1917

In the Supreme Court of the United States, October term, A.D. 1916 : United States of America, appellant vs. United States Steel Corporation et al., appellees. Suggestions of an amicus curiae ... / by Harry S. Mecartney.

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No. 481.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES STEEL CORPORATION, et al.,
Appellees.

SUGGESTIONS OF AN AMICUS CURIAE,

CONTAINING:

I. Application for Leave to File.
II. A Brief of the Argument.
III. Analysis of the "Standard Oil" Decision.
IV. Criticism of "Northern Securities" Ruling. (Annexed).

BY
HARRY S. MECARTNEY.

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I.

APPLICATION FOR LEAVE TO FILE SUGGESTIONS AS AN AMICUS CURIAE.

And now comes Harry S. Mecartney, of Chicago, Illinois, a member of the bar of this court, and herewith makes application to the court for leave to file in above cause the suggestions and brief data annexed hereto as an *amicus curiae*.

HARRY S. MECARTNEY.

Suggestions.

We believe that the original idea of an *amicus curiae* was a barrister at large who, from the vantage ground of an impartial observance, had noticed a grave error on the part of the court, either committed or imminent, and felt impelled to attempt to

save the court, the profession and the public from the threatened consequences.

Of late years an *amicus curiae* is usually thought of as one interested in the pending issue only as counsel for another who, though not a party to the cause, is financially interested in the outcome; and hence, such counsel is frequently thought of, primarily at least, as an *amicus,* more of somebody's particular interests than of the court.

If there be any class of cases in which the court could use to special advantage the services of an *amicus curiae* in the original sense of the term, it would seem to be the class to which the present case belongs. For, it is in these overwhelmingly important or turning-point cases—those that affect the *common life* and the *common interests* of the people at large—that the judges most frequently divide in their opinions. Hence it is in this class of cases that erroneous rulings are more apt to result.

This divergence in opinion can be largely explained or accounted for by the familiar truth that it is such *life issues* which put the heaviest strain upon our judgment, because they usually involve a breaking away from lifelong *habits* of thought and experience.

But such a result is *chiefly* accounted for by the insufficient or narrow presentation to the court of the issues involved, even though frequently our legal giants appear to advance the pros and cons of the argument. The modern successful lawyer is always "busy," always "rushed," and has not time for fullest meditation.

It so happens that in the Standard Oil case, 221

U. S. 1, presenting the *very issue* here involved, the Chief Justice formally and almost sadly commented upon the fact that in the briefs and arguments submitted by the very eminent counsel in the case there was "no real point of *agreement* on *any* view of the *act,*" or as to the *law,* or as to the *facts.* And it would seem that this formal deliverance of the court is alone and of itself a strong "item" to prove the claim of the usefulness of "neutral" counsel in this class of cases.

So, too, while the position of the Government's counsel is supposedly at least technically "neutral" in all these cases, nevertheless such counsel are usually heavily overburdened with exacting and varied duties. It is, too, an open secret that when a public issue becomes acute and affects the entire nation at large, it naturally becomes a feature of political debate and of general discussion, and gradually furnishes, too, a prominent "plank" in political campaigns. It must of necessity follow that thoughtlessly and unconsciously the "administration"—and hence its counsel—becomes a sort of champion or sponsor for one or the other side of the question; and this may occasionally *tend* to narrow its presentation. It is, in fact, lamentably true that upon the day after the publication of the Northern Securities' decision the press widely published a conference at the White House in which the then President expressed his great gratification over the "victory" which the administration had just "won" —a victory which, by the way, was seemingly renounced by him in later years.

All this would seem to prove that in this class of

cases there is a natural niche of usefulness to fill by the services of a *neutral "amicus."*

We also submit that, in cases like the present,—marking as they do crises in industrial progress, and calling in fact for an outlining of new national industrial policies—the necessity of the early *settlement* of such issues, or at least prompt relief from the concrete crisis, should be more fully recognized even in the judicial forum than is usual. It in fact behooves the *counsel* engaged to consider and point the "way out" of the difficulties.

As our eminent Philadelphia brother, Mr. Johnson, lately said upon his argument in the Adamson Law case: "The real issues here should be *settled;* they should be settled *now;* but let us settle them in a statesmanlike way."

And we have little doubt that if a few men of the marvelous ability and attainments of our eminent brother had the *time* to contribute their *statesmanship,* had the time to tender their *fullest* and most *independent* efforts and suggestions towards accomplishing the *settlement* of the public issues involved in these grave cases in which they should be retained from time to time, the divisions in this court in such cases would be heavily reduced from the prevailing ratio—and error in the court's judgments extremely rare; and there would therefore obviously be a minimum of need for "neutral" counsel and rare occasions indeed for the tender of their services.

In the Northern Securities case, however, this same eminent brother tendered but little to this end

—although his brief, as usual, was a marvel of clear ness in demonstrating the *logic* of the issues.

The issue of "competition *or* co-operation" was not raised, and the latter word is almost if not entirely omitted from the briefs. The *vision of the epoch* in this epoch-marking case was not revealed.

Nor did the company or combination in defending the legality of its existence *admit* its economic *power,* and then tender in argument its *amenability* to *regulation* as a sufficient antidote to public fear of the power, etc. It apparently did not *want* to be regulated.

The writer herewith submits data upon two main features—controlling features—of the present case The first claim was argued of course in the Northern Securities case—for it was the main point involved. It was overruled or denied in a "five to four" decision. *No petition for rehearing* was filed. In the Standard Oil case this same point was argued, but *indirectly,* the opinion itself grouping the company's argument under two heads only: First, lack of jurisdiction in Congress, and, second, lack of "due process" of law, etc. And *no appeal* was made to the court to *recall* the "Securities" ruling. It was simply sought to *escape* it—to "get around" it.

The privilege to openly attack this same ruling is *again* waived in the briefs filed in the present case; and it has been waived also in the oral arguments. We believe, however, that the suggestions tendered below in criticism of the Securities ruling (written in 1904-5 and annexed separately), are chiefly new, and that if the arguments below be permitted to be

filed, they will also constitute the first open attack upon the Standard Oil decision.

The second claim—affecting the *relief* to be granted—is seemingly absolutely new ground, and has not been passed upon in any way, shape or form, nor submitted to the court, in the prior "trust" cases.

As some color or warrant for disturbing the court or justices in this case, and attempting to "break into" the ordinary curriculum, etc., the writer tenders the following:

1. That he is absolutely neutral as to the issue. No paid retainer in any similar case has ever been received by him down to date, and he has no promise or hope of any, direct or indirect. He submits the suggestions herewith "without favor or hope of reward," except for the possible satisfaction of having aided—be it never so humbly—the permanent settlement of a question which has long vexed our country and its judicial systems, and borne heavily upon its industrial welfare.

2. That, including an exhaustive criticism or treatise of the Northern Securities opinion (128 pp.) completed in March, 1905, he has devoted about or over eight months of professional labor to writing upon this "Trust" issue.

3. That from time to time as the same was prepared, he has placed his data before the counsel for the Government and counsel for the corporations, defendants in these several "Trust" causes.

The effort here made, therefore, has not been born of impulse; and we believe that a due reluc-

tance to unnecessarily or prematurely bother the court of the justices, has been observed.

We therefore submit our feeble effort to prompt the court to reconsider this great national issue, and towards convincing it of the following:

1st. That there **is** no existing **"law** of competition" which if left alone **automatically** works for **good, or** even for an **increase of trade—**any more than the existing "law of competition" between the "warring members" of our human nature **automatically** results in **yielding** to the temptation and **never** in **triumphing over it.** No such concept therefore can be found in or "construed into" the Sherman Act.

2d. That there **is no point** in the **growth** or **process** of the combination of trade plants at which the "power to **control** prices" passes to the "Trust" or combination—as in the instance of obtaining the control of a corporation by the acquirement of a majority of its stock. For every trade plant has **some** power to control, *i. e.*, to influence prices. And this influence in turn fluctuates from day to day, as market conditions vary, and is widely variant in different articles or products.

In other words there **is** no point in such process of combination or **growth** at which one **becomes a criminal** and subject to fine and imprisonment. Certainly at least such a point **cannot** (humanly at least) **be ascertained—**unless **fixed in advance** by positive enactment.

That is to say:

The whole attempt of the court in these "trust" cases to justify a decree upon the basis of a "power to control prices" is an attempt to make a constant out of a variable.

3d. That this great lodestone of error in the several rulings of recent years should be formally recognized, and **the Northern Securities decision** (as explained by the Standard Oil ruling) **be squarely and openly overruled.** (Seemingly no one has yet **tried** to get it overruled.)

4th. That while a great industrial combination which has grown great and powerful by **evil and oppressive trade practices** may **deserve** dissolution, and while the court unquestionably has **power** to decree its dissolution—nevertheless **public policy** does **not** require or demand the entry of such dissolution decrees. But on the contrary, such **actual** dissolution would be a great public calamity; while a **partial** dissolution such as has been entered in the Standard Oil and other late cases produces little or no effect—and hence little or no good. (Apparently, it simply requires the keeping of more books.)

5th. The **warrant** for the incorporation of great industrial corporations is the **"public value" or benefit inherent** in their opportunities, their functions—their **size.** The decree in such cases, therefore, should not **destroy** this inherent public value, but should, so far as possible, **cause the offending entity to restore property unjustly taken,** to **right financial wrongs committed,** and **to satis-**

fy damages inflicted—both as to private parties affected and as to the public and to the **extent** that it is possible so to do.

6th. If its wrongs have been of such long standing and conditions have so changed that relief cannot be given—it cannot be helped—certainly not by a dissolution decree. The court is not to blame.

7th. That relief from oppressive combinations is to be had (1) by means of laws penalizing specific trade **wrongs, or acts, or practices** (2) by actual **regulation** of their trade practices through supervisory bodies, etc., and (3) by decrees of courts that will require **satisfaction** of wrongs committed.

Since the briefs in this case have just lately been filed, and the oral arguments just finished, we suggest that this application is made in ample time, because submitted in practically the earliest time at which any colorable necessity therefor has occurred.

We submit, then, that the present case, for reasons above and below given, presents a case of "peculiar circumstances," in which this court should receive properly tendered efforts of an *amicus curiae.*

For it has full discretion so to do. (First Northern Securities case, 191 U. S. 555.)

In conclusion, a word of "personal privilege," as the parliamentarians say.

For over a third of a century it has been my privilege to observe with many others, and with deepest professional concern the gradually increasing havoc

in American judicial rulings that our ultra-cheap system of jurisprudence has been making. For a number of years the court dockets at the large industrial centers of the country have been clogged up to an alarming degree, and "justice freely and without delay" has become in some places and in very fact almost a byword or mockery. Six, eight and ten-year lawsuits are a *common* thing!

Cheap "costs" have gradually led to cheap litigation, and this to "hasty" briefs and hasty decisions given under high pressure. The result of this nation-wide condition, has of necessity been to throw a great volume of cases upon this court, thus robbing it of time for fullest meditation upon each case presented—which it ought to have and which in earlier and simpler times it actually had.

For many years the writer with others has been appealing to local, State, and National Bar Associations to take cognizance of this general court situation and arm for a steady campaign of relief.

The justices of this court have been seemingly straining every nerve for many years to catch up more closely with its docket, in order to give more prompt relief. But it is beyond human capacity. It thus has felt called upon to grant practically *no rehearings;* and this means and inevitably means *practically never* to correct an error in the case in which made.

