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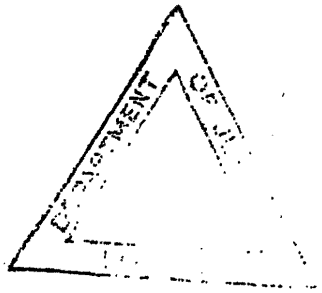

REMARKS BY

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Prepared for Delivery

before

THE NEW YORK STATE BAR ASSOCIATION

ANTITRUST SECTION

New York City

Wednesday, January 25, 1950

I am honored to appear before the antitrust section of the New York Bar Association to speak on "Progress in Enforcing the Sherman Act." I confess to some hesitation in discussing this topic before a group which probably contains more experts on this subject than any other group of lawyers in this country. Nevertheless, I am proud to appear before you as the holder of that office in our Government primarily responsible for the enforcement of the Sherman Act. I believe that that Act is the cornerstone of our free competitive enterprise system. In declaring unlawful every contract in restraint of trade it enunciates the major principle on which our society seeks to conduct its economic activities.

Chief Justice Hughes said that the Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[1/] He also said in his book on the Supreme Court that "a federal statute means what the Supreme Court says it means."[2/] An examination of the progress that has been made in enforcing the Sherman Act must, it seems to me, be founded upon an appreciation of these observations. In other words, the Sherman Act is adaptable to an ever-changing economy and wise judges are sensitive to these changes. Without this judicial wisdom, we would have seen no progress in enforcement of the Sherman Act. Competition would not have continued as the basic rule for our economic society.

The history of the enforcement of the Act, I think, proves this. That history may be divided into four periods.

The first is that from 1890 to 1902. That period saw effective enforcement for the most part only in the field of railway transportation. This was largely due to the decision of the Supreme Court in 1895 in the sugar trust case, that manufacturing was not interstate commerce and therefore not subject to the Congressional regulatory power.[3] Practically, this meant that only restraints upon railroads and steamships were subject to the Sherman Act. But we must not forget that the railroad industry at that time was probably our most important single national industry. The welfare of the nation was then far more dependent upon a healthy system of railroad transportation than is the case today. Effective antitrust enforcement in this field, therefore, was no small accomplishment. This early period is also notable for the adoption of the rule that price-fixing agreements are per se unlawful:[4] a rule that has remained unshaken down to the present time.

The second period extends from 1902 until the end of the first world war and embraces the administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson. The Supreme Court regained its vision and Mr. Justice Holmes in the Swift case in 1905 had no difficulty in effectively, if silently, overruling the sugar case.[5] As Chief Justice Taft said, the opinion in the Swift case "recognized the great changes and development in the business of this vast country and . . . fitted the commerce clause to the real and practical essence of modern business growth."[6]

This period was, I think, the most fruitful era for enforcing the Sherman Act until the final period commencing in Franklin D. Roosevelt's second term. Perhaps the most notable advance in the enforcement of the Act during the period was in the attack under Section 1 and under Section 2 upon integrated corporate combinations in the Northern Securities, Union Pacific, Standard Oil and American Tobacco cases.[7] These great victories for competition came in suits instituted under the administration of President Theodore Roosevelt, but in all but one of them the Government's cases were argued in the Supreme Court by Attorney General Wickersham.[8] And I think that prior to the present period, Attorney General Wickersham, under President Taft, instituted the largest number of significant antitrust prosecutions. In his four years in office cases were instituted against the American Sugar Refining Company,[9] Standard Sanitary Manufacturing Company,[10] Eastern States Lumber Association,[11] United States Steel,[12] United Shoe Machinery,[13] International Harvester,[14] Corn Products Refining Company,[15] General Electric,[16] National Cash Register,[17] Alcoa,[18] Motion Picture Patents Co.,[19] and many others. Some of the decisions in these cases are landmarks in enforcement of the Sherman Act. He also instituted the practice of negotiating consent decrees, the most notable of which was that against Alcoa. But time proved it to be ineffective.

It must be admitted that in one of General Wickersham's cases the Sherman Act received what has been proved to have been the greatest

setback in its history. I refer to the 4 to 3 decision of the Supreme Court in 1920 holding that the size of United States Steel Corporation and its power to monopolize the steel industry did not constitute a violation of the Sherman Act in the absence of a showing that the Corporation was exercising that power. To my way of thinking, that is but another way of saying that the Sherman Act only outlaws bad monopolies. The plain language of the Act is to the contrary.

The United States Steel case marked the end of an era in antitrust enforcement. It came at a time when people were tired of reform tired of war and eager to do away with Government controls of all kinds. Thus the decision comported with the spirit of the times. The result was a decided shift in antitrust activity. The decision ushered in the return to normalcy and the third period of antitrust enforcement. That period lasted until the NRA. In enforcing the Sherman Act for the ensuing 12 years the Department contented itself in the main with the institution of so-called practice cases; that is, cases under Section 1 which attack a specific practice rather than monopoly power. The practice most frequently complained of during the period was price-fixing.

