APPALACHIAN COALS, INC., ET AL. v. UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 504. Argued January 9, 10, 1933.—Decided March 13, 1933.

1. Competing producers of bituminous coal formed a corporation to act as their selling agent, with authority to set the prices. The industry was in grave distress, because of overexpansion, relatively diminishing consumption, organized buying, and injurious marketing practices within itself; and the members of the combination sought, through the agent, to escape those practices, promote the sale of their coal in fair competition, and sell as much of it as possible. Although they controlled a large proportion (73%) of the commercial production in the immediate region where they mined, the great bulk of their output was marketed in another and highly competitive region; and in view of the vast volume of other coal actually and potentially available, the conditions of production, and transportation facilities, there was no basis for concluding that competition anywhere could be injuriously affected by the operation of their plan. *Held* that there is no present reason for an injunction under the Sherman Act.

2. The purpose of the Sherman Act is to maintain the freedom of interstate commerce in the public interest; its restrictions are not mechanical or artificial but are to be construed by the essential standard of reasonableness. P. 359.
3. The Act does not seek to establish a delusive liberty of interstate commerce by making normal and fair expansion impossible; it does not prevent those engaged in that commerce from adopting reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. P. 360.
4. The mere fact that the parties to a combination eliminate competition among themselves is not enough to condemn it. The question is one of intent and effect, not to be determined by arbitrary assumptions, but by close and objective scrutiny of the particular conditions and purposes in each case. Pp. 360, 375.
5. Good intentions will not save a plan otherwise objectionable under the Sherman Act; but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. P. 372.
6. A coöperative enterprise is not to be condemned as an undue restraint because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather would foster, fair competitive opportunities. P. 373.
7. A coöperative plan of competing producers can not be held illegal merely because they do not integrate their properties in a single corporation but keep their plants independent. In either case the test is the same: Is there an unreasonable restraint of trade or an attempt to monopolize? P. 374.
8. A suit under the Sherman Act to enjoin a combination is governed by the principles of equitable relief; and to warrant an injunction there must be a definite factual showing of illegality. P. 377.
9. Where a trade agreement was attacked and sustained under the Sherman Act before it was put in operation, the case being decided upon the purposes of the participants and the probable consequences of their plan, the decree directed the District Court to dismiss the bill without prejudice, but to retain jurisdiction, to the end that, should results of the plan in actual operation prove contrary to the Act, the case might be reopened by that court for further proceedings by the Government and the voluminous testimony already taken remain available in that event. P. 378.

1 F. Supp. 339, reversed.

Appeal from a decree of the District Court composed of three circuit judges granting an injunction against a combination of producers of bituminous coal, in a suit by the Government under the Sherman Antitrust Act.

Messrs. Wm. J. Donovan and *Edgar L. Greever,* with whom *Mr. Horace R. Lamb* was on the brief, for appellants.

An agreement among competitors for the purpose of promoting efficiency and economy, even though it restricts the competition formerly existing between the parties, is not prohibited by the Sherman Act, unless either (a) an intent unreasonably to restrain or to monopolize interstate commerce is implied in the acts or the circumstances, or (b), by reason of its inherent nature, the combination will have the direct and necessary effect of restraining or monopolizing interstate commerce. *Nash* v. *United States,* 229 U. S. 373, 376; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *U. S. Steel Corp.,* 251 U. S. 417.

The appellants contend that, like the combination upheld in the *Steel* case, Appalachian Coals, Inc., represents a combination for the purpose of achieving economies and promoting efficiency in the sale of bituminous coal. It may be pointed out that in the *Steel* case the Court found that any intent and purpose to restrain or monopolize commerce had been abandoned, and that the sole question to be determined by the Court was whether the size attained and the power acquired were sufficient to make the combination illegal. In this case there is no illegal purpose to be abandoned, but, on the contrary, the testimony affirmatively establishes a lawful purpose. It may be pointed out that Appalachian Coals, Inc., is not an attempt at the same kind of integration as the Court considered in the *Steel* case. It is obvious that integration is not in itself a test of legality, but is merely evidence of a lawful purpose. Integration as it existed in the steel industry had no place in the production and sale of coal. Each of the purposes for which Appalachian Coals, Inc., was organized was directly related to the peculiar conditions existing in the bituminous coal industry and was calculated to promote efficiency and achieve economies in the coal industry just as integration was intended to achieve economies in the production of steel. Accordingly, the District Court found that Appalachian Coals, Inc., was intended to supplement orders for one grade of coal with orders for the other grades which were necessarily produced as an incident to the first grade. This distribution of orders is necessary to prevent the further breakdown of the industry resulting from the forced sale of coal of all grades for which there are no orders but which are necessarily produced in complying with contracts of sale for a particular grade. This is the type of integration best adapted to the coal industry. Such integration not only is desirable but it is essential if the price of coal is to be determined in a normal competitive market.