This is a sad condition of affairs—and one for which the court is not responsible and of itself cannot cure. But the situation calls loudly for relief. (The writer hopes to continue to contribute his mite to this end.)

But in the meantime, such a situation does not justify the assumption—apparently indulged in heretofore by the counsel engaged in these "trust" cases —that the court, *even though it may err, and may perceive its error, will not formally recall its ruling* upon an issue of national import.

This is indeed a peculiar and false respect for the court as such—to assume that it will *not* confess error under *any* circumstances. For respect for the court must go hand in hand with *concern* for its welfare and for the general *accuracy* of its decisions.

This general situation is only referred to here, as a just explanation, at least in part, of a very strange and very grievous court attitude in respect to this national "Trust" issue; and as helping to place *primary* responsibility therefor where it belongs, viz.: *upon the bar.*

We respectfully submit that in the Northern Securities case we reached the "parting of the ways," and were led into the wrong road and took a stride in the direction of *error.* We must now retrace our steps and take the other road.

For, "as sure as is the law by which the millstone sinks in the ocean," so sure is it that you *can not make a constant out of a variable.* And it also *ought* to be just that sure that in America men ought not to be convicted of a crime, when there is no means of humanly or consciously *knowing when* they became guilty of one.

Respectfully submitted,

HARRY S. MECARTNEY.

137 So. La Salle Street,
Chicago, March 20, 1917.

II.

AN OUTLINE "BRIEF OF THE ARGUMENT."

Preliminary.

In the fall of 1903, some time after the opinion in the Minnesota U. S. Circuit Court had been delivered in the "Northern Securities" case, the writer turned aside from ordinary professional labors to solve for himself the then much mooted question of the legality or illegality of "trusts," etc. The issue was recognized as one that was to come into every lawyer's professional life in time; and so he preferred to study the matter at first hand and to approach the issue as an "absolute neutral," and to work out his convictions before a paid retainer might possibly warp or handicap him in its solution.

(Incidentally: No paid retainer in a similar case has ever been received by him down to date.)

The conclusion reached, after a study of the briefs and of the question at large, was that the ruling of the court, finding that the "combination" was illegal, was erroneous.

After the decision of this court, in March, 1904, had been rendered, affirming the judgment of the Circuit Court (193 U. S. 197), he was prompted to enlarge upon his prior work, and was tempted to attack what seemed to him the fallacies in Mr. Justice Harlan's majority opinion.

The result was an elaborate if not fairly exhaustive document of 128 pages of print.

Copies of this document (bound in black seal) were sent to the various justices of this court; as well as

to various judges and lawyers within a limited "reading circle" of the writer.

After analyzing the ruling of the majority opinion and attempting to show its cardinal fallacy of *petitio principii* as we saw it, we sought to account for the mistake thus made (outside of the long-standing handicap of an abnormal "docket" burden upon the court), as follows:

1st. The fact that large and powerful combinations had grown up in our country and caught us with *no sufficient regulatory equipment on hand,* and hence that the *fear* of the evil that could be done or the oppression that could be inflicted by such combinations, seemingly led the court to go too far in its laudable desire to protect the public therefrom.

2d. The fact that it was not pointed out by the counsel in the case with any insistence, and was accompanied with no appeal that the then existing and threatening condition *called for* immediate and legal *regulation* of such large combines or monopolies; and that hence "the way for relief" was not argued, and not even definitely suggested in the briefs in the cause.

3rd. It was then predicted that as surely as the ruling in the Northern Securities case was attempted to be applied to large corporations generally which were similarly structured or formulated, disastrous financial results would follow.

The excuse for sending copies of this document to the then justices of this court was the fact that *if* the court had erred, it was, as usual, primarily the fault of a too narrow presentation of the "ultimate" issues, and that it then became a duty of the coun-

sel in the cause *to petition for a rehearing*—which had not been done in that case. And suggestion was made that, no matter how few rehearings had been granted by this court in the overwhelmingly heavy docket which had oppressed it for many years, wherever a "five-to-four" opinion or division was in evidence in respect to a great public issue, it was urgent that a rehearing of the question involved should be had, and hence petitioned for.

Considering, therefore, the ominous nature of the ruling, the overwhelming confusion and public loss that was apt to follow from it, the writer felt that as an "officer of the court" it was not inappropriate to lodge with the justices a very earnest appeal that the question in *some* form be reconsidered, and this, as said above, was done, and the result was labeled "The 'Merger' case; A Petition for a Rehearing; An Appeal from the Younger Generation," etc. (The document so labeled here and annexed hereto consists of Part I of this so-called treatise, a few pages of Part II and the "Vision" and "Retrospect" at the end.)

———o———

Several years later, and in July, 1907, the writer felt called upon—in view of the unsettled public and "market" feeling about this issue—to make certain suggestions to the American Bar Association (then in prospect of having its annual meeting at Portland, Maine), to the effect that a cause of such wide-reaching importance was enough to prompt the efforts of one of its able committees to present "a case stated" involving this same "trust" issue to the U. S. Supreme Court, and that it (being a *neu-*

tral body) should formally appeal for a re-consideration of that issue before the confusion became greater. (Copies of the appeal were sent in advance of the meeting to each of the 3,000 members.)

In that document the writer predicted again that if and when the Northern Securities doctrine should be sought to be applied to corporations or combines generally, "widespread disaster would result."

The motion for the Association to take this action was lost.

It was only a couple of months after this document had been prepared and distributed that the Government filed its information against the Tobacco Company (it had sued the Standard Oil Company some months before), and the government gave out to the press a list of *several dozen* of the largest industrial companies in the country which it had slated for attack along the same lines.

And it *so happened* that immediately afterwards the panic of October, 1907, occurred.

———o———

A year after this (1908) the writer prepared a document reciting briefly the then recent "Trust" history up to date, and suggesting to the railroad counsel of the chief systems of the country (some 200 of them were sent copies) that the roads or other large combinations petition anew in some form for a reconsideration of the "Trust" issue in this court, and seek to get the "Northern Securities" decision overruled. Nothing came of this effort.

Some four years later the Standard Oil and Tobacco cases were decided, explaining or modifying

the Northern Securities holding with a "rule of reason," but leaving the main basis of the prior ruling intact—*and unattacked.*

Over two years ago the writer was furnished with full copies of the briefs in this so-called "Steel" case, then pending in the District Court of New Jersey, and about the same time received a copy of the briefs in the present Harvester case, in which reargument has been lately had in this court.

He then prepared another brief document, bearing upon the merits of question but which was chiefly an attack upon the mode of *relief* which had been adopted in these cases. He dwelt at large upon the fatuity of entering these "dissolution" decrees in the matter of these big, valuable entities. He furnished copies of his "brief" to Judge Gary, of the Steel Company, and to Judge Dickinson, the Government's special counsel in the "Steel case."

We now come to the form in which these cases ("Harvester" and "Steel" cases) have been presented for argument in this court. We observe that apparently no earnest effort has been made by the corporations attacked to persuade this court (1), that its ruling in the Northern Securities case, as somewhat modified by its opinion in the Standard Oil case, is *wrong.* Nor (2), has any effort been made on the part of counsel for such companies to convince the court that *even if* these combinations have transgressed the Sherman law, said law *did not and could not require either their absolute or partial*

dissolution. That the law could not require the court to needlessly cause great and abnormal public loss, etc.

Therefore, having written and delved in a thoroughly neutral spirit in this issue for some thirteen years or more with original convictions unshaken; seeing the mischief grow; witnessing these vast records coming to this court, any one of which is enough to wreck a normal human mind in attempts to master it; seeing able arguments of able men delivered upon an ever shifting and elusive base,—it seems to us that it is about time for *some* one to raise a hand in protest. For the upheaval must come *some* time and the longer delayed, the greater. And having from time to time sent copies of the former data, prepared after many months of labor in the aggregate, to counsel and parties on both sides of these cases, we feel called upon, personally and formally and openly and directly, to suggest to this court the propriety of considering or reconsidering *both* of these dominant issues.

If unprejudiced service, *i. e.*, "*neutral*" service, and hard and persistent work done without any expectation of financial reward, is as acceptable to this court as that which is usually done for a paid retainer, or as that frequently performed as an *amicus curiae* by counsel for a party financially interested in the issue, we then are constrained to point to the great labor given and the great expense incurred by the writer on this big issue as a warrant for disturbing this court with an application to file the briefs or suggestions submitted herewith.

While it probably is not ncessary so to do we add an affidavit as to our personal non-interest, etc., in the subject.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

HARRY S. MECARTNEY, being duly sworn, deposes and says that he has been engaged in the practice of law for over thirty-three years in Chicago; that he has been a member of the bar of the United States Supreme Court for over fifteen years.

Affiant further states that the statements above made under the heading "Preliminary" substantially show the amount of time which affiant has spent in various professional brief work and treatises upon the subject referred to—namely, upon the question of the legality or illegality of combinations or so-called trusts in trade; that the time spent in and about said work, together with that spent in preparing for the application above and preparing the data and brief work submitted herewith, has amounted to about or above eight months.

Affiant further says that he has never been paid or promised any retainer or law fees for the work which has been thus done, nor for attempting to appear in the present case, nor for preparing the brief work or suggestions herewith submitted, nor has he any expectation of any financial reward, direct or indirect, from the work which he has done upon this issue, or in preparing the matter herewith submitted.

Affiant further says that the briefs in the said cause of *United States* v. *United States Steel Cor-*

poration, were only filed a few days before the argument, and that he did not and does not deem that any application to the court of the kind here made, would have been appropriate until after the regular briefs and arguments had been filed and made, for not until then could it have been determined whether the points or suggestions herewith tendered had been covered by the regular counsel.

That affiant has worked continually since the briefs in the cause were filed, in preparing the data herewith submitted and the same is submitted at the earliest hour physically possible so to do.

Further affiant sayeth not.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 21st day of March, A. D. 1917.

EVANGELINE STEWART,

(Seal) *Notary Public Cook County, Illinois.*

(I.)

The Error.

1. "Combination" is simply *"co-operation."* That there is no *"law* of competition," existing by statute, existing in physics, or existing in human nature, which law, if left alone *automatically* works for good or even works for an *increase of trade,* and which is violated by a statute passed in *general* form prohibiting evil or wrong in trade, whether by way of "restraint" or of inhibiting "monopoly" in whole or "in part."

2. The formal edict of this court to the contrary is *error,* and it should now be *formally recalled,* and the Northern Securities decision, *as well as the chief ruling in the Standard Oil decision, should be squarely and openly overruled.*

3. There is even no definite *trade* concept of *"competition"* except that of *independence, i. e.,* of *independent concerns* engaged in certain lines of trade.

4. If Congress meant by the Sherman Act to restrain *all independent* concerns engaged in trade from *joining* their means or resources in trade, or making *any coalition* for trade purposes, it could have plainly and easily said so—but it is not hard to imagine what this court would have done with such a law.

5. Although combinations in trade, or large corporations engaged therein, have, or may have, *some* power to oppress, it should be recognized that relief from the threatened power of such combina-

tions must be had through their *regulation,* through penal laws directed at their *acts* of oppression, etc., and by decrees causing restitution of property and satisfaction of damages, etc.

6. The proposition that *mere size* in an industrial unit or organization is *per se* illegal is absolutely unsound and fallacious.

