Department of Justice Under the Democratic Administration

[Robert T. Barry, in Louisville Courier-Journal.]

In the summing up of the achievements of the Wilson administration too much attention can not be centered upon the record of the department of justice.

In importance to the business of the nation, despite the legislative accomplishments of the democratic congress, too much emphasis can not be placed upon the reduction by the department of justice of the area of doubt in the no-man's land between that known to be illegal and that which is certainly lawful in business.

But, you ask, is there no longer twilight in the "Twilight Zone?"

Yes, the authorities of the department of justice say, but this mysterious area of half-light in the law of trade restraint now is no greater than that accepted as a matter of course in the application of many other laws.

What are these advances?

What are the differences between the "sham dissolutions" of monopolies under Roosevelt and Taft and the "genuine dissolutions" under President Wilson?

What are the "consent decrees"—the short cuts to square the affairs of great corporations with the law—of which so much has been heard of late?

Anti-Trust Laws

In the domestic field, no more important and interesting questions have confronted the federal authorities. It is the purpose of this article to state the essential features of the situation with reference to the enforcement of the anti-trust laws.

You find at the outset that the guiding rule has been: To protect the public against monopoly and "undue restraints" of trade; but to do so in ways that do not hinder but help, do not obstruct but facilitate the developments of legitimate business enterprise.

As matters now stand, in the vast majority of cases it is not difficult for those qualified by training and experience to determine whether a proposed transaction is or is not in violation of the statute forbidding restraints of interstate commerce. The fundamentals are well established.

"The Standard Oil and Tobacco cases," the government's lawyers say "decided not only that those particular combinations were within the prohibition of the Sherman law, but made it certain that any combination in any form that unduly restrained interstate trade in any of its various manifestations was forbidden by the act. They removed any doubt which previously could have existed as to whether a combination which unduly restrained that commerce could escape the condemnation of the law because of the garb in which the ingenuity of lawyers had clothed it. They established the application of the law to manufacturing and trading combinations as well as to those affecting other phases of interstate commerce.

"On the other hand, these decisions put an end to a bugaboo which had been rather sedulously circulated by those whose idea of the proper way to deal with the Sherman law is not to interpret and apply it, but to repeal it. As a result of much competition, rather considerable acceptance was gained for the assertion that the Sherman law, if honestly enforced, would cripple all business however legitimate; that no man might make any sort of amicable business arrangement with a commercial rival for their mutual advantage without facing the open doors of the penitentiary.

Apprehension Unfounded

"In the great cases named, the supreme court made it clear that such an apprehension was wholly unfounded. In express terms it declared that a normal and usual contract of the kind essential to individual freedom, the right to make which is necessary in order that trade may be free, was in no way condemned by the act. In holding that any combination that unduly restrained trade was forbidden, it was pointed out that undue restraint of trade was not a new form of expression but one that had long been known and dealt with in the law. That to determine what acts constitute that undue restraint of trade all that is necessary is the application of that legal reasoning in which lawyers are presumed to be trained and competent. The anti-trust acts were intended by congress to prevent certain well recognized social and economic evils. Acts which do not threaten to bring about these evils are not forbidden. Those which tend to produce them are condemned."

Such is the now famous "rule of reason."

What of matters yet to be decided? Some of the pending questions, it is pointed out, are involved in cases now pending before the supreme court which are rapidly being pushed to a final disposition. Is the fact a combination has behaved itself toward the competitors left outside its embrace a defense to a charge of illegality in forming the combination and eliminating the previously existing competition of the units combined? Is a monopoly which is complete as to the invaded part of a given field of industry beyond the condemnation of the law if it has refrained from invading the whole field? Is an attempt at monopoly absolved by the fact that it turns out that in that particular field of industry it is not possible for such an attempt wholly to succeed? Is a combination which was illegal in purpose and inception and, through the use of illegal methods has intrenched itself in a position of dominance, now outside the application of the law because a few years ago it saw the light and has ceased to follow the illegal practices for which it no longer has need?

Absolute Accuracy Desired

The officials of the department recognize the desirability of the most accurate possible definition of the illegal transactions forbidden by the Sherman law. When the Harvester, Steel, Can, Lehigh Valley, Reading, Kodak and Shoe Machinery cases now being prepared by the department for argument before the supreme court shall have been decided, the so-called area of debatable ground will have been greatly circumscribed.

It is believed at the department of justice that there has been real and not unfounded dissatisfaction in the past with the results of the enforcement of the Sherman act. Under previous administrations important anti-trust cases were won, but no noticeable effect in restoring competition in monopolized industry followed the "dissolutions" which were brought about.

