantial reduction in price.

(6) One form of excluding competition and restraining trade which seems to have met with favor in certain quarters has been to use the rights of a patentee over a patented article as a

basis for controlling the entire business with which the patented article may be connected far beyond the limits of the lawful monopoly granted by the Government to a patentee. The first case to involve this question was that of the manufacturers of electric lamps, where a purchaser of patented varieties of electric lamps found it impossible to buy unless he would agree also to purchase from the same vendor or association of vendors other electric lamps upon which there were no existing patents. After a careful investigation of this subject a suit was brought in the United States circuit court in Ohio against the General Electric Co. and others, which resulted in the defendants submitting to a decree whereby certain agreements under which this business had been controlled were terminated, and the de-

53026—11273

fendants were specifically enjoined from attempting by agreement to fix the price at which lamps purchased from them should be resold, and from making the purchase of patented articles from them conditioned upon the purchaser agreeing to purchase unpatented articles only from them, and from, in any other of a variety of methods specified in the decree, attempting to use their patent rights as a means of extending an undue control over the trade in unpatented articles, and from a variety of other unfair methods of dealing.

This decree establishes a precedent of great value in restraining attempts to use patent rights as a means of unduly extending control over an industry. The defendants in that case frankly met the objections of the Government and successfully endeavored to modify their practices and their agreements to meet the legitimate demands of the Government as formulated in the bill filed by it in the United States court. They were the first large manufacturers to respond to the Government's suit, not by defense, but by a candid effort to comply with its demands.

The suit against the Standard Sanitary Manufacturing Co. (the so-called Bathtub Trust), which resulted in a decree in favor of the Government by the circuit court in the fourth circuit in October last, was based upon agreements between the defendants under which certain patents were assigned to an agreed transferee, the defendants having previously agreed upon a system of licenses whereby each should receive from such transferee a license to manufacture under these patents, upon terms and conditions by which all competition between the defendants in enameled ware used in household bathrooms, etc., amounting to about 85 per cent of the entire product, was suppressed and eliminated, and uniform prices and terms of sale fixed and established, as well as a uniform method of selling products to jobbers, under written contracts whereby each jobber was compelled to sell at certain fixed resale prices, with the result that the combination not only controlled prices at which they sold to jobbers, but the retail price to be paid by the ultimate consumer. This was effected by a method of keeping the members of the combination advised of the amounts of their respective output, dividing the United States into certain territorial zones, and by a system of contracts restricting each jobber to making sales only within the zone to which he

was accredited, thus largely and unreasonably increasing the prices at which the product was sold to jobbers, and in the same degree the prices exacted of retail buyers. The decree rendered by the circuit court sustains the Government's contentions and the opinion of Judge Rose is the most important judicial expression thus far secured from any court on the subject of restraints of trade in patented articles. The rule is there enunciated "that a patent does not give the right to a patentee to sell indulgences to violate the law of the land." The defendants in this civil suit were also indicted in the United States court in the eastern district of Michigan for the offenses which formed the basis of the civil suit and are now actually on trial for the same.

Another case involving the unlawful extension of the power of the patentees was furnished by the case of the United Shoe Machinery Co., in New England.

Very many complaints against that company and its methods led to an investigation by a grand jury in Boston, resulting in the finding of indictments against a number of the officers of the company for violation of the Sherman law, and this was followed by the filing of a petition in equity on the civil side of the court, which suit is now pending. The case involves the validity of a complicated series of agreements known as "tying agreements," under which the company requires any shoe manufacturer who desires to use any machine or implement manufactured by it and useful in connection with shoemaking to lease it under leases containing restrictive provisions binding for the full term of 17 years from the date of the agreement, irrespective of the date of the expiration of the patent, and under which the lessee further agrees to use the machine or device so leased only in connection with other machinery manufactured and leased by the United Co. in every case where that company manufactures the machine. So that, in effect, a manufacturer of shoes finds it impossible to secure any piece of machinery manufactured by the United Co. unless he agrees to lease from it, on terms and conditions prescribed by it, every other piece of machinery necessary or useful in the manufacture of shoes which he may need which is manufactured by the United Co. The legality of these provisions is involved in the civil suit, while the legality of the monopoly secured by the use of such agreements, as well as of the other acts set forth in the indictment, is involved in the criminal prosecution.

(7) The case of United States *v.* Steers and others was an indictment secured in Kentucky under unusual circumstances. It is often said that one wrong leads to another. The control of the American tobacco combination over the price of leaf resulted in the fixing of prices at less than the producers of tobacco in Kentucky thought reasonable. They thereupon formed a society of tobacco growers for the purpose of controlling the sale of all the tobacco of certain types grown in the State, and thus met the combination of purchasers with a combination of sellers. They procured the passage of a State law in Kentucky legalizing their combination. But not content with

the power acquired by voluntary association they undertook to prevent, by force and violence, the sale of leaf tobacco by farmers who were not willing to withhold it from the market and sell only when and as permitted by the association. Hence arose what was called "night riding." Bodies of armed, masked men would ride up to the house of a planter who had not conformed to the rules of the association and would either take him out and whip him or burn his barn and his accumulated stock of leaf tobacco, by those methods discouraging any effort to break the control of the association. In this particular case complaint was made to the United States authorities that in some cases tobacco delivered to the agent of a railroad for shipment into another State had been taken forcibly away and such shipment thus prevented. These charges were investigated by a grand jury in Kentucky and 12 individuals indicted for conspiring to prevent an interstate shipment of tobacco by a farmer of Dry Ridge, Ky., and thus unlawfully conspiring to restrain interstate commerce, in violation of the Sherman law. Eight of these defendants were convicted on trial by a jury in the United States circuit court and were sentenced to pay fines

53926—11273

aggregating $3,500; they appealed from the judgment of conviction to the circuit court of appeals in the sixth circuit, where the judgment was recently affirmed.