If mere *size* in any particular trade industry be ominous, it can only become *illegal* when a limit to size is *drawn in advance* by some *legislative edict.*

7. A so-called "trust" which has monopolized a part—even a very large part—of a particular class of trade or commerce of the country, can only be attacked and dissolved when it

> *a, actually has used* unfair and oppressive *methods* to attain its size or gain its position of dominance in the trade; or *b,* where its *declared objects* are unfair, oppressive, or illegal; or *c,* where it is proven or admits that *it intends* to commit such evils or wrongs.

8. The *fundamental law* of trade and the *fundamental encouragement* to trade is to *increase* trade by all possible legal and fair means. And when the size of the trade factor—whether in corporate or partnership or individual form—becomes large enough to involve or possess the *power* to oppress, it *then* challenges public *regulation*—but *not destruction.*

9. *If* these be economic truths, they are presumably known to the public at large, and presumably were so known at the time the Sherman Act was passed. And the court in construing the Sherman Act (and its "general language") had no call and no right to attribute an intention to Congress *to run*

counter to such truths and to our whole industrial system and policy.

Nor had it any call or right to substitute an intention to preserve what it has been pleased to call "reasonable competition," or, as the Government counsel says, "our competitive system"—an ambulatory, undefined, and indefinite concept.

10. What would be thought of a law which proscribed *not* "restraint of trade," *not* "monopolistic" *practices* but—"any coalition of trading concerns which militated against the *'preservation of our competitive system'*"!

And of an attempt to convict traders of a crime upon the basis of such language!

11. And to find men guilty of a crime *or "conspiracy"* to do an act which is *not per se* a fraudulent or unfair trade *act* (as, for instance, an instantaneous or sudden and oppressive or fraudulent raising of *prices*), but which "unreasonably restricts," *not* trade,—but *competition*—is to convict them of transgressing or going beyond an imaginary line in *growth.* That is, to convict them for *growing* to *a conspiracy—a point* not defined in advance and hence a point *which no human agency can define.*

So that the only way to absolutely avoid becoming a conspirator would be *to refuse to grow at all.*

Legislation, it is true, *can* draw a point or line at a definite *size, i. e.,* definite amount of *capital,* or definite limits of *territory* or of *time,* or of *amount of business,* etc., etc.

Admittedly, Congress has *not* done this.

12. Nor is any aid given to this effort by resorting

to the common law (as this court attempted to do in the Standard Oil case)—except to apply the common law of "restraint of trade" *practices,* or monopoly *practices, i. e.,* "forestalling" or "engrossing" the market, *i. e.,* sudden and *temporary* and *acute* acts, accompanied with an actual and definitely large *increase in prices, or* accompanied with *avowed* or *admitted* or *undenied intent to* enhance prices, etc. And such offenses usually affected the *necessaries* of life in an age when there usually were scant supplies of these and rarely indeed a surplus.

13. Even these acts at common law were not pretended to be covered by general *principles,* but by specific *legislation;* and even such statutes were finally *repealed.* As this court says in the Oil case, "in the changing conditions of society" and of "economic conceptions," it was finally recognized that frequently the result of engrossing, *i. e.,* buying in large quantities, etc., were not harmful but *"tended to fructify and develop trade."* (P. 55.)

Is it not as easy for the court to find that in 1890 there existed "economic conceptions" in favor of the idea that *co-operation* of large units is *apt* to lower prices to the public and to increase trade, etc.? To find that *"co-operation"* in the *present* conditions of society is as well recognized as *cut-throat competition?*

14. Apparently no case has been cited, or can be, in which any one was *convicted* at common law under such specific statutes (which actually *furnished* their own standard, viz., *sudden* and *acute* acts of oppression, etc.), and where such acts were held to make one guilty when they had *actually been fol-*

lowed and perhaps followed for months and years with a *reduction*—instead of an *enhancement*—in prices.

Evidently no authority at common law has been cited where it was held that the *power* to raise prices to any degree was *itself* and *in principle* the *actual* raising of prices.

15. "Restraint of trade," *i. e., fraudulent* restraint of trade, and "monopolistic *practices,*" is a definite concept and sufficient to fix guilt. But a fraudulent *growth,* whether accomplished by gradual increase by the purchase of plants or by association of partnerships or corporations—in a jurisdiction where *specific statutes allow* such growth—cannot be conceived for a moment. There is no given point *in growth* which can *mark the line between innocence and conspiracy.*

There is no common law ruling that *joining concerns* in trade constitutes "engrossing" or a "monopolistic" *act.*"

16. The error in the Standard Oil decision (the fullest exposition of the view of the court on the subject), consisted chiefly in this:

(a) Admitting that the Sherman Act—providing against a conspiracy, *i. e.,* against a *crime*—was drafted *"in general language";* admitting that this criminal statute was so vague that "it *required* that *some standard* should be *resorted to," i. e., supplied by the court* in construction, etc.,—the court *supplied the wrong standard;*

(b) The court attempted to supply "the standard of reason" which had been "applied at the common law." But instead of defining that standard as

affecting unreasonable or fraudulent "enhancement of *prices*" or other fraudulent and specific *acts*, or "monopolistic *practices*," it passed by the *only definite and valid standard* supplied by the common law, and was led to seize upon a supposed line between "reasonable" and "unreasonable *restraint of competition.*"

(c) It failed then to test out the only "competition" concept *produced* by the common law, namely: an *unlimited* restriction of one's right to engage in a trade by making a special contract, therefor. And in such instance the "reasonableness" or "unreasonableness" of any proposed limitation in such a contract was tested by a definite *territory*, a definite *period of time*, or a definite *amount of business*, etc., etc.

The Sherman Act furnishes none of these limits in its supposed protection of "competition."

17. The formation of this big combine, no matter how big it was, was simply *a step* in the *growth* of the industry. It was not any greater *in proportion* than perhaps thirty or forty "steps" similar or substantially similar, taken amongst the antecedents of the very subsidiary corporations. And it apparently has not been claimed by the government that the stockholders in the holding company have made any *greater profit*, or at least any greater *rate* of profit, by reason of the step thus taken than the stockholders of the *subsidiary* companies had made years before in taking advantage of the same or identical strictly legal invitation of their respective states to *join plants* or *consolidate corporations* for the *purpose* of *increasing their trade.*

It is no remarkable or unique thing for the assets of a corporation to increase in a period of over 16 years in the proportion of 3 to 1—especially in a *fast developing* industry.

18. In other words, if Congress desired to make it criminal for a corporate industry to *grow,* either by purchase of plants *or* by consolidation of companies and industries, it *should have drawn the line at a certain amount of capital*—as in the instance of the present Missouri statute—or at *a certain amount of business or trade* carried on (as ascertained by some furnished tests or reports to be made), etc., etc., or by *territory* to be covered—*and too, perhaps specifically define* the *trade,* the *article,* or *kind of products,* etc., etc.

19. The mere incident of a "holding company" is unconsciously seized upon to bolster up the concept of unfair or fraudulent growth, etc. But if such plan is a *legal* plan and *legally chartered* by one of the states, one cannot find *guilt* in this device. It could, it is true, furnish some evidence of *intent connected* with a *fraudulent act* or *practice.* But it, being legal, cannot help out the variable and shifting element of *size* or growth, to the extent of fixing guilt.

20. But more than this: Why is not the corporate device of a "holding" company a *logical* and *legitimate* one for the efficient and economical direction of a mammoth industry with various and varied plants in many states?

Were our country a single state, one large corporation with plant or territorial "departments" might be as satisfactory to deal with from the standpoint of a single government or a single regulatory body created by it.

But in a government of separate states, with a national government superimposed upon them, the situation is different.

In fact, each state as is well known *prefers* to deal with a large local industry through a corporation of its *own* creation. And sometimes the local restrictions or regulations are so many or complex as to suggest or compel local incorporation in the interest of simplicity and directness.

21. Again: Independently of this dual government feature, the holding company is probably the best if not the only satisfactory device for an economic control over the associated plants and industries and their output, in the way of territorial supply of trade and the distribution of orders, etc., to the best advantage of all concerned—and hence, it is, certainly it *may* be, the *best* device to develop the largest increase of trade.

The holding company may involve increased power—but hand in hand with this goes *power to increase trade.*

22. The ominousness of a holding company is a factor in economic power—and hence, it is *a* factor of economic *public advantage.*

In other words, the bigger the economic giant and the more power he has, the more does he challenge *regulation.* But if we destroy "the goose that lays the golden egg"—we simply lose the egg.

23. The holding company feature cannot be seized upon to support the idea that it "unduly restricts competition" as an individual did at common law when he placed by contract an *unlimited* restraint upon his right to work or do business.

24. Nor does the word "perpetual" (used in Standard Oil decision ....), add anything to the situation. The holding company is no more "perpetual" than its charter; and that charter no more perpetual than others.

25. Of convincing significance is the fact, that in Canada, England, France and Germany, the economic value in *size* itself, in certain lines of industry has long been recognized, and size has been *encouraged*—but at the same time *actively regulated.* How would Germany have so vastly increased her foreign trade in iron and steel in the last 20 years had she had only small plants as formerly—in other words, had she *"preserved"* at all hazards her *"competitive system?"* For the attorney general tells us that ours must be so preserved, and that this was the *object* of Congress in passing the Sherman Act. And all the headings in his brief hover around or are based upon this one idea.

26. If the "holding" company is peculiar to our country, and if there be anything ungainly, or awkward, or unnecessarily cumbersome in this feature of large industrial development and power—it arises from our dual system of government—national and state, and this gives it its uses or its warrant of necessity.

27. The plea made in our "Northern Securities" or "merger" treatise or criticism to the effect that the safety valve of relief from the threatened power of large industrial combinations lies in *active supervision* and *regulation,* and the effectiveness and *sufficiency* thereof has been borne out by the legislation passed since, viz: In the broadened powers of the Interstate Commerce Commission and its practical

working for nearly or quite 10 years past, and by the establishment of the Federal Trade Commission.

The destructive decrees—*i. e.*, theoretically destructive at least—such as have been entered in the late "Trust" cases are not needed now to deter men from doing the unreasonable—even if they ever did *have* any substantial effect so to do. The scepter of "regulation" and "restraint" against oppressive *practices* is now ever above them and in plain sight.

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28. In conclusion:

(1) We cannot make a *constant* out of a *variable.*

(2) The only "restraint of trade" which this statute (Sec. 1) furnishes as a *constant,* is restraint of trade by fraudulent *acts* or *practices*—as, for instance, an undue or fraudulent *raising of prices* to the consuming public. *This* can be so great and sudden as to be a *guilty act.*

(3) The only *constant* furnished by the prohibition against "monopolizing the whole or any part of" the trade in any article of trade (Sec. 7) is a prohibition of "monopolistic *practices,* such as enhancement of prices"—which this court in the Standard Oil opinion calls one of the things spoken of "as monopoly" itself.

(4) If in interpreting the statute we hold it to mean anything *more* than these two different concepts, we are *bound* to hold it to be a *wholesale prohibition* against *all* persons or corporations engaged in trade from *associating* or *combining* their plants even for business, *i. e.*, trade purposes.

(5) A holding company is a legal entity and can

not furnish a test nor help to draw a line to help out this general statute. It is not interdicted, or condemned.