But definite progress was made in two very important respects in this anti-price-fixing program. First, in the Trenton Potteries case, the Supreme Court reaffirmed the Missouri Freight and Traffic Association decisions holding that price-fixing was, per se, unlawful. 20/

The opinion in the Trenton Potteries case removed any doubt that the doctrine had been weakened by the rule of reason enunciated in the first Standard Oil case. Secondly, the Supreme Court in the Column & Lumber and in the Linseed Oil cases made it perfectly plain that the existence of a price-fixing conspiracy could be implied from a course of dealing without proof of a specific, definite agreement.[21]

The period from 1920 to 1932 is also notable in that the attack was furthered upon the abuse of the patent privilege. The campaign had been commenced in the Standard Sanitary case brought by Attorney General Wickersham in 1910. That case held that the "bathtub trust" was not rendered immune from the Sherman Act merely because the trust possessed patents covering some of the articles which had been the subject of the monopoly. During the 1920's the Department sought to apply the general principles of this case to new situations. The attack was furthered but the battles were lost, at least for the time being. Cases against General Electric,[22] Radio Corporation of America,[23] International Business Machines[24] and Standard Oil Company (Indiana) were instituted.[25] Only the International Business Machines case bore immediate fruit. General Electric resulted in a holding by the Court that a patentee could fix prices in license agreements without violating the Sherman law, Standard Oil legitimized various patent pooling practices, and the RCA case was settled by a consent decree of doubtful utility. The General Electric decision was rendered at a time when American industrial techniques were thought to have produced an

unparalleled prosperity. It was widely supposed that this prosperity was due in large measure to American inventive genius and that if courts tampered with businessmen's patent licensing arrangements, inventive genius would be depressed. The impact of these losses was to increase the impetus toward the use of patents by businessmen as a means of avoiding the rigors of the Sherman Act.

By 1936, however, laissez faire had had its day and it had ended in a horrible depression. Government sponsored cartelization under the aegis of the blue eagle had also been tried and found wanting. The country decided to return to competition as the rule for American business. The Supreme Court was ready to expand the Sherman Act to meet the felt necessities of the period. In rapid succession cases were instituted against the major oil companies for price-fixing,[26] against the Aluminum Company of America for monopolization,[27] against the major moving picture producers,[28] against the three leading manufacturers of automobiles for coercing their dealers to finance car sales through their affiliates,[29] and against the leaders in the glass container business for using patents to control the entire industry.[30] Each case resulted in a substantial victory for competition.

You are all generally familiar, I am sure, with this modern period of antitrust enforcement. The increase in pace is illustrated by the fact that in 1933 the average number of lawyers in the Antitrust Division was 32; today it is about 320. While the number of cases filed is at

best a poor index of progress, I think that it is worth mentioning that from 1890 through 1935--a 46 year period--411 cases were filed under the Sherman Act: an average of about 9 a year. From 1936 through 1949--a 14 year period--594 cases were instituted or an average of about 42 per year.31/

This highly sketchy review of the history of Sherman Act enforcement suggests several generalizations. First, the great strides that were made in the early part of the century in developing the meaning of Section 2 of the Sherman Act and its application against monopolies were brought to a halt by the Supreme Court in 1920 in the case against United States Steel Corporation. Since that time, with the very important exception of the movie cases and in the Pullman case,32/ only minor gains have been scored in dissolving monopoly power. The monopoly problem is, I dare say, next to unemployment, the most pressing domestic economic problem of our time. We recognize, of course, that bigness as such is no crime. We also must recognize, as has the Supreme Court, that "size carries with it an opportunity for abuse"33/ and that therefore we must be constantly on the alert for these abuses. There are now pending in the courts cases which we hope will revitalize Section 2 but will also make it clear that some corporate integrations can constitute unlawful combinations in restraint of trade under Section 1 of the Sherman Act. Herb Bergson is scheduled to speak to you on this subject at greater length this afternoon.

There is one aspect of monopoly power, however, in which very significant strides have been made within the past 10 years. I refer to the limitations placed upon the use of patents as a means of circumventing the Sherman Act. Where patents are the instruments of

unlawful monopolization the courts have had less difficulty in fashioning and applying remedies which will eliminate the monopolization. Thus the Supreme Court in the Hartford-Empire case in 1944 for the first time ordered defendants to license their patents to all applicants at reasonable rates of royalty. This type of relief draws the teeth from the monopoly because it removes the defendants' power to exclude--monopoly's hallmark.