(8) A civil suit was brought in New York against the publishers of a large number of the standard magazines, to enjoin the operation of certain agreements under which, by undertaking that no one of them would sell any of his publications except through the agencies and on the terms prescribed in the agreements, which involved fixing the price at which the retailers should resell to their customers, competition among them was destroyed, and the public compelled to buy, whether of subscription agencies or from retail dealers, at prices and on terms fixed by the combination.

(9) A somewhat unusual suit was brought in May, 1910, to restrain the trunk lines of railroad in the western classification territory, from putting into effect increased tariffs upon a very large number of commodities on the eve of the enactment by Congress of legislation vesting the Interstate Commerce Commission with power to investigate a proposed increase in rates before it takes effect, so that the people should not be compelled to pay increased rates of freight for freight transportation pending an inquiry as to the reasonableness and justness of the proposed increase, in cases where the commission is satisfied that, prima facie, there is a reasonable doubt as to the justice of the advance. The circumstances under which this particular increase was agreed upon by the railroad companies, in the opinion of the law officers of the Government, took it out of the ordinary system of rate making, and justified a resort to the Sherman law to protect the public from the arbitrary action of the carriers, which, if unchecked, would have compelled the people to pay increased rates during the period they were under investigation. After the enactment of the commerce act of June 25, 1910, which extended the power of the Interstate Commerce Commission over the subject, the bill was dismissed by the

Government, and subsequent investigation by the commission resulted in the finding by it that the proposed increase was unwarranted and should not be made, thus completely justifying the action of the Government in intervening when and as it did.

(10) The civil suit brought against the Hamburg-American Steamship Co. and others, in New York, involves the question whether or not the United States is powerless in the face of a combination of virtually all the trans-Atlantic steamship lines authorized by the law of the European countries where most of them are domiciled, whereby substantially the entire business of transportation by steam vessel across the North Atlantic is pooled, rates and prices are fixed by the pooling association, and all competition in rates and terms of shipment suppressed. The representatives of some of these foreign lines have somewhat cynically expressed their belief that our Government is powerless in the face of this combination. They admit that some of the American agents might be subject to indictment and punishment, individually, within the United States; but they maintain that the association, which is valid in the European countries where organized, can not be reached by the process of American courts.

One of the most valuable contributions by the Supreme Court to the enforcement of this law was the adjudication in the

Tobacco case that, if necessary, unusual remedies would be invoked to carry out its provisions; and I have no doubt that if the Government shall establish on the trial of this case on its merits the facts averred in the petition, which the circuit court on the hearing of a demurrer has held to be sufficient to make out a case of unlawful restraint of foreign commerce, some way will be found to enforce a respect of the laws of this country even by the owners of foreign steamship companies who use its ports. It is undoubtedly true that the United States is handicapped by an inefficient and extraordinary legislative policy which has resulted in driving its merchant marine from the sea and compelling its ocean-borne commerce to be carried in foreign bottoms. Perhaps no more useful office could be performed by the Department of Justice than to focus the attention of the people upon the lamentable absence of an American merchant marine, and the great need of legislation to aid in the upbuilding of an American merchant marine, through the enforcement of a decree in this case. The Republican platform of 1908 declared that—

> We adhere to the Republican doctrine of encouragement to American shipping and urge such legislation as will revive the merchant-marine prestige of the country, so essential to national defense, the enlargement of foreign trade, and the industrial prosperity of our own people.

There was a time when our flag was to be seen in every foreign port, and when American ships carried the greater part of the ocean-borne commerce of the world. If foreign steamship lines using our ports can defy the laws we have made to protect our people against unfair restraints of trade because we must use their ships or cease exporting our products, it is high time our Congress set about the enactment of legislation to make possible the reestablishment of our own merchant marine, so

possible the reestablishment of our own merchant marine, so that American shipping once more takes its place in the front rank of the world's commerce.

I have pointed out with some detail the questions involved in these various proceedings, civil and criminal, in order that it be made clear that they all involve some variety of the same offense, namely, the effort to secure and retain control over business by methods which are always unfair—sometimes unfair to the participants themselves, or some of them; always unfair to outside competitors and always unfair to the public in general. One and all of them involve the effort, more or less subtle, more or less brutal, on the part of a limited number of men to control as nearly as may be an entire industry or the entire business in a particular part of the country for their own benefit, and to destroy that equality of opportunity in others which is the birthright of every American. These were the evils to meet which the Sherman law was enacted, and the enforcement of that law by the present administration has been directed particularly against that sort of unfair dealing which, when known and understood, is condemned by all right-minded men; but which, working in darkness, cloaked under forms of law and surrounded with the mantle of respectability, is not so readily understood.

It is those who are interested in this method of doing business who have raised the clamor against the enforcement of the Sherman law; who have read in the active, vigilant prosecution of that law under President Taft the doom of their prac-

tices, and who, threatened with the loss of illicit gain, seek to discredit both the law that condemns them and the Executive that brings them to execution. That great Republican Senator who was principally instrumental in the framing of the law, in his remarkable contribution to its history, says:

> The expansion of business of every sort and the dangerous combinations that have attempted (in many instances too successfully) to absorb the business of the country into their own hands, to crush out fair and useful competition, and so dominate and monopolize the industries and trade of the Republic have been so great that the result is the unnatural and unequal distribution of wealth and power which the experience of centuries has shown to be among the great evils that affect civilization and true progress. The act of 1890 was designed and framed to check and, so far as possible, prevent these great and growing evils. But, like all laws enacted to punish and prevent selfish disturbance of social order and equal rights, the act would fall into innocuous desuetude without the vigilant and persistent exertions of the executive department, for, of course, the courts can not act without cases properly brought before them.