(6) The concept of a "control of prices" will not help. In many lines of trade a concern which does 30 per cent. or 40 per cent. of the entire trade, could produce more effect upon the market than one in another line doing 80 per cent. of the business in its general line.

(II.)

The Relief.

Our second main proposition is this:

29. That where such combination or corporation *has* actually oppressed the public, or its competitors, by unfair trade *methods* or *practices* in trade, and has perhaps grown to its position of trade power largely as the *result* of such evil practices, and while

(1.) Such facts of evil growth may be presumptive evidence of an *intent* to *further* oppress (as held in the Standard Oil case); and while

(2.) Such combination may *deserve* dissolution; and while

(3.) The court has *power* to dissolve such a *quasi monopoly,* yet

(4.) There being an *inherent public value* in the combination itself—its entity, its functions, its very *size*—

A proper and wholesome decree in such case does not involve a dissolution of the combine, and the destruction of this public value. But such decree should require the offending "trust" to restore to

private parties wronged the property or money wrongfully taken from them, or to satisfy the damages committed, so far as it is possible to do so.

And as to *public wrongs* the decree should require that the property of the offending trust be turned out or over to public authority to satisfy any statutory fines or other public claims. And where such public loss is reasonably certain *or* can be estimated in amount with reasonable approximation, the decree should require the payment of such amount into the *public treasury*—the *cy pres* representative of the public finances, etc.—in satisfaction of such damages or loss.

30. If it be said that such a proceeding would be levying fines in equity, etc., it is answered, Not so: That equity of necessity must have full jurisdiction in cases of such nature to *require wrongs to be satisfied;* and that no company or incorporated enterprise which has *forfeited its right to live* and has by its practices *formally invited* its dissolution, can complain of the court's *conditioning* its *continued existence* upon such terms or any other reasonable terms—as an *alternative* to the exercise of its *power* to dissolve, *i. e.,* destroy.

31. If the concern shall have grown so big and its industrial ramifications shall have become so wide and extensive, and if its tentacles have gradually reached so deep into the body politic, and the concern has become so great that the dissolution thereof would cause immense and staggering public inconvenience, confusion and loss (as this court intimated was the case with the Standard Oil Company), that is the *greater reason* why the court should require *sat-*

isfaction of wrongs, public and private, for past misdeeds, *rather* than decree such *dissolution.*

32. If, on the other hand, "the trust" or entity, attacked should defy the decree and voluntarily resign its functions rather than submit to such terms—an unlikely thing in any case—then there would be nothing for the court to do but to appoint receivers for the property to collect the amounts levied by its decree, and to conduct the business until the company should be wound up under ordinary proceedings or at least until its property should be sold out to individuals or corporations for continuance of the business, etc., etc.

33. If its wrongs shall have been of long standing, and if repeated and specific remedies or relief or satisfaction for past misdeeds cannot be safely decreed —then it is not the fault of the court, but of the people at large or their representatives in Congress in failing to provide a regulatory body, or necessary preventative measures, etc.

34. And it is obvious that, in any event, a decree of dissolution which neither collects for damage done nor gives relief for wrongs committed, and which also fails to *actually* dissolve and which does not reduce the *actual* size of the so-called monopoly, or which does not bring about a reduction in the so-found oppressive prices or restrain other acts of oppression, etc., can be of no particular public benefit, from *any* point of view.

35. If the Government shall have failed to establish a regulatory body in due season and if private parties concerned have failed to make timely complaint of wrongs committed, or while it was prac-

ticable for the court to give relief, this cannot warrant this court or any other court in entering either a futile decree or a drastic one, viz.: one decreeing dissolution—and *per se* a public loss and injury.

36. The whole trend of legislation of late years in the way of enlargement of the powers of the Interstate Commerce Commission in the establishment of the Federal Trade Commission, together with the apparent neglible results of these dissolution decrees, etc., etc., all seem to prove clearly that the court in its "trust" rulings both as to merits and methods of relief *has simply taken the wrong road and should retrace its steps.*

NOTE. Had this court found as facts in the Standard Oil case:

That such combination had attained its form and size and position of industrial power *through a long and persistent policy and purpose* of *unfair elimination of rivals;* through receipt of *illegal rebates* on freight, and other *illegal practices* and trade acts; had *oppressed the public* either generally or in special districts or places; had *defied* the *decree of dissolution* of the Ohio Supreme Court, and had *escaped* any legally prescribed fines or penalties of that or other state courts, etc., etc., and

Had the court then *as a condition* for the company and its subsidiaries (tied up by contract or corporate form with this tainted combine) to *continue* to do interstate business required them to turn over their *property* or a portion of it sufficient to amply *satisfy* all fines, or demands, public and pri-

vate, which a decree could reach, and to turn over property to the jurisdiction of the *local* courts whenever necessary to carry out and satisfy their decrees, etc., etc.; and

In the *alternative:*

That *receivers* should be appointed for the combine and its constituents and their properties duly *administered* in the interest of the public and parties wronged, to satisfy the entire situation, etc., etc.;

We say: had *such* a decree been entered, we fail to see how any one could validly complain of it.

But the court in its decision in that case finds that the Sherman Act was violated *merely* by the taking of *strictly legal steps* to *increase trade* and to get increased economic *power* (as every one does who takes on a new plant) and *then* finds that the fraudulent trade acts committed *merely emphasized* such a conclusion—instead of making them the *sole basis* for a decree.

III.

An Analysis of the Standard Oil Decision.

221 U. S. 1.

In this cause, strangely enough, no appeal was made by the counsel for the defendant companies that the Northern Securities ruling be *formally* and *openly overruled.*

In fact, a cursory reading of one of the briefs—the one of 190 pages—submitted by Mr. Johnson and others—does not reveal even a deliberate *reference* to the decision.

The court, in order to apply its prior ruling to the immense record, sought with commendable earnestness, to find a fixed "standard" which it said "the statute demanded" *i. e., demanded that the court supply* this standard—*i. e., owing to the "general language of these* (its) *provisions."*

And what standard did the court supply?

Seizing upon the idea that there *was* a line between "reasonableness" and "*un*reasonableness"—*i. e.,* hunting for a *constant* on which to convict—it sought refuge in *a* "rule of reason."

And then what "rule of reason" did it find?

Not the rule which revealed a line between a reasonable or unreasonable (*i. e., fraudulent*) *act;* but it attempted to draw a line between a reasonable and unreasonable *growth* in trade.

It did not hold to a test of *"restraint* of *trade,"* the concrete subject of the statute (Sec. 1), but—to one involving *"competition"; i. e.,* it attempted

to draw a line between reasonable and unreasonable *competition.*

The advantage of deserting the *specific subject* of the statute for another, and then *returning* to the subject after reasoning out the matter, added nothing but *indirection* to the process. And "indirection is seldom safe."

That is to say: The court, instead of drawing or indicating the line between a reasonable (or fair) and unreasonable (or fraudulently high) *price,* or between a fair and an oppressive *trade act*—drew its so-called line between a reasonable and an unreasonable *growth* or *size.* And this, too, in a country whose corporate laws expressly, and whose industrial policy undeniably *allowed all* the growth or size desirable or which could affect trade or promote the *greatest trade!*

It was to be assumed, said the court in effect, that the intention of Congress was—*not* to prohibit unreasonable *prices,* unreasonable *trade, "forestalling"* or *"engrossing" the market* with avowed *intent* to *enhance prices* (a *temporary* or *specific act*); it was not against *temporary or acute acts* which would *oppress* the people and unreasonably "restrain *trade"* and thus imply and *safely* imply *guilt,* and hence *justly* make the parties subject to fine and imprisonment, etc., etc.—but the law *was* passed to preserve due or reasonable "competition" to preserve "*our competitive system*"—as the brief of the Attorney General claims; and, as he lately argued in the Harvester case—"to preserve the small dealer," etc., etc.

Then the court as to Section 2, of the act, and in order to satisfy the "demand" for a "standard," proceeds to reason thus:

That "monopoly" in the strict technical and original sense of the term (meaning a legal grant to one to monopolize all the trade in a certain article, and this of course being a *prohibition* against others engaging in such trade), had not existed in England for many years, and never had existed in America; that after legal monopolies had been abolished in England the term "monopoly" had gradually in common speech (in England as well as in America), become to be frequently used to denote the *"results* of monopoly and monopolistic *practices,"* such as "forestalling, engrossing," etc., and particularly "the forced *enhancement of prices"* (all sudden, temporary or *acute* acts which can imply *guilt*); that hence these terms, viz.: "forestalling and engrossing" and "enhancement of prices" must be supposed to have been in the minds of Congress—evidently because *they* could furnish the much needed "standard" "demanded" by the act.

The court then, to support this view, is led to cite but one English case, viz.: *Mogul Steamship Co.* v. *McGregor,* A. C. 25 (1891), in which the plaintiff claimed damages from a combination—not one that had *raised rates or enhanced prices,* etc. It was an association or combination of ship owners who were doing a large part of the trade in ships between several Chinese ports and Europe. The association had greatly *lowered* prices and given special inducements to shippers to ship exclusively by its vessels, and thus it was able to increase its trade and draw the same from its competitor, plaintiff. Plaintiff

claimed that he had been ruined, or threatened with ruin, by the *loss of trade* which thus had been drawn to defendants by the *ruinous prices* and *special inducements,* etc.

The whole argument of the various opinions of the Lord Justices was that one could *not* complain of "competition" or of *combination* that resulted or was intended to result in *prices far below even a reasonable or 'living' figure."*

But it was *not* ruled that an agreement between rivals in trade to charge only a certain price, which might be found to be *reasonable,* and for a limited time or territory, was illegal (as held in Am. Joint Traffic and Trans.-Mo. Freight Assn. cases). Much less was it ruled that the *combination* of the ship lines for the purposes of trade was illegal simply because it carried *"a power to control prices"* and therefore "unduly restricted *competition."*

It was not ruled that the *association* of plants or lines was *per se* illegal or fixed guilt on the parties accused. And such citation seems strangely inadequate to support any proposition of the kind. The decision was to the effect that even a combination between trade units by which their assets and capital were added together for the *very purpose* of increasing their own trade and *eliminating competition,* was *not* a "restraint of trade" *or* "a monopoly"—either in a legal or common speech sense.

The whole 470 pages of briefs on the law in this Standard Oil case—tendering this court *over 400 citations*—and the 620 pages of briefs on the facts, were seemingly tendered this court with *no claim* (that is, with no open and formally expressed

claim) that the Northern Securities opinion was *erroneous,* and with *no appeal* to *have said decision overruled.* And the basis of that opinion was attempted to be disturbed only by arguments which here and there conflicted with the *reasoning* of the decision—but for some reason or other lacked this candid and formal appeal. And although the cause was reargued, it was seemingly reargued upon the *same* basis as originally submitted; and, as in the Northern Securities case, *no petition for rehearing* was filed therein.

And so as to the briefs in the present case.

They are presented upon the basis that the theory of the prior decisions, principally the Northern Securities ruling, as explained by the "rule of reason" in the Standard Oil case is to control the record.

In the brief for the Steel Company it is said (page 11):

> "The true interpretation of the terms 'monopolize' and 'restraint of trade' as used in these sections (of the Sherman Act) *was in doubt for a long time* after the passage of the act. The authors of the act, the members of the bar, and the judges themselves, differed more or less upon the subject for upwards of twenty years."