The District Court distinguished the *Steel* case on the ground that the combination was corporate in form and apparently from this fact alone it concluded that the Steel Corporation had resulted "from normal growth and development." The U. S. Steel Corporation was a holding company. While such a holding company may have been a normal and usual method of conducting business at that time, it may be doubted whether it is still a normal method in view of the provisions of § 7 of the Clayton Act. But there can be no doubt that exclusive common selling agencies are usual and normal methods of combining selling facilities in the coal industry, composed of thousands of small and independent producers of coal who can operate only if their product is distributed over a widely scattered market.

The District Court recognized the practical necessity of selling agents when it stated in its opinion that common exclusive selling agents "would not be condemned in the absence of an actual intent to eliminate competition and affect prices." In the case at bar there is affirmative evidence of a lawful purpose and this evidence is supported by the findings of the court below. The inference to be drawn from the court's statement that an actual intent to eliminate competition is present in this case, is directly contrary to all the evidence and to the findings of fact. Obviously, the *Steel* case could not have held that a combination large enough to "affect" prices was illegal, for every transaction in the market, whether large or small, "affects" prices; and the Steel Corporation controlled the production of approximately fifty per cent. of the entire steel industry.

The rule of law applied in the *Steel* case was not new. The controlling principle finds its roots in the English common law. *Mogul S. S. Co.* v. *McGregor,* (1892) A. C. 25.

It is not disputed that certain kinds of conduct not criminal in any one individual may become criminal if done by several. But that doctrine has no application to an agreement or a combination of capital for a lawful purpose, namely to achieve economies in trade, where, as here, the activities of the combination are reasonably confined to the accomplishment of that purpose.

If the distinction drawn by the District Court between open coöperation between small competitive units to accomplish economies in industry, and corporate consolidations or corporate holding companies, is to be sustained, the effect will be to retard the normal growth of the small, poorly financed business unit and to subsidize corporations of sufficient size and financial strength to effect corporate consolidations or mergers. The effect of the application of this principle was pointed out by Mr.

Justice Brandeis in his dissenting opinion in *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 418.

The following decisions indicate that combinations for the purpose of promoting trade by achieving economies and by the introduction of more effective sales methods, are not forbidden by the Sherman Act, even though they incidentally eliminate competition formerly existing between the parties. *Whitewell* v. *Continental Tobacco Co.,* 125 Fed. 454, 458; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *United States* v. *Terminal R. R. Assn.,* 224 U. S. 383, 404; *American Press Assn.* v. *United States,* 245 Fed. 91; *National Assn. of Window Glass Mfrs.* v. *United States,* 263 U. S. 403; *United States* v. *International Harvester Co.,* 274 U. S. 693; *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291; *Robinson* v. *Suburban Brick Co.,* 127 Fed. 804; *Arkansas Brokerage Co.* v. *Dunn,* 173 Fed. 899; *Nordenfelt* v. *Nordenfelt Co.,* (1894) A. C. 535.

A. As to intent. The agency was formed pursuant to a controlling and lawful purpose; and the restraint upon interstate shipments, if any, is incidental to the accomplishment of that lawful end, and therefore not unreasonable within the meaning of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 282; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 177.

The primary purpose being to sell more coal and to develop an efficient, economical and effective marketing organization and to eliminate so far as possible the destructive trade practices growing out of the sale of "distress" coal and the "pyramiding" of orders, it is obvious that these purposes could only be achieved by joint action.

The evidence shows that a selling organization of the size and financial strength of Appalachian Coals, Inc., was essential if the widespread consuming markets were to be effectively reached by all the producers and if the destructive trade practices were to be materially lessened. Moreover, if the destructive practice of "pyramiding" coal was to be eliminated as far as the defendants were concerned, it was necessary that Appalachian Coals, Inc., be made an exclusive selling agent.

The further question is presented whether an illegal intent is to be implied from the fact that Appalachian Coals, Inc., will be a large competitive unit. The size of Appalachian Coals, Inc., and its power over the market are in no sense comparable to that which the Supreme Court was considering in the *Standard Oil* case. In that case it appeared that the combination had the power to control and in fact did control the price of crude petroleum. The evidence in this case shows that Appalachian Coals, Inc., will not have the power to set the market price for coal in any market in which it will sell, and the District Court so found.

No intent to restrain or monopolize interstate commerce is to be inferred from the form of organization adopted.

The Sherman Act permits the making of normal and usual contracts to further trade by normal methods, *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179; *Moore* v. *New York Cotton Exchange*, 296 Fed. 61.

B. As for the direct and necessary effect of the organization. It will not have the power to dominate or set the price of coal in any consuming market.