Under the wise, patriotic, and efficient administration of William Howard Taft, the vigilant and persistent exertion of the executive department in the enforcement of this law has never slackened nor failed. If the people understand and approve, as they will and must, with what splendid courage and singlemindedness that great patriot has directed the impartial enforcement of this law, they will continue him in his high office to so far work out the problem of squaring business practice with the laws of the land as to make impossible for the future the recurrence of those abuses which in the past have threatened the stability of our institutions through the unchecked power of combined wealth.

53926—11273

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The Changing Order

Essays on Government, Monopoly, and Education, Written during a Period of Readjustment

By

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Sometime Attorney-General of the United States

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X

RESULTS OF THE TRUST DISSOLUTION SUITS[1]

THE trust question; that is the question of the proper relation of the Government to large business organizations, is a great economic question which should not be made the football of politics. The men who united in framing the Sherman Anti-trust Law were Democrats as well as Republicans. In the final debate in the Senate, one of the clearest statements of the need and purpose of that legislation, was made by Senator George, a Democratic Senator from Mississippi.

Since President Taft came into office, eleven (11) final decrees have been entered in equity suits brought by the Government under the Sherman Law to prevent and restrain violations of the act; two (2) large combinations of competitive concerns have been voluntarily dissolved, following criminal prosecutions of individuals concerned in them; and in one other instance, a temporary

[1] From an Address before the Finance Forum, West Side Young Men's Christian Association, New York, Nov. 13, 1912.

injunction resulted in the abandonment of a comprehensive movement to increase railroad rates, prior to the enactment of the law which gave to the Interstate Commerce commission power to prevent increases until it should have investigated the justice of making them. Of these decrees, three (namely, those against the Standard Oil Combination, the Tobacco combination, and the Powder combination) were directed against what are technically known as *trusts;* that is, the kind of things spoken of by Senator Sherman when he introduced his original bill into the Senate in March, 1890:

> Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and they have invented a new form of combination commonly called *trusts*, that seek to avoid competition, by combining the controlling corporations, partnerships and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals. . . .

Perhaps the simplest definition of a modern trust is "a partnership of competitive corporations." Now, the decrees in the cases above mentioned struck down three of the greatest existing partnerships of competitive corporations controlling great industries which ever have grown up in the United States. They also established the principle that monopoly and unfair restraint of com-

petition could not successfully entrench themselves behind stock ownership; but that in whatever form the control of great industries is absorbed into a few hands, the law can search into the organization, and if it be found that an *undue* restraint is put upon interstate commerce, or a monopoly threatened, the Court can end that restraint or break up that monopoly.

In another case, namely, the suit against the Terminal Association of St. Louis, the unification of substantially every terminal facility by which the traffic of that city was served, was scrutinized by the Supreme Court, and, recognizing the peculiar topographical conditions of the city, the combination was permitted to continue; but only upon condition that its organization be so modified that the Association should act as the impartial agent of every line which was under compulsion to use its instrumentalities.

Eight (8) of the other decrees mentioned ran against combinations of (1) manufacturers of incandescent electric lamps; (2, 3) manufacturers of plumbing supplies and of sanitary enamel ware; (4) wholesale grocers; (5) manufacturers and dealers in kindling wood; (6) manufacturers of window glass; (7) manufacturers of what is known as plate matter and ready print matter for use in newspapers; and (8) manufacturers and importers of aluminum and the raw material from which it is

of aluminum and the raw material from which it is produced. All of these were cases where independent manufacturers or dealers—competitors in

business—had united in various agreements, having for their purpose and necessary effect the fixing of prices, control of territory, and partitioning of business among themselves, and the exclusion of competition.

Following the prosecution of the Beef Packers in Chicago, who were charged with combining for the purpose of controlling the price in meat and meat products, the National Packing Company (a corporation which had been organized to take over a very large number of competing plants which had been acquired by representatives of the three great packing interests) was dissolved, and its properties scattered all over the United States, aggregating upwards of sixty million dollars in value, were distributed *pro rata* to and among the owners of the stock of the Packing Company. This distribution was so made as not only to remove the restraint on competition which was wrought by keeping all of these properties under one corporate control, but in many instances to induce competition in places where there was previously none. Moreover, many of these plants had been conducted under the names of their original owners, their actual ownership being unknown. This practice was terminated, and the business at these plants is now being conducted in the names of their

actual owners. Besides these cases, in which final decrees have been actually entered, suits are pending and now being actively prosecuted against such large combinations as:

The United States Steel Corporation; the American Sugar Refining Company; the National Cash Register Company; the United Shoe Machinery Company; the Keystone Watch Case Company; the American Naval Stores Company (known as the turpentine trust) the International Harvester Company; the New Departure Company (the combination manufacturing and controlling coaster brakes).

These various concerns are charged with existing in violation of the anti-trust law.