There is evidently, therefore, through the entire brief no intimation even—that is, no open and candid intimation—that this court's construction of the act is wrong, or leaves "doubt" as to how to apply it.

It therefore becomes our privilege to attack the

prior construction of this act, and to show by our feeble demonstration that this construction *amounts simply to an attempt to make a constant out of a variable.*

Nor can we put the responsibility for this result upon Congress.

Suppose Congress had *specifically* enacted that where two legally existing concerns or two individuals engaged in a specific trade should *combine their assets and plants,* in order, if you please, to extinguish "competition" between them, the officers of the companies or the individuals concerned should be "guilty of a misdemeanor," and be punished by fine and imprisonment. What would this court have said about such an act, *except to hold it unconstitutional?*

What would it have said of such an act, which was *further* conditioned: That even though in such case an *intent* to increase the volume of trade in that article existed, and although there was concededly an intent to *reduce* prices the parties were still *guilty?*

How, then, can the court put such construction upon a statute passed in *general terms*—"in general language"? An act which does *not* expressly say this, and yet a statute which *can* be *safely* interpreted in a way to reasonably fix guilt, which *can* be safely interpreted to mean unreasonable or fraudulent trade *practices,* and unreasonable or *fraudulent* —that is, monopolistic—*practices?*

Is it not easily seen that this court has unconsciously dragged the *statute from its base*—"re-

straint of trade''—in order to indirectly ''sustain'' what it is pleased to call our *competitive system?*

And what is our *''competitive system''?*

There is no definite concept in such a term *except independence* or *individuality* in trade. And if the statute prohibited mergers of independent plants, it prohibited *all,* ALL such mergers.

If *co-operation* in trade is not an evil, *per se,* if combination of small trade units is necessary in *some* lines of business in order to obtain the *greatest amount* of trade, and frequently *absolutely necessary* to obtain any substantial part of *foreign* trade, and instead of depressing *healthy* competition, is frequently an *encouragement* to (1) *competition to increase* trade, (2) *competition to establish reasonable* prices, and (3) *competition* to serve with *best efficiency* the public in the line of the *particular* trade—how do we find any prolific benefit in a *wholesale ''preservation of our competitive, i. e., independent system?''*

This *court therefore has lamentably been betrayed into attempts to make a constant out of a variable.*

And most able attorneys are bringing records to this court of such length that no human brain could ever appreciate the showing of even a moderate fraction of the ''evidence'' given, and inviting the court to wade through the 1,000 pages or more of briefs submitted on each side, to find a count on which to convict! The result is a wearisome shifting back and forth in the arguments before the court —chasing a will o' the wisp.

We do submit that it is indeed dangerous to find a question of *intent* from all the various facts and suggestions submitted here—when no *oppression* of the public *has ever been claimed, either* in the way of *enhancement of prices* or in the way of *reduction of trade.*

It is in fact an amazing thing.

"Two exporting grocers (Mr. Justices Holmes in his Northern Securities dissent) are to be "sent to jail"—when it has been an obvious and utter impossibility, *either* on their part or on the part of *any one knowing all the facts,* to tell *when* they became *guilty!*

Conclusion.

All of the labors of the government's counsel as shown by the headings in their brief, and all the labors of the court in these several cases, and the result of all of its reasoning, are shown to hover around this one proposition:

That whereas, there were, (immediately prior to the consolidation or to the adoption of the "device" of the (strictly legal) holding company), a number of corporations which were independent of each other, and presumably "competing" with each other, for iron and steel trade, etc.; and since they apparently had not—or at least no one of them had—power "to control prices;" and whereas, immediately *after* the consummation of the device, the entire interests or trade represented by the holding company and all its subsidiary companies, repre-

sented an "*estimated* percentage" (whether 55 or 60 or 70%) of the total steel and iron *trade* of the country; *therefore* it must be presumed that there was an intent from the new formed arrangement in the various companies or their officers "to control prices," because such a large percentage of trade demonstrated the *power* to so control. And hence, the result of such arrangement was "a stifling of competition between the former subsidiaries" and an attempt "to monopolize the whole or *a part* of the steel and iron trade or commerce," etc., etc.

But when, the defendants' counsel answers that such an arrangement would result in *vast economy* in *handling* the percentage of trade (whatever it actually was); when they further answer that it was *necessary* to so integrate the various plants and lines of trade, *in order* to bid for *foreign* trade; when they seek to prove it by the *vast actual increase* in foreign trade from an insignificant to a very large proportion thereof; when they point to the fact or claim that prices of the *same* material, (quality and quantity considered) were *not greater* after the consummation of the device than they were *before,* and in fact and upon the average were *definitely less;* when they claim that they have shown that the trade of the "non-trust" or *independent* companies has *increased* in proportion *more* than the increase of the total trade of the Steel Corporation; when they claim that the association has also greatly aided in *increasing* the total volume of *domestic trade,* etc., etc., they are answered by this amazing proposition:

That all this is IMMATERIAL, *and that they are guilty—of what?*

Of an *intent* to unduly restrict *not* trade, but *competition,*—from which it *follows* that they are guilty of acts *in restraint of trade,* etc., etc.!

This we repeat is an amazing situation. And why there is no candid and open and vigorous attempt made on behalf of the regular counsel for defendant corporation to tear to shreds this false concept is equally amazing.

Is it feared that it would offend this court to suggest that *occasionally* it may make a *mistake?*

It is indeed a false respect for both the ability and the candor of the justices of this court to assume that when the court has made a mistake, it will *not confess its error,* a thing which able justices have to do almost daily on the trial bench and justices in reviewing courts frequently have to do—and with no loss of respect from the bar or the public!

It is true that in the late argument in both the Harvester and Steel cases very able arguments were given to prove that an intent to restrain or monopolize or oppress could not validly be inferred from this statute, unconnected with *specific acts* of wrong or oppression. But why was it not *openly said or suggested* that the rulings to the contrary in both the "Securities" and "Standard Oil" decisions were *erroneous?*

When Mr. Justice Pitney asked Mr. Bancroft, (for the Harvester Co.), as we recall his words: "I notice that the court below based its opinion upon the fact that the Harvester Company controlled 80 or 85 per cent. of the total trade, and that this gave you *power* to control prices in that line of trade, and not upon the claim or basis that you

actually had raised prices," etc., etc. "I should like you to direct your argument to this feature of the case."

Mr. Bancroft (unconsciously no doubt) declined the gauge or challenge thus tendered him—and thereby missed his opportunity.

He answered with a very able argument to show that *wrong intent* could *not* be gathered from an *act* of combination or consolidation where the consolidated entity had existed for many years in actual practice, and when *no* enhancement of prices or *other* specific trade *acts of oppression,* etc., etc., had been perpetrated or claimed to have been perpetrated for at least 10 years last past—etc., and then spoiled it all by his assertion that *that* was the law *"as he understood the decisions."* (The "trust" decisions of this court.)

It is time for *some* one to candidly suggest that the court *has erred* in these "trust" decisions, and thus render it the best service that can be given it in these uniquely burdensome and brain-wearying cases, and which are leading us—*nowhere.*

Respectfully submited,

HARRY S. MECARTNEY.

137 So. La Salle St.,
Chicago, March 20, 1917.

The "Merger" Case

Petition for Rehearing

(An Appeal from the Younger Generation)

Written by

An Officer of the Court

The "Merger" Case

Petition for Rehearing

An Appeal from the Younger Generation

To our Brethern,
the Justices of our National Supreme Court:

I attempt herein to voice a plea, which as one in the throng I seem to hear from the younger generation of America as uttered from a vantage ground of view or vision which, of necessity, it occupies alone.

The fallibility of human judgment is not measured by the human mind or what it lacks. If so, a body of jurists selected, as are the justices of this court, from a large number of men trained in legal logic, would rarely disagree upon clear-cut questions of legal principle, and an error of the majority in a thoroughly considered case of that kind would be almost a marvel.

But early environment limits our view; custom draws us into by-ways; dangers imagined in youth bring "fears in the way" in old age; and ripened judgment and honest patient effort have to yield a tribute to these tyrants of experience and occasionally at their behest to step from the path of accuracy into the field of error. This is true of us all.

The older generation have fought and conquered the hard pressing issues of their younger day. The younger have thus been left free in their early youth to diagnose issues in embryo, and by the time these have grown large and have to be met are more familiar with them, have taken their measure, are more ready with weapons for the fray, have selected the vulnerable places for attack, are more confident of victory.

In the logical trend of things the younger generation have been carried farther on in the road to progress, farther up the mountain towards the pinnacle of universal peace.

Here is their vantage ground.

The call to service does not necessarily summon us to tread beaten paths or to observe set forms, or to repeat time-worn amenities.

The "officer of the court" sworn to aid it—to *constantly* aid it—in the ascertainment of truth,—in the *upholding* of truth,— is not bound to conceal his knowledge of a vital error having been committed until the curriculum of a widely variant practice shall bring around a similar case or bury it forever. Nor is a paid retainer the only key to unlock the breast of a *faithful* officer and loose the secret there concealed and prompt an appeal for justice and right.

The justices of the court sworn to support the constitution and *uphold* the law are not bound to hide any conviction of error committed and allow legal rights to be abridged or destroyed, and con-

fusion to increase until perchance some one affected by the error shall divine that the judges have perceived their error AND will be willing to acknowledge it.

It makes no difference that custom has sanctioned this course. The development of character and the enlargement of soul may involve the departure from ruts of error as well as an adherence to the lines of truth; and each refusal to so depart where the duty seems clear, adds a new sin to one's record. The secret of error committed in innocence becomes burdened with the guilt of concealment.

So, feeling that the high court of the land has erred in a case of far-reaching importance which will add to the already fast gathering confusion, tend to put off the day of ultimate reckoning and to further obscure the light in a day of much darkness, the writer submits this appeal to the justices to reconsider the issue of *competition* or *co-operation,* and to the majority (or to any one of them) to confess to themselves and of record their error *if* they have erred and can discern it; or that they announce that the principles involved in the "Merger" decision will be re-considered upon a proper case presented.

My call to respond: It is in the line of my profession.

My warrant: Born in America.

In the name of the common people who demand that the most vital principles of the day be not an-

nounced in the highest court of the land with a divided judicial mind and heart;

In the name of the patriots of America who are pained to see the press explaining divisions among the justices as caused by partisan bias and belief in the truth of which is of necessity fostered by such repeated divisions;

In the name of those ambitious to serve by formulating wholesome and efficient measures for relief and who can have full confidence in legal principles upon which to build, only when announced by a united court, and whose work requires that obstructions be cleared from the way;

In the name of the labor unions and other co-operative bodies of America who rightfully wonder whether "competition" demands an undivided fealty in economics, and rules our industrial destiny—is omni-beneficial; or whether "*co-operation*" has *any* warrant for recognition, and whether the bond which binds them together for co-operative effort is tainted and ignoble;—

The younger generation appeals for a re-consideration of the principles involved in the Northern Securities case.

To the end that a united court or a more united court may utter the verdict "void" or "valid," and the way be cleared for action and advance.

The nation ought to anticipate impending evils by preventative measures. And where evils have grown up for the want of such measures they ought to be promptly corrected.

Usually the people neither prevent nor promptly correct; they have to be *driven* to face about after they have suffered from disaster.

Such disaster may sometimes be deferred by an erroneous judicial fiat, which temporarily relieves the pressure or relieves it in certain places; but it is bound to be all the more momentous and dread when it does come.