"The law was brought into derision and almost into public contempt," officials say. "For while boasting of victories the government was permitting trusts and monopolies to dissolve by dividing themselves into convenient parts which were distributed among the old owners. The result was merely a change of form. Those who controlled the industry before controlled it afterward and were no more anxious to compete with themselves than they had ever been. A court decree may look well on paper, but it does not change human nature. The law was thus practically nullified. This was true both as to the principal case of the Roosevelt administration (the northern securities case) and in the principal cases of the Taft administration (the Powder, Tobacco and Standard Oil cases).

"In marked contrast the present administration has insisted on real dissolution. In every case it has demanded that the parts into which the unlawful combination or monopoly was or may be dissolved be put into separate and distinct ownership and not left in the hands of the old owners. Such real dissolutions were insisted upon by the department in the Union Pacific-Southern Pacific merger case, the Harvester case, the Telephone case, the New Haven case, the Reading case, and the Kodak case.

The Reading Case

The Reading case is pointed to as a good example of genuine dissolution. The defendants proposed tnat the combination be dissolved by authorizing the parent company to distribute its stockholdings in the controlled company to its own minority stockholders. This would have been an improvement over the Standard Oil case, but it was inadequate. The government insisted that the parent company be compelled to dispose of not only its stock but also of its bonds and other securities of the controlled company, and to dispose also of them to persons other than stockholders of the parent company. The court sustained the position of the government and the result will be an entire severance of ownership of the parent company and the company which it formerly controlled. Under such conditions real competition will be possible.

The success of the prosecutions brought under the Sherman law and the enactment of the Clayton act and the federal trade commission brought about a real and marked reformation in many quarters. Illegal methods of doing business were seen to be dangerous and were abandoned.

The "consent decree" is one of the evidences of this wholesome development, it is stated. More and more often the men in charge of large enterprises, whose legality has been questioned, have volunteered to cooperate in making their affairs square with the law and thus avoid protracted and expensive litigation. These men the Department of Justice has assisted in every possible way The complaints in the New Haven, Telephone and Thread cases were for example, disposed of by decree entered by consent of the parties and results present striking examples of the advantages of this "policy of mutual reasonableness," as it is often called. Other important cases have been so ended.

Union Pacific and New Haven

This is illustrated by a comparison of the Union Pacific and the New Haven cases. Both were mergers of railroad corporations. The first case could be settled only by a lawsuit, which was fought by the defendants to the end. The original position of the government seeking dissolution was filed February 1, 1908. The case was decided by the Supreme court in favor of the government on December 2, 1912, nearly five years later, and the final proceedings winding up the matter were not had until December 22, 1915. The expenses of this litigation were very large both to the government and to the railroad company. The court costs paid by the company amounted to over $20,000 but that sum takes no account of the many thousands spent by the defendent corporation for counsel fees and for the other very large expenses incident to such a suit. The printing bill alone amounted to thousands of dollars, which was divided between the defendants and the government. On the other hand, the New Haven case was settled within ninety days from the filing of the bill, by the entering of a decree which was in every respect as effective a decree as if it had been entered into after the case had been heard by the lower courts and by the supreme court. It differed from such a decree only in that it was entered with the consent of the defendants, who agreed that it might be entered against them and were consulted as to its terms. In comparison with the Union Pacific case the cost to the parties was almost insignificant.

Telephone Case

The telephone case presents another instance of the advantages to the public of the consent decree. There had long been complaints by independent companies that the American Telephone & Telegraph Company and its affiliated companies, the Bell system, were attempting to monopolize communication by wire in this country. Such, indeed, was the declared purpose of the American company as shown by its report for the year 1910, and very considerable progress had been made toward that end. Over half of the telephones in use in the country were on its lines and it had obtained substantial control by stock ownership of the Western Union Telegraph company. In July, 1913, suit was begun against this system under the anti-trust act. Thereafter conferences with the department were sought by its officers and as a result the Bell system committed itself to a course of action which is designed to protect the continuance of desirable competition in interstate communication without hindering the co-operation of telephone and telegraph companies where the result is a supplemented service which could not otherwise be given. The pending suit was ended by a decree in favor of the government to which the defendants consented, and the threatened monopoly was thus prevented.

The most recent government victory in anti-trust litigation was that of June 24, when Judge Hand, of the New York circuit court ordered the dissolution of the Corn Products company. This company, it is held, has exercised a vicious monopoly of the manufacture of corn and glucose products, huge quantities of which are consumed in the United States. In this case for the first time the provision of the trade commission act, which authorizes the trade commission to sit as a master in chancery and formulate a decree of dissolution, is invoked.

Guardian of Public

The new commission will serve as a guardian of the public interest to see that the final decree carries out the intent of the law to bring about genuine dissolution. Space does not permit a full statement of the cases in which the department is endeavoring to protect the public against monopolization. Watch cases, paper board, jewelry, bicycle parts, cotton, plumbing supplies, bill posting and numbers of other fields of industry have been made the subject of attempts at unlawful control and monopoly. In many of these prosecutions are going on. And, from day to day, the department is constantly receiving and investigating complaints and making up its mind