A suit to terminate the control by the Union Pacific Railroad system of the Southern Pacific Railroad system has been argued in the Supreme Court of the United States and now awaits decision.[1] A suit to dissolve the combination between the carriers and producers of anthracite coal in Pennsylvania, New Jersey, and New York has also been argued in the Supreme Court and awaits decision.[2] A suit to terminate a combination of bituminous coal-carrying roads in Ohio and West Virginia has been argued and submitted to the Circuit Court of Appeals in the Ohio circuit, and awaits decision.[3] Four (4) different suits are pending against combinations of steamship lines

which control certain forms of traffic between the

[1] Decided in favor of the Government, Dec. 12, 1912 (226 U. S., 61, 470).

[2] Decided partly in favor of Government, partly in favor of defendants, Dec. 16, 1912 (226 U. S., 324).

[3] Decided in favor of the Government, Dec. 28, 1912. Final decree entered March 14, 1914.

United States and foreign countries; five (5) suits are pending against combinations of lumber dealers formed for the purpose of regulating and controlling competition in that business, and especially of preventing retail dealers from purchasing directly from the wholesalers, instead of buying directly from jobbers; one (1) suit is pending against a combination of magazine publishers formed to control prices and fix the terms on which retailers may deal in their publications; and one (1) suit against a combination of bill-posters, organized to monopolize the business of bill-posting throughout the United States, was recently brought and is now pending. A prosecution of a number of persons engaged in a pool formed for the purpose of controlling the entire supply of free cotton of a given season has been twice argued in the Supreme Court and awaits decision.[1]

Now, before considering the effect of all these suits, we must first stop to consider what the law upon which they are based was intended to accomplish, because that must be the criteria by which to judge the results achieved. There seems to be a

good deal of popular misconception on this point, and much current discussion has proceeded, apparently on the theory that the object of the law was to secure the confiscation or destruction of the property employed by the combinations declared to be illegal by the act. Indeed much of the

[1] Decided in favor of the Government, Jan. 6, 1913 (226 U. S., 525).

criticism of the results of the dissolution of the Tobacco and the Standard Oil combinations has been based simply upon the fact that the selling value of the stocks of the constituent companies had increased.

Yet the Supreme Court declared in the Standard Oil case, and reiterated in the St. Louis Terminal case, that while injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, one of the fundamental purposes of the statute is to *protect*, and not to *destroy* rights of property. And in the Tobacco case, the Supreme Court laid great stress upon its duty, while giving complete and efficacious effect to the prohibitions of the statute, to do so with as little injury as possible to the interests of the general public, and with a proper regard to the vast interests of private property involved.

This principle was observed in the Standard

Oil decree, by directing the distribution of the stocks of the corporations held by the New Jersey Company *pro rata* among its stockholders, and enjoining the several corporations from in the future doing any acts of the character of those by which the combination had been created and maintained. In the Tobacco case, where upwards of an hundred millions of bonds, and nearly eighty millions of preferred stock in the hands of the investing public were involved, the Court ordered

such a distribution of the properties of the combination among fourteen separate corporations as should give to no one of them an actual or potential monopoly of any part of the business, and then enjoined those companies from methods of organization or business which would make possible new combination or monopoly.

The first great combination that was broken up under the Sherman Law was one of manufacturers of sewer pipe, to divide territory, suppress competition in bidding, and control the prices of their product. This was consummated by the judgment of a Circuit Court of Appeals presided over by President Taft, when he was Circuit Judge, which was unanimously affirmed by the Supreme Court in 1899.

The next great result obtained was the dissolution of the Northern Securities Company in 1904. The decree there practically compelled the Securi-

ties Company to distribute the stocks of the two great trans-continental railroad companies which it held (that is, the Northern Pacific and Great Northern) *pro rata* among its stockholders. The immediate result of that distribution was to make the same people owners, in the same proportion, of the stocks of those two competing systems. That was, however, but a temporary condition, and for a long time past no one has suggested that these two systems are under a common control. It was also followed by an enormous rise in the market price of these railroad stocks; yet no

one has ever questioned the great benefit resulting to the public from the termination of the unified control over those two particular systems; and, far more important, it resulted in arresting the process of concentrating the ownership of railroads into a few hands, which was then going rapidly forward.

The third great step in the enforcement of this law was its application to the great industrial trusts in the Standard Oil and Tobacco cases. The beneficial results of those decisions ought not to be obscured by the temporary high prices of the stocks of the constituent companies quoted on the curb market. There is a perfectly obvious reason for these high prices. Before the Government suits were brought, no outsiders knew anything about the value of the properties of the Standard Oil combination; nor with accuracy of the Tobacco

Oil combination; nor with accuracy of the Tobacco trust. The evidence adduced in those suits afforded the public some idea of the vast amount of property which had been acquired by them, and led to the speculative prices which followed the distribution. The great accomplishment of the decisions is in wiping away all artificial barriers to the enforcement of the law, establishing its supremacy over the largest combinations, and demonstrating its sufficiency to reach the actual evil of monopoly, no matter in what form it is clothed.

The properties and business of the Standard Oil combination were distributed among more than

thirty corporations, which were compelled thereafter to conduct their businesses separately and independently of each other. The properties and businesses of the Tobacco combination were distributed among fourteen, and those of the Powder trust, among three separate corporations. The decrees prohibited the different companies from having common directors, common officers, common agents; from occupying the same offices; from making contracts with each other tending to prevent the freest competition and the most independent action; from carrying on business in any name but their own, and from lending financial assistance to each other. In the decrees against the various combinations of independ-

ent manufacturers formed by agreement among themselves, a large variety of practices which in the past had resulted in crushing out fair and useful competition, and in centralizing control over the business in the combination, have been expressly prohibited. Thus, in the suit against the Pacific Coast Plumbing Supply Association twenty-four corporations and sixty individuals were enjoined:

From combining, etc., to prevent manufacturers of plumbing supplies from selling to persons not members of the association or not listed in a blue book published by the association;

From publishing any such book;

From publishing any list of manufacturers who had not agreed to sell only to members of

the association or to persons listed in the blue book;

From advertising lists of persons in the business who are not members of the association;

From combining to boycott a manufacturer for having sold to persons not members of the association and not listed in the blue book;

From conspiring to prevent persons located in a given territory from purchasing plumbing supplies from manufacturers or other dealers;

From communicating with a manufacturer or dealer to induce him not to sell to persons not members of the association or not conforming to the definition of a jobber given in the blue book

the definition of a jobber, given in the blue book.