Great crises in a nation's internal affairs never come unannounced. There is always a herald whose warning is not heeded; there are ominous rumblings which are laughted at or willingly diagnosed as accidental or incidental or ultra-distant.

The Demon of Evil does not openly and boldly destroy. He first confuses, and while his prospective victims are looking in various directions or accusing each other, and their systems are temporarily deranged and disordered, he innoculates his insidious poison.

America has become intensely commercialized. The god of Mammon reigns. He demands heavy tribute from all individuals and institutions. Courts formerly useful in building up deliberately a science of legal rights are now strained to repeat, at the instance of oppressors and speculators, their time-worn decrees and announcements, leaving but little time for the consideration of vital and "pioneer" cases. They are thus of necessity rushed into error a large part of the time and thus is fostered division and the now common and essentially ominous dissent.

The frequent errors of high state courts have now become alarming; and many divisions and dissents

in the court of ultimate national judicial authority proves—must of necessity prove—frequent error. Much is thus added to the fast gathering confusion; and this occurring so often in the most vital cases gives alone a heavy impetus towards the danger brink; or makes a heavy draft upon the nation's economies, and hence upon its welfare and its life.

Epoch-making issues must be settled correctly or grave consequences follow. Epoch-making decisions must not be allowed to remain as first declared by a divided court, or calmly submitted to by the whole people of the country with a "so goes the world" sigh of resignation.

The consequences are too serious.

It is not the money interests of Mr. Hill and his associates that have been involved here.

It is not railroad rates or the quality of service to the communities served by the two or three roads in question.

The question is, rather, shall a nation grown old and highly developed industrially, its territory covered with a close network of railroads and other trade arteries, be allowed to combine its establishments and roads in the interest of *economy* to the whole people; or shall this be prevented upon the plea that mankind is naturaly selfish, cannot be trusted, and that therefore it is *dangerous* to be *economical?*

It is whether "making money" is to be forever assumed to be the chief ambition of man and the goal of his "prosperity" and be he forever encouraged to treat it as such, and that therefore co-operative agencies or instruments are not to be encouraged

for fear of greed controlling the exercise of the increased powers.

It is whether in the onward march of the nation at large towards its goal of sacrifice and ministry, it may try to husband its energies, save repetition in its local systems, and so co-operate in its public and semi-public industries and utilities as to spare the greatest number of people for alleviating and ministering to needy ones at home and abroad.

To correctly settle such question, it will do but little good to look over decided cases. We must look to the *future* and have visions and some conceptions of the destiny of the country at large.

What is this destiny?

Continued and increasing sway of the god of Mammon, commercialism forever, the masses financially subjugated, the ceaseless struggle for positions of vantage and power over each other,—constant restlessness,—hopelessness,—death?

Or, equity in dealing, justice, forbearance, sacrifice, hopefulness, vision, service to other nations, world redemption?

If the latter, is not "*co-operation*" the watchword for advance, the accompaniment of collective effort for others? And if so, what is the import of a decree which stifles this battle-cry?

Whenever courts have gone wrong in cases involving grave questions of public policy or economy, fear of some imagined pending evil or disaster has been usually the lodestone of error.

"As man thinketh in his heart, so is he," applies not merely to questions of morality.

"As Justice *fears* in her heart, so is she," could accurately be written of decrees human.

What is it that Justice has feared in this case?

The possibility *that one corporation or set of men might control the whole transportation system of the country.*

But, suppose such a thing were *economical* to the general public of the country.

Suppose it were *more convenient* for the general public of the country.

Supposing the aggregate wealth, the aggregate trade, if you please, of the whole country were thereby *increased?*

What then?

To say that the nation at large would be incapable of regulating such a company is to confess national weakness, and to run away from an issue that *possibly* must be met.

We are passing—have passed—the bend in the river. We must not refuse to turn about and look ahead. Driven by Necessity toward the headland of Satisfaction, we have refused to turn up the broad highway of Sacrifice and Ministry. And Prejudice and Habit have made us willingly blind to the rocks of Commercialism and Greed directly ahead. Now we doubt each other, are blaming each other, are quarreling with each other; we refuse to turn about; and the hell-whisper of *"Paternalism and Socialism"* is more audible to us than the stentorian appeal *"Courage and Co-operation,"* the battle-cry of our professed faiths.

Brethern of the Bench: Let us whisper a word of courage: America *is* strong enough, she *has* courage enough to meet the issue brought upon herself—Co-operation or Stagnation, God or Mammon, Life or Death!

Do her not the wrong of keeping her eyes blinded to the issue which has long pressed upon her and is pressing harder the while, and to her full duty of marshalling for co-operative effort and master strokes her minions in error and unhappiness, as well as those whose ideals are healthful and true, but whose energies are unused and dormant.

Justice, too, not only fears, but she also has fads and bugaboos. She sins not from plain dishonesty. She yearns to do right. But she is "renewed like the eagle" from generation to generation in her foibles and prejudices, as well as in her strength. These uncrown her at times without her knowing it and work ruin in her courts.

We can bring to the justices of this court no rules of logic unknown to them.

We can add nothing to their powers of reasoning.

We can analyze cases no better than has been done, and fuller analysis would do no good.

But may we not appeal for more confidence in America's coming yeomanry and add testimony that it can and means to fight its battles with weapons fit, and to meet issues—to conquer?

May we of the younger generation not appeal for the privilege of bearing the burden which is ours,

to be allowed to feel the full pressure of issues which confront us?

May we not protest against the fear of combination, and question the warrant which forbids us *co-operation?*

May we not volunteer in the present and add our vision of the future?

May it not be that we have all been looking too closely to the mountain of precedent piling up, and thus have been tied to the past, and forgotten to look to the future for our hope and to find the path we must tread?

The milestone cases of this court of the earlier day were not dominated by precedent and the phrasings of constitutions were not interpreted by wading through its mazes. The *destiny of the country* was looked to and this as dictated by the vision of a faithful strenuous lived race.

Has this case been argued with this destiny kept constantly in view? If so, we cannot discern it in the briefs.

Analysis and logic might be sufficient for such cases if they were reasoned on principle alone; but if it is tried to drag them through many and complex reported cases the course is long and devious; and it is too much to expect that nine men can correctly travel the whole sinuous course from end to end and come out at the same exit unless the way is lighted from above.

May we not be passing the bend of the river, where wasteful competition must be left behind and effective co-operation must be the watchword?

With all due deference, it is no "mere economic question which this court need *not* consider or determine."

The question here is whether a thing is an *evil*—a public *evil*. And as this thing is one of trade, it is a trade question, an economic question. If the thing is such evil, it falls within the prohibition of the Congress of the country. If it is not, it cannot fall within it.

No one contends or claims that in express terms any certain style of corporations or any certain method of incorporating was interdicted. It is not a question, therefore, as to whether a particular method or *technique,* as it were, is illegal.

The question is whether a certain *principle of action* shall be condemned, which principle may be necessary for the progress of the nation or for the achievement of its destiny, or *to save its very life? This principle is co-operation.*

Have the arguments dwelt prominently with this principle, or carried it out to its ultimate scope, or shown clearly how the decree of the court of necessity condemns it?

If not (and it is thought that they have not) there is yet a niche to fill.

We said above the "ominous dissent." But it is ominous not only to the public; it is so to the court itself.

In the Trans-Missouri case as well as in the present case, Mr. Justice White protested that the court's decision condemned in principle every labor union, the members of which had associated themselves to-

gether to better their condition and obtain reasonable wages.

If this *should* be so, is not the error of the decision capable of being made so clear that every sane, hard-headed mechanic or laboring man throughout the country will not only believe it, but be able to see *why* it is so.

Says Mr. Justice Holmes: "The question here is whether two exporting grocers should go to jail;" and that the decision holds illegal every ordinary partnership or association, etc., throughout the country, which has been made by competing tradesmen.

If this be true, will not the small partner or stockholder, as well as the large and prominent one, be able to see it?

The common yeoman can usually tell, on the facts being given, whether the two exporting grocers should go to jail. The laborer and mechanic *live* in the principles which dictate and support an effort to secure betterment of their condition; and if the Supreme Court of the land has run counter to such principles in its deliberate and studied judgment or decree, they will sooner or later discern it. If such a decision does affect and condemn such organizations and their earnest efforts to bring about better wages and better conditions, in the very nature of things it will not be long until this court will either have to renounce its doctrine and vote its decisions erroneous or will be invited to enter judgment against inter-state labor unions and similar bodies, a thing which it will find itself very reluctant to do.

Are not the warnings of Justices White and Holmes in these two cases, potent with the sugges-

tion that *another effort* ought to have been made and still ought to be made, to have the justices agree? Is it not just *possible* that error has been made and in a matter both vital and simple of understanding? Do not the dissent of four judges make it *probable?*

The frequent dissent of so many judges must of necessity weaken, has of necessity heavily weakened, the confidence of the people at large in this court,—waving entirely aside the professional agitator, and the yellow journal editor, and counting only the great body of respectful, law-abiding, unprejudiced, hard-headed and just citizens.

A court of rugged fidelity and highest intelligence, its dissentient decrees have been the rule for years in matters of most vital import. This is enough in and of *itself* to alarm reflecting lawyers and citizens.

To assume that the majority of one has been constantly right, is to assign to that one mammoth mental parts and unnatural superiority to his colleagues. This might explain the situation if the dissenters were the same judges all the time, or the dominating vote came uniformly from the same judge.

No, we cannot explain the dissents or divisions that way. The ability and industry of the judges are not questioned by anybody. We doubt if Marshall and his worthy colleagues would have been more uniform in their opinions had they been doing or attempting to do the work that this court is trying to do to-day.

But that brings us to another vital point or suggestion which no doubt ere this has been raised in

the mind of the reader: How can this court transact the business thrown upon it with promptness and dispatch, and yet have time for the reconsideration or rehearing of cases, or for ultra-earnest and exhaustive efforts on the part of its justices to agree?

It cannot.

But it can give such deliberation to cases it *does* decide. It can be particularly careful with its "pioneer" or turning-point cases, leaving to the Congress and other agencies the reframing or remodeling of the system of practice so as to relieve its congested docket.

That this is necessary there is no doubt. And the writer will not dodge the challenge implied in the suggestion, viz., what plan therefor is feasible? We will not prolong this document with a long argument, but just outline some suggestions "in the rough."

(NOTE: Here are omitted some six or eight pages devoted to suggestions as to how the congested docket of the court could be relieved.)

The chain of reasoning running through the majority opinion is as follows:

Congress has power to regulate inter-state trade; these two "merged" carriers are engaged in such trade; they are thus subject to regulation by Congress;

The object of the anti-trust act was, and its language imports as much, to protect the public from combinations, conspiracies, etc., which restrain such trade; a merger of two "competing" or independent lines or establishments engaged in such trade *extinguished competition between them;*

The extinguishment of competition between two such lines or establishments in and of itself restrains trade; hence the merger of these independent or *competing* lines *is within the prohibition of the act.*

There are two unsound links in the chain—the ones italicized.

What is this "competition," which term the court has read into this act?

"Competition,"—a seeking together.

Seeking what?

Seeking trade?

Or to make money through trade?

Or to make the most money with the least trade?

Or to get the most trade without losing any money while making little or no profit?

Or to give the best possible service for the most money?