The development of the improper patent use doctrine in a series of recent cases has also been a notable advance. The Supreme Court has declared that any use of patents in violation of the Sherman Act renders them unenforceable against infringers.34/ This doctrine has caused radical changes in patent licensing practices throughout American industry. A third important step forward was made in the Line Material case where the court narrowed the doctrine of the General Electric case so as to render unlawful a series of license agreements among competitors fixing prices for patented materials.35/ The result has been to confine the doctrine of the General Electric case to situations where a single patentee fixes prices for patented goods for his own protection.

Notable progress in the past 10 years has also been made through the expansion of the per se doctrine. You will recall that in the first Standard Oil case Chief Justice White indicated that not every contract that restrained trade was unlawful. He said that in order to determine those that were included, resort had to be made to reason. But he added that by their very nature, some contracts inherently restrain trade and

hence resort can not be had to the rule of reason to determine their legality. Nevertheless, his remarks gave defendants the opportunity to argue reasonableness as a defense to almost every case brought under the Sherman Act.

But ever since the enunciation of the rule of reason, the Court has tended to limit its application. That tendency has become more marked in the past 10 years. It has been established that boycotts and agreements fixing prices, and allocating customers and markets are per se unlawful.[36/] In the Associated Press case, decided in 1945, the Supreme Court refused to consider defendants' suggestions that the by-laws of AP were a reasonable regulation of its members' businesses. The Court held that, on their face, regardless of their effect, the by-laws restrained trade by excluding competitors of members from access to news. Again, in 1947, in the International Salt case, the Supreme Court declared unlawful, per se, the licensing of a patented device on condition that unpatented salt be employed in conjunction with the device.[37/] It has been suggested that the Salt case is merely an application of the improper patent use doctrine which, as we have seen, had already been greatly expanded. But the opinion in that case contained this significant statement: "It is unreasonable, per se, to foreclose competitors from any substantial market."[38/] The full implications of this statement are yet to be developed. Last term in the Sportswear case, the Court rejected the defendants' request that contracts requiring their customers to deal only with them be interpreted

in the light of the rule of reason.[39] The Court noted that the restraints affected a substantial interstate market, and, without more, found them unlawful.

Progress has also been made in applying the Sherman Act to restraints on our commerce with foreign nations. The anti-cartel program of the Department of Justice is founded upon the important truth that acts done abroad can vitally affect American commerce and hence are subject to the Sherman Act. Perhaps the most widespread practice of the international cartel is to divide national markets among its members. Judicial condemnation under the Sherman Act of division of markets was first enunciated in 1899 in the Addyston Pipe and Steel case.[40] That case was concerned only with domestic commerce, but the reasoning of the opinion seems equally applicable to our foreign commerce. Not until the National Lead case in 1947, however, did the Supreme Court have occasion to come to grips in a comprehensive case with the antitrust problems arising out of international cartels.[41] It unequivocally accepted Judge Rifkind's view that the Sherman Act forbids agreements dividing "the world into exclusive territories within which each of the parties is to confine its business activities."[42]

In a sense--indeed in a very important sense--progress in enforcing the antitrust laws can be measured by the cases that the Government does not have to bring rather than by those that it is necessary to file. You antitrust lawyers in private practice constitute an important agency for enforcing the Sherman Act. Your clients depend upon you and not on

us for advice. In giving that advice it is you who must determine what is lawful and what is unlawful. In more than 99 out of 100 cases your decisions will be final. After all, the Antitrust Division of the Department of Justice sees only a very small fraction of the business arrangements whose legality you have passed on.

In this connection I recall Mr. Brandeis' statement before a congressional committee in 1913. He told the committee that when businessmen sought advice from him on antitrust matters, he warned them that he was unable to advise clients how to walk along the edge of the cliff without falling off. But, he said, he could show them a path a few yards back from the edge where they could walk with safety.

One hears considerable comment concerning the uncertainty of the Sherman Act. But this comment must be viewed in the light of the fact that the Sherman Act is a broad economic charter which must be adapted to ever-changing economic conditions. Within this limitation, I think the Sherman Act has achieved as great a certainty as a democratic, capitalistic society can afford. A static certainty in our basic antitrust law can only be achieved at the expense of progress.

1/ Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360 (1933).

2/ Hughes, The Supreme Court of the United States (1928), p. 230.

3/ United States v. E. C. Knight Co., 156 U.S. 1 (1895).

4/ United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); United States v. Joint Traffic Association, 171 U.S. 505 (1898).

5/ Swift and Company v. United States, 196 U.S. 375 (1905).

6/ Board of Trade v. Olsen, 262 U.S. 1, 35 (1923).

7/ Northern Securities Co. v. United States, 193 U.S. 197 (1904); United States v. Union Pacific Railroad Co., 226 U.S. 61 (1912); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

8/ United States v. Northern Securities Co., supra, was argued by Attorney General Knox. Frank B. Kellogg, Esq. participated with Attorney General Wickersham in the argument in the Standard Oil case, and James C. McReynolds, Esq. participated with Mr. Wickersham in the argument in the Tobacco case.