In the decree against the manufacturers of electrical incandescent lamps, a large number of corporations, all of whose stock was owned by the General Electric Company, had carried on business ostensibly as independent companies, but really under the control of the General Electric Company; they were ordered to be dissolved and their business in the future to be conducted in the name of the General Electric Company. The making and performance of certain contracts whereby the manufacturers agreed to sell goods only to the General Electric, or as permitted by them, or on terms or prices fixed by them, were enjoined. Independent competitive companies were enjoined

From fixing prices by agreement;

From maintaining by agreement, differentials between lamps which did not in fact differ in

quality or efficiency and from allowing discounts based on the aggregate of purchases from different manufacturers.

From making agreements with jobbers, etc., under which they could only secure goods manufactured by the General Electric Company on condition of agreeing to take all other goods manufactured by them;

From making more favorable terms of sale to customers of any rival manufacturer than it at the same time offered to its established trade, with

the purpose of driving such rival out of business.

An interesting decree was rendered in the case against the Central West Publishing Company and the Western Newspaper Union. These two concerns are substantially the only ones in the country engaged in the business of manufacturing and selling ready-print papers, and stereotype plates, both of which are used by a vast number of newspapers, largely the country press. They were enjoined against combining with each other and thus preventing any competition whatever in the business, and they were both enjoined:

1. From underselling any competing service with the intent or purpose of injuring or destroying a competitor.

2. From sending out traveling men for the purpose or with instructions to influence the customers of the competitors or either of them so as to secure the trade of the customers, without regard to the price.

3. From selling their goods at less than a fair and reasonable price with the purpose or intent of injuring or destroying the business of a competitor.

4. From threatening any customer of a competitor with starting a competing plant unless he patronized the defendant.

5. From threatening the competitors of either one that they must either cease competing with

the defendants or sell out to one of the defendants, under threat that unless they did so their business would be destroyed by the establishment of nearby plants to compete with them.

6. From in any manner, directly or indirectly, causing any person to purchase stock or become interested in the other for the purpose or effect of harassing it with unreasonable demands or inquiries.

7. From circulating reports injurious to the business of the other.

8. From persuading customers of competitors to violate contracts made with them by undertaking to indemnify them against loss and damage by reason of so doing.

Every one of these decrees dealt with forms of unfair competition, which investigation had shown to have been resorted to for the purpose of controlling prices and suppressing competition. An examination of the different decrees will demonstrate that the decision in the Tobacco case has been put into practical effect and that the Federal

courts are exercising in equity suits under the Sherman Law, a power to restrain which is coextensive with the evils against which it was enacted. That statute strikes at *undue* restraints of the trade and commerce of the United States and attempts to monopolize it, and empowers the courts of equity of the United States to make such decrees as will be effective to prevent and restrain

every form in which such restraints or attempts to monopolize may be found to exist.

The first tangible result of these dissolution suits is found in the fact that no new combinations or trusts, such as the Standard Oil, Tobacco, Sugar, Steel, Harvester, or the like, have been formed during the last four years. So long as the statute remains in its present form, none will be formed, unless the law department of the national government shall cease to be vigilant in the enforcement of the law. The next result is, that it has become apparent that the field of enterprise is open to competition if any choose to embark in it. Only a few days since, the formation of a new corporation with a substantial capital was announced to engage in the tobacco business in competition with the companies resulting from the disintegration of the trust. Since the disintegration of the Tobacco trust, all of the stock of the United Cigar Stores has been sold to persons having no connection with the old trust, and that big retail corporation is carrying on its business independently of the companies with which it was formerly affiliated.

A fight for the control of the company between the holders of a majority of the stock of the Waters–Pierce Oil Company, to whom it was distributed by the Standard Oil Company, after the Supreme Court's decision, and the minority holders, has resulted in the sale of that majority stock, or a

large part of it, to that minority, and thereby the elimination of Standard Oil interests from that corporation.

The regulation of rates of transportation of oil through the pipe lines owned by the companies, which were controlled by the Standard Combination by means of the enforcement of the Hepburn Act by the Interstate Commerce Commission, also promises to remove all unfair advantage of the large refining and marketing companies over the terms and conditions of transportation, which constituted so potent a factor in building up the trust.

But the criticism is made that these suits have not resulted in reducing the price of commodities dealt in; and it is argued that as one of the evils of monopoly is the control of prices, the fact that prices have not been reduced is evidence that the monopoly has not been destroyed. The criticism is a superficial one. Scarcely a year has passed since the principal dissolutions took place, and it can hardly be expected that the results of twenty years of successful monopolization can be undone in less than one year. In the next place, the various companies among which the business of

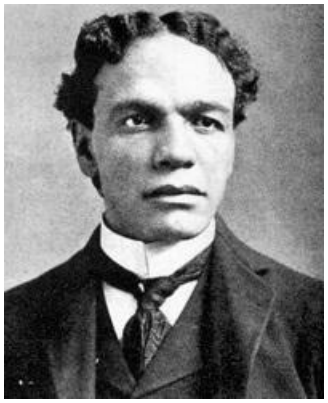
former combinations has been distributed are not likely to embark on a sharp price-cutting competition unless compelled to. The prices of raw materials have been distinctly affected by the

dissolution, and both tobacco leaf and crude oil sell at much higher prices since the unification of substantially all the buyers has been removed, than those which previously prevailed. There has been some advance in the price of a few products of petroleum, such as gasoline, due to the enormous increase in demand for the refined article, and the increase in the price of crude oil. There has been no increase in the price of tobacco products, but there is an enormously increased competition in pushing the sale of different brands of tobacco by means of extensive advertising.