Or to give the poorest service consistent with making much money—or little money—or merely a fair living—or simply keeping above the point of actual loss?

Or to give good service to the public, even at the point of much actual loss—or little actual loss—or no loss—or little profit—or fair profit—or gross profit?

Do all independent concerns, "competing" concerns, *agree* in their policies and tally in the degree of *intensity* in their purposes?

If they do, what is this policy, and at what point is this intensity?

If they do not, of what definite value, or how

definite *is* this "competition" that has been made to do this yeoman duty in interpreting the act of Congress?

What *is* competition,—this alleged priceless boon in the trade world,—this supposed self-acting regulator or governor of the laws of trade in the interest of the public?

Competition has been confused with the *inducement* to compete.

If I hold a piece of meat before two hungry dogs, a struggle for the meat might and usually would result; yet the meat—the inducement for the struggle —must not be confused with the struggle itself.

It is not absolutely certain that such a struggle for the meat will result—one dog may fear the other and not try for it, or he may imagine that meat will not agree with him, or he may have compassion on his hungry companion, etc.

If there is enough meat for both dogs, there is not apt to be a very great struggle on the part of either.

But, however this may be, the point of the illustration is, that the *inducement* to compete is not competition, even in dog nature—and that even "dog competition" does not follow *automatically* from the inducement.

A live beef in a corral close to an armed starving Englishman would logically have but one fate in 999 instances out of a 1,000; before a starving Hindoo, it would likewise have but one fate—but a wholly different one—it would be perfectly safe from molestation. Yet in the former instance the placing

of the beef before the Englishman could not be said to have directly caused its death.

The merger, therefore, of two independent and competing establishments does not in and of *itself* extinguish the effort of each to serve the public to the best of their ability.

The public has no direct interest in the struggle or rivalry between two independent establishments—it has what it is pleased to call an interest in the "benefits" of competition. It has a right to prompt service and reasonable prices. Has it a right to *ruinous* prices—prices established by one man, which will ruin himself and all his competitors?

And if the public gets its service and its *reasonable* prices, what interest has it beyond this?

The second fallacy in the opinion is in the basal assumption so often reiterated, that the *extinguishment of competition is a restraint* of trade.

Here is the great lodestone of error, the blind alley—the air-hole—the maze.

To extinguish actual competition between what may be naturally competing establishments, *without substituting anything else,* may *lead* to public detriment.

To co-operate and *join means and resources* for the purpose of *increasing* trade and developing new territory, is a different thing.

It makes no difference that the ultimate object in such co-operataion is the making of money. For it will certainly be conceded that the main incentive to business enterprise is making money; and the induce-

ment for *more enterprise* would seem logically and legitimately to be the making of *more money.*

What has led this court to assume that only evil comes from a combination which happens to extinguish the inducement to compete, or that it can bring *no* advantages of *economy,* or *public convenience,* etc., which must be set off against such competition and a *balance struck* before the net evil or net good be ascertained?

The court reasons: That Congress in express terms has *not* forbidden mergers or consolidations, but only such as restrain trade; as mergers or consolidations of independent or competing establishments *do restrain trade,* therefore the same are within the inhibition of the act.

Then the court proceeds to say that it has no concern with the question of whether such mergers, etc. *may be* a public benefit, *i. e.,* do *not* restrain trade, for Congress has by its fiat *said* that all combinations which restrain trade, are illegal.

A more complete begging of the question, it is hard to conceive.

And the court proceeds to say: That if this merger is allowed, then further mergers could be allowed, until still much more gigantic mergers would be able to fix prices over a large territory and possibly the whole country. And when it is answered that Congress could regulate such rates, and therefore that the *fear* thus used by the court is *unfounded,* the court replies that, if Congress could do so, it has *not chosen* to do so, but has simply decreed that such mergers *are* illegal—around the circle again.

Will the justices deny that the approbation of a manager may be and often is sufficient to bring out the best service in a foreman or other employe?

That healthy rivalry between each other for good marks by the manager is inducement enough for the best service of such foremen or workmen?

That genuine public service and public approbation and uniform testimony to a business life well spent, *may* be inducement enough for men to do their business well, to be fair in fixing rates, and to prompt them to "mergers," if you please, solely in the interest of economy, greater development and better service?

Why may not two competing establishments or lines of railroad be run to their fullest capacity under one management and give out their best service to the public? Have they *no* inducement to do so? May not *duty* to one's self and one's community be such an inducement?

Is it not easy to believe that people *can* or *can learn to* love their community enough to use energy and means in its service?

Brethern of the Robe: The younger generation of America does not intend to grovel in ruts of selfishness, or even in ruts of service. It is not going to suck the life-blood of a community through corporate oppression, or seek to appropriate the labor of large numbers of comrades in service at starvation wages, and then stand around waiting for war to show its "patriotism." And it is not going to allow others to do so.

It resents any volunteered estimate of America's manhood which pictures it as grasping and bound to

grasp all it can to the point of straining the country's institutions and "rendering Congress helpless" against its exactions.

And by the way, it wonders why, if "inter-state trade is a unit" over which the power of Congress is "absolute and supreme," there is any doubt about the power of Congress to regulate the rates of such traffic, and to see to it that they are *not* exorbitant and oppressive.

It wonders why the court should even take pains "to express no opinion" on this subject, when the court itself finds its *chief inspiration* in the *fear of* public oppression by heavy rate exactions.

May not love of country, love of service, love of God, be as natural an *inducement,* as great a magnet, pendent lines, as the approbation of a human supeplaced over one railroad management of two inderior is over a foreman or workman of one line?

Are we not to believe that human nature is growing better, that it may, if its responsibilities are placed upon it, *grow* better? And does it not *need* its struggles and its risks to grow stronger and more rugged?

And are there *no exceptions* to the rule—even *if* such rule be dictated by experience—that men *will* get all they can take and *will* oppress if they have the opportunity, and that *competition* is the only spur to wholesome effort and the only check on oppression?

Have we forgotten the American patriots of the Revolutionary period who placed their fortunes at the service of their country in time of need?

Have we forgotten the honest shoemakers of our home villages, who insisted on making good boots and for an honest wage?

Was the man, who during a fuel famine refused to sell his cordwood to the speculators, but sold all to consumers at ante-famine prices, *a freak?*

Is the "Village Blacksmith" *a myth?*

How has America fallen from her high estate when the highest court in the land rules in effect that its countless minions are debased by greed, will continue so, and that its mighty Congress is "powerless in the premises. That the patriots who will give their lives for it in war will not give their means to it in peace, or will not refrain from injuring it, and can never be *taught* or *trained up* to so act, that its ideals are myths, its religion of *service* a sham!

We spoke of crises:

Instantly the mind reverts to war or riots, or sudden and widespread disaster, and speculates upon the question how near do either of these impend?

If we seem to be in no immediate danger, all temporary fear is dispelled and the writer is put down as an alarmist.

Crises, however, are not alone those occasions where the public peace is threatened.

Whether a crisis attends the taking of any particular step is not measured by the margin between such step and open riot or manifest calamity.

As a matter of fact, no government is safe when the lives of its people are essentially wrong.

When, however, the problem of governmental safety may be supposed to be pretty well solved, crises will be the turning points in the *lives* and *economies* of the people.

If this decision were to the effect that all labor unions in America were illegal combinations, and that this court would enjoin all or any such unions as were interstate or affected interstate trade, it would startle every American citizen and the occasion would be recognized as a crisis.

Yet, *four* of the nine justices think and say that the decision *does* condemn the basal principle of such unions.

Why is this fact alone not enough both to suggest and *command* a rehearing or a reconsideration of the principles involved?

If the nation at large has reached the parting of the ways; and the people recognize that they must now take the highway of *co-operation* to reach their future goal; if this is so manifest, if the basic economic laws and impulses are so firm and so strong as to start and keep them on this road or highway, in spite of an occasional court decree producing confusion here and there, it will be said a decree as this is not so critical after all—no particular disaster will result.

But is it not—must it not be a crisis *in the history of this court,* and a heavy blur upon its record?

Shall the courts be left behind beckoning to the forsaken way and forging fragmentary chains of error on the soundless anvil of precedent and fear?

In the beginning of the argument which accom-

panies this plea (Part II), there is set out in over fifty numbered paragraphs, a number of observations of the writer which were printed and issued some weeks before the merger decision was rendered in this court. The pamphlet was written before any study of the cases. It was meant to show the economic truths which seemed to the writer to appear from one's actual experiences before the maze of decisions were entered.

Its main plea is a dual one: *co-operation and regulation.*

The history of events since the pamphlet was written has only confirmed this plea. The present effort of Congress made within a few months is to pass regulatory laws and increase the power of the Interstate Commission.

The people are taking, have taken the right road. It is little credit to them. They should have taken it years ago; and have been driven into the road by sheer force of an economic law and for self-protection.

Yet the point is, the people *are* marching on and now invite the court to follow. Will it not feel impelled to do so?

The court feared a combination which would control "the whole transportation system of the country." But Mr. Prouty (of the Interstate Commerce Commission), points out in his article of last *June,* in "North American Review," that for quite a while a big majority of the railroad mileage of the United States is controlled by *a half-dozen individuals*—the event which the court feared has practically existed for quite a while.

You see, court decisions and the cry "Down with the trusts," have not destroyed the trusts or prevented their growth.

In the said accompanying suggestions we seek to prove this outline:

(a) Untrammeled competition, recognized as healthful in building up the early industries of the country, is now in *certain lines* of industry, unhealthful, and its continued practice occasions *waste.*

(b) The "trust," is an economic growth and an economic necessity.

(c) It brings *increased power* to individuals by reason of its combination features.

(d) Therefore, it demands *special regulation;* and special security against acts of oppression may be required of it.

(e) The *cost* of this regulation is the price of the *saving* by means of the trust.

It was also said:

"The form of trust mentioned in the Sherman Act is *a trust to restrain trade.*

"The ever odious 'trust' of the popular conception as well as of the demagogue on the stump is the trust of *oppression.* It was more prevalent a decade ago than now. The trust of *healthy economy* of *fair wages* and *legitimate returns* has been more in evidence lately. The trust of the *future* will be this latter trust with returns of promoters or managers held for public uses or used for the common good. *The 'trust' may act for good or for* evil. Whatever its *action* may be, however, its warrant *for* EXISTENCE *is* CO-OPERATION. *And to condemn co-operation is to condemn life itself.*"

The fear of this court is not primarily of the trust;

The fear of the people is not primarily of the trust;

The fear is that the American people are so supine, so confused, so tied up by selfishness and so dormant in their ideals of civic duty and civic patriotism, so bound to a rank and silly partisanship, etc., etc., that they will not *rouse* themselves to use their inherent *supervisory* power to control these creatures that economic progress has brought to them.

Were this issue the ultimate test of American citizenship this court could not save the people from the issue.

The syllogism of the majority opinion restated is:

(1) To destroy competition is baneful to the public and therefore illegal.

(2) To own to the point of controlling both these roads gives the *power* to destroy competition between them.

(3) Where this *power* to destroy competition is thus acquired this *in and of itself* operates to destroy it.

That is, the *coming* of the power into existence, its very *advent,* destroys competition—that is, the *power to destroy* competition and *competition itself* cannot exist at the same moment; that is, the *inducement to use* the power to destroy *is destruction itself* —the inducement works *automatically,* as it were—is an actor—is alive and working—human nature in the main is bent one way—is debased—cannot restrain the automatic working of the inducement!