A practical consideration is that Appalachian Coals, Inc., could be dissolved with the greatest ease. A mere cancellation of the agency contracts would restore the defendants to their present competitive positions. There is, therefore, not the same degree of danger to the public as in the case of a consolidation or merger, for in that case any abuse of power can be effectively dealt with only by dissolution.

The true test of monopoly of a market or restraint of trade is not whether in some mysterious way the sales of the combination may affect prices, or even whether it will be an important and influential factor in the industry. The true test is not the size of the combined companies, but the competitive strength of the companies that are not acquired. *United States* v. *U. S. Steel Corp.,* 223 Fed. 55, 68; *United States* v. *U. S. Steel Corp.,* 251 U. S. 417, 449; *United States* v. *International Harvester Co.,* 274 U. S. 693.

The strength of the principle embodied in the Sherman Act is found in its flexibility in meeting changing conditions. What is restraint of trade and what is the public interest, are currently determined by the changing conditions of a growing and progressive civilization. No rule of thumb defining these terms has ever been formulated, nor is it possible to do so. *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 579.

The decision of the trial court appears to be based upon the idea that the contracts between Appalachian Coals, Inc., and the producer defendants constitute a price-fixing agreement, and that any price-fixing agreement is, *per se,* unlawful. The language of the contracts expressly negatives that theory. The selling agent must sell all the coal it can and sell it at the market price. There is only one thing that can prevent it from selling all such coal, namely, that the demand is not sufficient to " absorb " it.

The fact is that the selling agent has the power to name an asking price, but it is its duty to accept some offer that is made it, namely, the one that it believes to be the best " obtainable under existing competitive conditions." Distinguishing: *Chesapeake & Ohio Fuel Co.* v. *United States,* 115 Fed. 610.

The effect on the market price of offering coal for sale in any market depends upon many things, among them the demand and the total amount of coal offered. These factors make the market price. Other things being equal, the more coal offered, the less the market price. If all agreements are to be condemned which "affect" prices, there must be an end of all trade.

It is true that they have heretofore sold a substantial part of the coal sold in some of the markets where they sell, but they have no control over any of these markets, or over any trade therein, but must meet the keenest kind of competition everywhere.

The testimony also indicates that the effect of these contracts will not be to destroy competition between these defendant producers in any market, except to a certain extent where the coals are identical in quality. Even then, there will remain competition between identical coals for the reason that the coals of certain producers being sold under trade names will move more freely than the coal of other producers.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston* and *Hammond E. Chaffetz* were on the brief, for the United States.

The evidence fully supports the finding of the District Court that the effect of appellants' combination is to eliminate all competition among themselves and to fix uniform prices at which their product will be offered for sale. It also supports the court's conclusion that the elimination of competition and the consequent effect on prices are "the very crux of the plan." From the inception of the regional sales agency plan it was contemplated that its adoption in any district should be contingent upon securing control of a certain percentage of the production. The agreement among the defendant producers that their agency contracts with Appalachian Coals should not become effective until the latter controlled 70% of the commercial production in Appalachian territory, shows the same purpose even more directly.

Appellants have enumerated economies, increased sales, joint research, advertising and credit information, and the partial elimination of "pyramiding" and distress coal as among the primary purposes of their combination. It is pertinent to inquire whether it was necessary to set up an exclusive sales agency, with power to fix uniform prices, in order to achieve these ends, and whether this agency plan will materially change marketing methods, apart from restraint of trade. The plan will not bring economies in the marketing of coal or increase sales. Joint research, advertising, and credit information can be undertaken without adopting this exclusive sales agency plan. "Pyramiding" appears to be only a minor incident in the sale of bituminous coal. Appellants' combination will bring little relief in the matter of distress coal.

In appraising these alleged purposes, the Court must consider whether appellants' unwillingness to effect an organization to achieve them alone does not indicate that they are not the primary purpose of this combination. The Court must determine whether appellants surrendered a large measure of individual freedom, and assumed substantial financial obligations, chiefly to secure such intangible benefits as may result from joint advertising and research, or a decrease in "pyramiding" and distress coal. We maintain that the real purpose of the combination is parallel with its outstanding effect, namely, the suppression of competition.

The District Court found that concerted action and elimination of competition, through the combination, will affect market conditions and tend to raise prices to a higher level than would prevail under conditions of free competition. It found that appellants will not have monopoly control of any market or power to fix monopoly prices.