More important than all of these, the unfair methods of competition resorted to in the past have been checked and in large measure destroyed, so that the field is open to fair competition and enterprise to a larger degree, I believe, than for many years past. Of course, this has its disadvantages as well as its advantages. It is impossible in many lines of industry to maintain what the producers consider to be satisfactory prices, and some complaint is made in different trades, because the producers are advised that they cannot lawfully get together and agree upon and maintain prices which will afford them a satisfactory profit. The law is coming to be understood by the community, and substantially the only complaint

heard against it is from those who wish through some form of combination or agreement, to raise prices or restrict competition. When the pending suits against the great combinations are terminated, I believe no abnormally large combinations will be left intact, and the businesses and property now held by them will be distributed among a sufficient number of separate and distinct companies to remove all possible fear of undue influence by them over the business of the country. If their future activities are restricted by injunctive provisions in adequately drawn decrees, and the government law department is vigilant in seeing that they are complied with, it is my hope that no further legislation will be necessary to protect against undue restraints of interstate commerce.

William H. Lewis



William Henry Lewis (November 28, 1868 - January 1, 1949) was an African-American pioneer in athletics, law and politics. Born in Virginia to freedmen, he graduated from Amherst College in Massachusetts, where he had been one of the first African-American college football players. After going to Harvard Law School and continuing to play football, Lewis was the first African American in the sport to be selected as an All-American. I

In 1903 he was the first African American to be appointed as an Assistant United States Attorney; in 1910 he was the first to be appointed as one of the five United States Assistant Attorneys General, despite opposition by the Southern Democratic block. In 1911 he was among the first African Americans to be admitted to the American Bar Association.

When Lewis was appointed as an Assistant Attorney General in 1910 by President William Howard Taft (Republican), it was reported to be "the highest office in an executive branch of the government ever held by a member of that race."[1] He was one of four African Americans appointed to high office by Taft and known as his "Black Cabinet". Before being appointed as an AAG, Lewis had served for 12 years as a football coach at Harvard University. During that period, he wrote one of the first books on football tactics and was known as a national expert on the game.

Early years

Lewis was born in Berkley, Virginia in 1868, the son of former slaves of European and African ancestry.[2][3] His father moved the family to Portsmouth, where he became a respected minister.[3] His parents stressed education. After local schooling, at age 15 Lewis enrolled in the state's recently established, historically black college, the Virginia Normal and Collegiate Institute (now Virginia State University).[4]

Football player and coach

Amherst College

With the assistance of Virginia Normal's first president, John Mercer Langston,[4] Lewis transferred to Amherst College in Massachusetts. He worked as a waiter to earn his college expenses.[3] He played football for Amherst for three seasons.[2] In December 1890, the Amherst team voted "almost unanimously" to elect Lewis as the team captain for his senior year, 1891.[5] He was also selected as the class orator and won prizes for oratory and debating.[2]

W. E. B. Du Bois, a professor at Atlanta University and later founder of the NAACP, went to the Amherst commencement ceremony to see Lewis and George W. Forbes, another African-American student, receive their diplomas. He wanted to celebrate their achievement with them.[6]

All-American center at Harvard

After graduating from Amherst, Lewis enrolled at Harvard Law School. He played two years for the Harvard football team at the center position. An article published by the College Football Hall of Fame noted that, while Lewis "was relatively light for the position (175 pounds) he played with intelligence, quickness and maturity."[7] Lewis was named as the center on the College Football All-America Team in both years at Harvard. He was the first African American to be honored as an All-American.[4][8]

On one occasion when Lewis and the Harvard team entered a dining hall, the Princeton University football team (which had many Southerners) rose as a group and exited in objection to the black player.[9] In November 1893, Harvard's team captain was unable to play in the last game of the season due to an injury. The game was Lewis' last college football game, and the team voted him as the acting captain for the game, making him Harvard's first African-American team captain.[4][10]

In announcing the All-America selections for *Harper's Weekly*, Caspar Whitney wrote that "Lewis has proved himself to be not only the best centre in football this year, but the best all-round centre that has ever put on a football jacket."[11] In 1900 Walter Camp named Lewis to his All-Time All America Team, noting that Lewis's quickness had revolutionized center play, placing the emphasis on "mobility rather than fixed stability."[11]

Football coach at Harvard

Following law school, Lewis was hired as a football coach at Harvard, where he served from 1895 to 1906.[4] During his coaching tenure, the team had a combined record of 114-15-5.[4] *The Boston Journal* wrote that Lewis was owed "much of the credit for the great defensive strength Harvard elevens have always shown."[2]

Author and renowned expert on football

Lewis developed a reputation as one of the most knowledgeable experts on the game. In 1896, Lewis wrote one of the first books on American football, *A Primer of College Football*, published by Harper & Brothers, and serialized by *Harper's Weekly*.[4][12] Upon the book's release, one reviewer noted:

A new feature, hitherto inadequately treated by previous authors, is the exhaustive treatment of fundamentals or the rudiments of the game, such as passing, catching, dropping upon the ball, kicking, blocking, making holes, breaking through and tackling. There is also a treatise on 'avoiding injuries' ... There are scientific expositions of team play, offensive and defensive, and a supplementary chapter on training which will be useful.[13]

In a 1904 article, *The Philadelphia Inquirer* placed Lewis on par with the legendary Walter Camp in his knowledge of the game, writing, "The one man whom Harvard has to match Mr. Camp in football experience and general knowledge is William H. Lewis the famous Harvard centre of the early nineties and the man who is the recognized authority on defense in football the country over."[14]

In 1905, critics of football sought to ban it from college campuses, or to alter its rules to control its violent nature. Lewis published an editorial in which he wrote, "There is nothing the matter with football. ... The game itself is one of the finest sports ever devised for the pastime of youth, and the pleasure of the public." While opposing unnecessary roughness, Lewis argued against proposed changes, noting that he did not want to watch "a game of ping-pong or marbles upon the football field."[15] Lewis asserted that football should remain "a strenuous competition, a scientific game played according to the rules of the game with vigor and force, sincerity and earnestness."[15]

Lewis later recalled, "There is no game like football. ... If it hadn't been for football there is no telling what I would be today. ... It gives you a general hardening and training which stands a man in good use in later life."[16]

Politician and lawyer

Lewis entered politics by successfully running for election to the Cambridge Common Council where he served from 1899-1902.[17] In 1901, he was also nominated to fill the vacant seat of the Massachusetts House of Representatives' 5th Middlesex district to complete the term of Albert S. Apsey after Apsey was elected to the State Senate.[17] Lewis narrowly lost reelection in 1902 to Frederick Simpson Deitrick by a total of 134 votes. Lewis was the last African American to serve in the state legislature until Royal L. Bolling was elected in 1961.[18]

As a result of his Harvard football career, Lewis became a friend of President Theodore Roosevelt, a Harvard alumnus, and was a guest of Roosevelt's at his estate at Oyster Bay, New York in 1900.[19] In 1903 the United States Attorney for Boston Henry P. Moulton, at the direction of Roosevelt, appointed Lewis as an Assistant United States Attorney in Boston; he was the first African American to be an Assistant US Attorney.[20] His appointment was reported in newspapers across the country.[21][22][23] Some wrote that the appointment was an effort by Roosevelt to show that "his championing of the negro is not political and is not limited to the southern states."[24]*The New York Times* downplayed Lewis' race, noting, "Lewis is said to be so light in color that only his intimate friends know him to be a negro."[25]

Some wrote that Roosevelt appointed Lewis in order to keep him in Boston, where he could continue coaching the Harvard football team. The author noted that Lewis "owes his appointment to the fact that he is an uncommonly good football coach and that President Roosevelt is a Harvard man."[26] Cornell has made several attempts to hire Lewis as its football

coach. According to the story, Harvard men were "unwilling to lose Lewis's services in the football season, and they undertook to make his residence here so profitable that he would remain."[26]

First African-American Assistant Attorney General

In October 1910, President William Howard Taft announced he would appoint Lewis as a United States Assistant Attorney General, sparking a national debate. A North Carolina newspaper wrote that the "Lucky Colored Man" would hold the "Highest Public Office Ever Held by One of His Race."[1][27] The appointment was reported to be "the highest office in an executive branch of the government ever held by a member of that race."[28][29][30] *The Boston Journal* wrote that Lewis had received "the highest honor of the kind ever paid to a negro," such that he then ranked in "a position of credit and influence second only to that occupied by Booker T. Washington",[31] president of Tuskegee Institute.

The Washington Evening Star concluded that the appointment of Lewis to "a higher governmental position than any heretofore given to a colored man" would result in a confirmation battle with southern Democrats, who had imposed racial segregation across the South.[32] An Illinois paper mistakenly reported in December 1910 that opposition to Lewis was so strong that Taft had decided not to place his appointment before the Senate.[33]

But, Taft did not withdraw the nomination, and a Georgia newspaper predicted a "Hard Fight Is Coming" on the nomination:

Many southern members are firmly resolved that Lewis shall never be elevated to the high post of one of the five assistant attorneys general. The position carries with it a handsome salary, high social position and an entrée to White House functions. Whether or not Lewis would ever avail himself of these privileges, a number of southern Democrats feel that they do not want to be a party to elevating him to an eminence where such recognition would be his as a matter of official right.[34]

After a two-month fight against him waged by the Southern Democratic block (Southern states had disenfranchised most blacks at the turn of the century and white Democrats dominated southern politics in a one-party system), the Senate confirmed Lewis as an Assistant Attorney General in June 1911.[35] After being sworn into office, Lewis went to the White House, where he personally thanked President Taft for the high honor.[36] Lewis' initial assignment was to defend the federal government against all Indian land claims.[36] Lewis was a frequent caller at the White House and regularly attended White House functions during the Taft administration.[37]

Lewis was the highest-ranking of four African Americans appointed to office by Taft, who were known as his "Black Cabinet": Henry Lincoln Johnson as Recorder of Deeds for the District of Columbia, James Carroll Napier as Register of the Treasury, and Robert Heberton Terrell as District of Columbia Municipal Judge.[38]

Challenge from southern ABA members

In 1911, Lewis was among the first African Americans to be admitted to the American Bar Association (ABA).[8][39] In September 1911, Lewis faced a campaign for his ouster from the