Is not the complete *non-sequitur* in the third proposition glaringly apparent?

It is confusing competition with the *inducement* to compete.

It is about as logical as to say that a man by taking a position where he can throw stones at either of two houses, hits one of them; or that by the mere fact that one has come to a crossroads he must be held to intend to take the wrong road instead of the right one.

The responsibility for erroneous decisions in the Trans-Missouri case and in this case (if they be both found erroneous) does not rest alone with this court.

The fear of the trust combination or merger, openly expressed by this court in argument and opinions, was prompted by love of country and was uttered in the people's interest. The court was entitled to be met on this ground.

But it was not. An adequate consideration of the *people's interest* in the broad question and their *protection* from the *increased economic power* inherent in the trust, clearly involved this issue. Yet, outside of a few occasional skeleton suggestions, the court received but scanty argument along this line.

The word "co-operation" was little used—the word "regulation" still less. *There was no appeal on the part of the railroads to be regulated.*

There was no one appealing to this court to warn the people by its decree that the time has arrived "and even now is" for them *to use their power of regulation.*

Some would say: "This is true for a very evident reason. The railroads did not want to be regulated. Their lawyers were controlled in their interests. They did not dare give out their fullest light."

This may be the true explanation. But we prefer to think that the lack of argument in the line of regulation was rather due to non-appreciation of this feature of the subject and to the idea prevalent throughout the country that anything which might tend to restrict the piling up of immense fortunes in the hands of railroad magnates or other captains of industry was "paternalistic" and a hamper upon "enterprise."

Nevertheless, whatever the reason, we make bold to say that these cases were not fully argued certainly from the standpoint of the *public* interest.

For instance, in the brief of Mr. Bunn, in the present case, where the decision of the Circuit judges is entirely cut to pieces by inexorable logic, as it is thought, the word "co-operation" is scarcely used at all, and no suggestion of regulation is made therein.

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While one is apt to be misunderstood, the effort to have this court set itself right "and that right early" in this matter of vital public concern, even though made by an humble pen, surely cannot be inconsistent with a keen sense of justice, and a regret to see wrong unrighted.

In this day of gathering confusion the nation appeals above all for *accuracy* in all her affairs, and especially in the decrees of her courts. She recognizes that her people sin against her. She also

recognizes that they will correct these when they see them.

She recognizes that without new issues to meet she will stand still and then decay; and she asks that no incorrect, though well-meant, decree shall shield her from the fight.

Error in vital cases in her courts results in injury, and its consequences directly and indirectly but surely gravitate down to and reach the lives of her subjects; their labor is thus wasted, their efforts rendered futile, their welfare affected, they lose—they suffer.

If our country has destiny and a soul, it appeals, silently it is true, but appeals all the same for a chance to develop her soul and approach that destiny.

And it surely cannot be wrong for one, who seems to see obstructions placed in her path, to do his share towards removing them.

Error is not only wrong—it *wounds*.

Error has *wounded* America!

To trace the cause of this error and display it clearly to the justices of this court is the work of an able champion. But no able champion is attempting it.

And it would seem not to be wrong for the humblest who seems to see the wound in her side to beckon to it; feeling that pain must be there to invite to assuage it; seeing the lips mechanically obedient to precedent and habit, to attempt to release them, and to render articulate her Silent Appeal.

PART II.

Comparative Schedule.

1. As population grows more dense the industrial system of the country

   (a) Becomes more complex;

   (b) Demands greater centralization in its management;

   (c) Casts greater responsibility upon its managers;

   (d) Gives greater opportunity for oppression; but

   (e) Brings the greater necessity for effective police regulations,

   (f) The greater the penalties that should accompany abuse of responsibility, both by prescribed punishment and public opprobrium.

   (g) And the more security should accompany the centralization of power to protect against oppression.

2. The more generally an industry touches or affects the people at large,

   (a) The more public it is, and hence

   (b) The stronger it bids for public—*i. e.*, governmental—regulation.

   (c) The greater the penalties and loss arising from the lack of regulation, and hence

   (d) The greater the cost of any prejudices which may keep us from taking such a logical step or adopting a plan of regulation.

3. The older an industry becomes

   (a) The more highly developed it is apt to become.

(b) The greater the necessity of centralization from the standpoint of both economy and convenience.

(c) And hence the more public it is apt to become and the more it is apt to need public recognition.

(d) The *less* the benefit to the public at large from actual competition, and

(e) The greater *waste* in competition,

(f) The *greater* does co-operation figure in its economy and effectiveness.

4. The greater and more intense the commerce of the nation becomes,

(a) The more stringent the police measures required for its regulation,

(b) The more does national regulation and supervision become necessary,

(c) And the greater the confusion from variance in local and state regulations and the greater the aggregate waste and public loss therefrom.

5. The greater the capital required for the establishment of an industry affecting the public at large (like, for instance, a railroad),

(a) The greater the waste from actual competition occasioning the building of entire new lines where they are unnecessary for the public service.

(b) While the necessity of public regulation of the established lines is all the greater.

6. The greater the number of railroads in the country,

(a) The greater necessity for centralized management and

(b) Assured permanent policies, and thus

(c) Combinations among owners,

(d) The greater the aggregate waste and confusion and inconvenience from the want of such combinations.

7. The larger and more extensive the railroads of the country,

(a) The more stringent should be their supervision.

(b) The less effective is local supervision and more urgent the call for national supervision.

Now, it would not seem hard for a candid observer to recognize:

1. That the industrial system of the country is complex;
2. That the railroad industry affects the people at large;
3. That it is now an old industry;
4. That the commerce of the country has greatly intensified;
5. That great capital is required by the establishment of railroads;
6. That there are a great number of railroads in the country; and
7. That they are large and extensive.

And hence the necessity for recognition of the co-operative principle and the fatuity of holding to competition as a remedy. And hence the necessity for regulatory police and supervisory methods of such industries. And hence, *if* evils and oppression *have* occurred (who will say they have not?), can we not attribute them *to the absence of effective regulation?*

When, however, we speak of the intensifying of

industries, commercial relationships, the growing complexity of modern life and increase of the volume of business, already vast, the mind instantly conceives of vast regulating agencies and of excessive interference and "paternalism."

And if this commercialism and complexity continues to increase, this fear would be well founded. But how about the commercialism, etc., *without* the regulation? Is it not to be feared more?

"The plainest things are things we do not see."

Probably the hardest lesson for the American people to learn is to learn that *commercialism* ITSELF *oppresses.*

The regulation which is demanded by an intensely commercialized and individually intensified life is simply a war measure—a measure of defense—something to hold things together while the people face about and enter into simpler living and find their lives in fields of service. And when they do this there will be comparatively few industries to be regulated to any great extent—those only that affect the people at large, like railroads, telegraphs, telephones, navigation, etc. Therefore, to the above comparative statements, we add a few more, viz.:

8. The simpler the article manufactured, however,
   (a) The less special is the skill required in its manufacture, and
   (b) The less the necessity for centralization in its manufacture.

9. The simpler the habits and methods of living in a people,
   (a) The fewer their wants.

(b) The smaller their manufacturing interests.

(c) The simpler their industrial system.

(d) The less strain upon public regulation and regulating bodies,

(e) The more effective will be the regulation of such industries as are necessary to be regulated, more time being left therefor.

(f) The more time will the people have for the urgent militant work and offices of the individual and the nation for others.

10. The greater the internal evils of the nation,

(a) The greater the necessity for co-operation in combating them.

(b) The greater the necessity for recognizing the co-operative principle, and, of course,

(c) *The more serious the blow to public weal by denying such principle.*

11. The more the nation and its people become militant for the good and amelioration of other nations and peoples,

(a) The more will the *co-operative principle* be used

First—To prevent waste in the repetition of one man's work by another; and

Second—To give more effective work through unity of action.

A Vision.

A land highly cultivated and productive, a land of homes with gardens and fields, a land of strong men and faithful women, living simple and rugged lives, toiling daily, striving constantly, resting regularly, grand in character, large-souled, throbbing in spirit,

acting upon its *faith, co-operating* for good, "working *together* with God."

Its erstwhile great cities decentralized, its countless thousands rescued from slums of filth and pauperism, as well as slums of selfishness and gluttony, and restored to normal conditions, its complex "conveniences" abolished, its child-life simple, healthful, buoyant and full of hope.

Its nation-wide highways centralized and controlled in the interest of economy and convenience, its local highways and utilities managed in the interest of and for its communal welfare, extravagance banished, efficiency predominant, while home functions are preserved in wholesome privacy and exercised under tender family care.

It does not rest upon itself redeemed; it hears the Macedonian cry from across the water. Its heraralds have long been there preparing the way. Its minions are going and coming to and from its labor field, bringing the subjects of its care and love to its own homes and settlements or sharing their life abroad.

And this land is America—its feverish rush for gold stilled in the calm of home culture; its struggle between brother and brother at an end; competition for positions of vantage over each other banished; competition to serve each other intensified.

America in the peace of a normal life—and its flag a symbol of **co-operation.**

A Retrospect.

Those were the days (when the Northern Securities case was pending) of commercialism run mad. The struggle for existence on the part of the early settlers had been conquered and succeeded by the industrial development of the county under the banner of "enterprise," and this banner was still held aloft and before the eyes of all—the millionaire—the multimillionaire, as well as the hard pressed laborer.

"Success" was the watchword and was understood to be getting rich, serving well in war, attracting attention through talents or holding office.

Patriotism was but faintly understood. "To fight and, if need be, die for one's country" *in time of war,* was its interpretation. To live for one's community in time of peace was to most people a new and even curious idea.

The motives of men in business were supposed to be entirely commercialized—to get money at all hazards, stopping only at the point of effectual legal restraint.

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Those were, indeed, the days of commercialism run mad; of ideals at war with practices:

Immense fortunes had been accumulated in private hands, and for *purely private uses!*

Children, not only occasionally but as a rule inherited these large fortunes, and of course were ruined by them or their development retarded and their lives dwarfed.

Men seemed thoroughly dead to any sense of this folly, in spite of the uniform object lessons of wrecked lives in wealthy people's children.

It was no disgrace to work simply to accumulate money; and a bequest of one's fortune (above a legitimate family competence) to the state, would have occasioned public comment as a very liberal thing!

The policy of nations was to build up only their own trade, and trade with foreign nations was nurtured only to the point that it was beneficial to domestic wealth getting; while in churches everywhere was preached the doctrine of sacrifice and was held aloft the vision of world unification!

This, too, at a time when a nation sometimes lent its life blood to give another state independence!

Competition, recognized as healthful in the building up of the early industries of the country, had long outlived its general usefulness; and, enshrined as a sort of trade idol, was used blindly to retard co-operation of large interests so necessary to fullest development.

Thus direct waste was committed in the name of the public good; so great was the dread of the "power of wealth."

This fear was the controlling influence which impelled the court in the Northern Securities case to attempt by its decree to annul a co-operative arrangement which assured a single definite policy as to the management of the two railroads in question and which policy had directly permitted the sudden and vast increase in oriental trade;—

A decree which in the name of **competition** con-

demned **co-operation;** and which stands out pre-eminently in the history of decided cases as **an act in restraint of trade.**

HARRY S. MECARTNEY.

CHICAGO, March 1, 1905.