9/ United States v. Atlantic Sugar Refining Co. (1910), settled by consent decree in 1922, see The Federal Antitrust Laws, C.C.H. (1949), pp. 83-84. A criminal case, instituted in 1909, resulted in a disagreement by the jury and a nolle prosequi was entered in 1912 (id., at p. 80).

10/ Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20 (1912) (civil). United States v. Standard Sanitary Manufacturing Co. (criminal) resulted in imposition of fines aggregating more than $51,006 (1 D. & J. 755-756).

11/ Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 (1914).

12/ United States v. United States Steel Corporation, 251 U.S. 417 (1920).

13/ See United States v. United Shoe Machinery Company, 247 U.S. 32 (1918) (petition dismissed); and United States v. Winslow (indictment of officers of United Shoe Machinery Company dismissed), 227 U.S. 202 (1913).

14/ United States v. International Harvester Company, 214 Fed. 987 (D. Minn., 1914), defendants' appeal dismissed 248 U.S. 587 (1918); see also 274 U.S. 693 (1927).

15/ United States v. Corn Products Refining Co., 234 Fed. 964 (S.D. N.Y., 1916), defendants' appeal dismissed 249 U.S. 621 (1919).

16/ United States v. General Electric Company, 1 D. & J. 267 (N.D. Ohio, 1911).

17/ United States v. National Cash Register Company, 1 D. & J. 315 (S.D. Ohio, 1916) (consent decree); United States v. Patterson (indictment of officers of National Cash Register), 205 Fed. 292 (S.D. Ohio, 1913), reversed 222 Fed. 599 (C.C.A. 6, 1915), cert. den. 238 U.S. 635, nolle prossed 1 D. & J. 798 (1916). The district court had imposed sentences of imprisonment for terms of nine months to one year on 27 defendants and President Patterson was sentenced to prison for one year and was fined $5,000 (1 D. & J. 795) but these convictions were reversed.

18/ United States v. Aluminum Company of America, 1 D. & J. 341 (W.D. Penn., 1912).

19/ United States v. Motion Picture Patents Co., 225 Fed. 800 (E.D. Penn., 1915), defendants' appeal dismissed 247 U.S. 524 (1918).

20/ United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

21/ American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

22/ United States v. General Electric Company, 272 U.S. 476 (1926).

23/ United States v. Radio Corporation of America (D. Del., 1932) (C.C.H. Trade Reg. Rep., Ct. Dec. Supp. 1932-1937, par. 7025).

24/ International Business Machines Corp. v. United States, 298 U.S. 131 (1936).

25/ Standard Oil Company (Indiana) v. United States, 283 U.S. 163 (1931).

26/ United States v. Socony-Vacuum Oil Company, Inc., 310 U.S. 150 (1940).

27/ United States v. Aluminum Company of America, 148 F. (2d) 416 (C.C.A. 2, 1945).

28/ United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

29/ United States v. General Motors Corporation, 121 F. (2d) 376 (C.C.A. 7, 1941), cert. den. 314 U.S. 618; United States v. Chrysler Corp. (N.D. Ind., 1938), The Federal Antitrust Laws (1949) p. 175; and United States v. Ford Motor Co. (N.D. Ind., 1938), ibid.

30/ Hartford-Empire Company v. United States, 323 U.S. 386 (1945).

31/ See The Federal Antitrust Laws (1949).

32/ United States v. Paramount Pictures, supra, n. 28; United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Pullman Company, 50 F. Supp. 23 (E.D. Penn., 1940); 53 F. Supp. 908, 55 F. Supp. 985, 64 F. Supp. 108, affirmed by an equally divided court 330 U.S. 806.

33/ United States v. Swift and Company, 286 U.S. 106, 116 (1932).

34/ See Hartford-Empire Company v. United States, supra, n. 30, at 415.

35/ United States v. Line Material Co., 333 U.S. 287 (1948).

36/ See United States v. Associated Press, 52 F. Supp. 362, 369 (S.D. N.Y., 1943), affirmed 326 U.S. 1.

37/ International Salt Co. v. United States, 332 U.S. 392 (1947).

38/ Id. at 396.

39/ United States v. Women's Sportswear Manufacturers Association, 336 U.S. 460 (1949).

40/ United States v. Addyston Pipe and Steel Co., 85 Fed. 271 (C.C.A. 6, 1898), modified and affirmed 175 U.S. 211 (1899).

41/ United States v. National Lead Co., 332 U.S. 319 (1947).

42/ United States v. National Lead Co., 63 F. Supp. 513, 527 (S.D. N.Y., 1945).