ABA. Though there was no racial restriction in the organization's charter, some members threatened to resign if Lewis stayed. When Lewis' name had been submitted with others by the Massachusetts Bar Association, his race had not been disclosed. The Southern white delegates said they did not know Lewis was a negro until he entered the convention hall.[40] Lewis refused to resign.[41]

When the ABA's executive committee voted to oust Lewis in early 1912, U.S. Attorney General George W. Wickersham sent a "spirited letter" to each of the 4,700 members of the ABA condemning the decision.[42][43] While northern newspapers congratulated Lewis and Wickersham for their stance,[44] a Charlotte, North Carolina newspaper criticized Lewis for his lack of "good manners" in refusing to resign:

The insistence of William H. Lewis of Boston, now an Assistant Attorney General, that he retain his membership in the American Bar Association notwithstanding objections is due condemnation upon other grounds than those of race. He would probably not have been elected if it had been known by the majority of delegate who he was. Having thus slipped into an organization, he should offer his resignation pending a real decision of the matter. This is simply what any one elected to any manner of organization through any sort of ignorance or misapprehension is required by good manners to do.[45]

Lewis became an advocate for African Americans in the legal profession. During the fight over his removal from the ABA, Lewis published an article saying that many white men "know intimately only the depraved, ignorant, vicious negros - those who helped to keep the dockets filled."[46] He called for blacks to train and form "an army of negro lawyers of strong hearts, cool heads, and sane judgment", to help the large number of African Americans who were "exploited, swindled and misused".[46]

Private law practice

Lewis's tenure as Assistant Attorney General ended with Taft's presidency in 1913, as these are political appointee positions tied to particular administrations. Taft recommended Lewis for appointment as a Massachusetts Superior Court judge, but the state's governor, Eugene Foss, declined to make the appointment.[47] Lewis returned to Massachusetts and entered the private practice of law. He developed a reputation as an outstanding trial lawyer and appeared before the United States Supreme Court on more than a dozen occasions.[17] He remained active in Republican politics while practicing law. Among his cases, he represented persons accused of bootlegging and corruption, in addition to those challenging racial discrimination.[48] In 1941 he represented Massachusetts Governor's CouncilorDaniel H. Coakley during his impeachment trial.[49]

Civil rights leader and speaker

Throughout his career, Lewis was outspoken on issues of race and discrimination. After a white barber in Cambridge refused to shave Lewis, he filed a suit seeking $5,000 in damages and successfully lobbied for the passage of a Massachusetts law prohibiting racial discrimination in places of public accommodation.[47][48][50][51]

In 1902, Lewis delivered an address on race relations to a gathering of Amherst College alumni. Lewis called race the "transcendent problem" facing the country, referring to the recent Spanish-American War, the disfranchisement of blacks in the South by new state constitutions, and the imposition of Jim Crow, which deprived blacks of civil rights, in his remarks:

Yesterday the United States waged a war for humanity when tyranny and oppression had grown intolerable. ... Only a few hundreds of miles south of us are 10,000,000 people who are deprived of their rights, who are practically in a state of serfdom. Thousands of them have been lynched and shot for attempting to exercise the God given rights of every human being. The great Democratic party rolls on its honied tongue the sweet morsels of 'consent of the governed' and 'equality of man.' The Republican Party, progressive, patriotic, absorbed with expansion, is too busy to disturb the harmony of the spheres. They stand opposite making grimaces at each other; one says 'Filipino;' the other hasn't the courage to say 'Nigger.' It is a beautiful game of football with the negro as the football.[52]

He delivered the commencement address to the Tuskegee Normal and Industrial Institute Class of 1910 in Alabama, urging them, despite adversity, to maintain their love for the South:

Love your native Southland. Nine tenths of our people were born here. All our past is here. All our future is here. Here most of us will live and here pass to the great majority and be gathered to the ashes of our fathers. The most glorious history of our race is here in the Southland, the most glorious history of the negro race anywhere in the world is here. If we have suffered here, we have also achieved greatly here. Rejoice in everything Southern.[53]

While serving as Assistant Attorney General, Lewis learned that a young African-American graduate of Harvard had been refused employment at a prominent Boston trust company on account of race. In a speech to Boston business leaders, Lewis said: "In Boston the outlook for the negro is far worse than it has been since the Civil War. I think the blood of three signers of the Declaration of Independence and of the Abolitionists has run out."[54] He noted that, if he owned the majority of stock in a certain trust company, he would force the company to hire "the blackest man in Boston."[54] Lewis' speech reportedly drew "volumes of cheers" from the businessmen and "also from the colored waiters who cheered frequently."[54]

Lewis was one of three persons invited to deliver an address at Boston's Symphony Hall memorial to abolitionistJulia Ward Howe following her death in 1910.[55]

In 1919, Lewis was one of the signatories to a call published in the *New York Herald* for a National Conference on Lynching, intended to take concerted action against the widespread practice of lynching and lawlessness in primarily Southern states.[56] Lynching had reached what is now seen as a peak in the South around the turn of the century, the period when those states imposed white supremacy.[57] In the summer of 1919, after Lewis' speech, the economic and social tensions of the postwar years erupted in numerous white racial attacks against blacks in northern and midwestern cities where blacks had migrated by the thousands and were competing with recent European immigrants; it was called Red Summer.

Death

Lewis died in Boston of heart failure on January 1, 1949. He was interred at Mount Auburn Cemetery in Cambridge, Massachusetts.[58]

Honors

- In 1980, Lewis was inducted into the Virginia Sports Hall of Fame.
- In 2009, he was elected to the College Football Hall of Fame.[59]