These findings of the District Court must be read in the light of its other findings and of the evidence. The power of Appalachian Coals to control price will not be seriously affected by the competition of independent producers in Appalachian territory. Generally speaking, it is the large producers which have joined the combination and the small producers which thus far have stayed out. Both self-interest and business prudence will dictate a policy of accepting the price leadership of Appalachian Coals and endeavoring, upon this basis, to obtain a fair share of the market. The organization of regional sales agencies in other districts, which is already far advanced and only awaits the favorable outcome of this litigation to be completed, will increase the power of Appalachian Coals to affect and control price. Changes in conditions, such as widespread strikes, or a production tax, would greatly increase this power, any sudden change in supply or demand being sharply reflected in price. Another important factor in the competitive situation is that certain producing districts have an advantage in certain markets which these producers can translate into higher prices if they are permitted to eliminate competition among themselves.

A review of the competitive situation in North Carolina, South Carolina, Georgia, Ohio, Michigan, Tennessee, and Kentucky shows that Appalachian Coals will control more than 50% of the business in bituminous coal in important interstate markets in each of these States.

The Sherman Act must be interpreted so as to effectuate its policy and purpose. Congress, in prohibiting restraints of trade and monopolies, adopted the view that the public interest was best served by the maintenance of free competition; and the courts, in construing the Act, may not adopt other criteria of the public interest. If there are conflicting considerations which render it doubtful whether the policy of the Sherman Act is working to the best social advantage in a particular industry, it is for Congress, not the courts, to grant relief. *United States* v. *American Linseed Oil Co.,* 262 U. S. 371, 388; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 43;

United States v. *Trenton Potteries Co.,* 273 U. S. 392, 397; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49. Furthermore, it does not appear that appellants' sales agency plan will remedy the basic problem of the bituminous coal industry, and it is probably economically unsound.

Appellants' principal defense seems to be that there is no difference in legal or economic effect between their combination and a union of competitors under single ownership. They assert that a merger is not illegal unless it attains or exercises monopolistic power, and that their combination will not give them such power.

Appellants recognize that a combination formed for the purpose of suppressing competition, whether in the form of a merger or otherwise, is illegal. Therefore, if we have correctly analyzed the primary purposes of appellants' combination, it is illegal upon appellants' view of the law. Moreover, the *Steel* and *Harvester* cases, upon which appellants rely, do not establish any legal principle of general application, except that the size of a corporation or its unexerted power is not in itself an offense under the Sherman Act. In addition, appellants' premise is not correct. Although mergers necessarily result in the elimination of the competition previously existing between the merged units, this consequential elimination of competition is usually merely incidental to a normal, legitimate business undertaking.

On the other hand, the abnormality of appellants' arrangement is shown by the fact that Appalachian Coals was created, not to displace sales agencies now operating, but to provide a medium for exercising price control. The abnormality of the plan is further shown by the fact that 137 different producers have given to a common agent the power to fix the price at which their product shall be sold. The provisions for allocating business create a definitely static condition among members of the group and likewise stamp the combination with abnormality. It does not represent a normal trade development, but is essentially a "plan" imposed from above to bring about a change in competitive conditions.

While the analogy between this combination and a merger of competing units is remote, cases dealing with agreements not to compete or to sell at uniform prices are directly in point. A review of the decisions of this Court shows that it has always held or assumed that agreements of this character among a group large enough to affect the market are illegal under the Sherman Act. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *American Column & Lumber Co.* v. *United States*, 257 U. S. 377.

Messrs. Walker D. Hines, Goldthwaite H. Dorr and *Wilson Compton*, by leave of Court, filed a brief as *amici curiae*.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and in attempted monopolization of part of that commerce, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209. The District Court, composed of three Circuit Judges, made detailed findings of fact and entered final decree granting the injunction. 1 F. Supp. 339. The case comes here on appeal. 28 U. S. C., 380.

Defendants, other than Appalachian Coals, Inc., are 137 producers of bituminous coal in eight districts (called for convenience Appalachian territory) lying in Virginia, West Virginia, Kentucky and Tennessee. These districts, described as the Southern High Volatile Field, form part of the coal-bearing area stretching from central and western Pennsylvania through eastern Ohio, western Maryland, West Virginia, southwestern Virginia, eastern Kentucky, eastern Tennessee, and northeastern Alabama. In 1929 (the last year for which complete statistics were available) the total production of bituminous coal east of the Mississippi river was 484,786,000 tons, of which defendants mined 58,011,367 tons, or 11.96 per cent. In the so-called Appalachian territory and the immediately surrounding area, the total production was 107,008,209 tons, of which defendants' production was 54.21 per cent, or 64 per cent if the output of 'captive' mines (16,455,001 tons) be deducted.[1] With a further deduction of 12,000,000 tons of coal produced in the immediately surrounding territory, which, however, is not essentially different from the particular area described in these proceedings as Appalachian territory, defendants' production in the latter region was found to amount to 74.4 per cent.[2]

The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. This agency is the defendant Appalachian Coals, Inc., which may be designated as the Company. Defendant producers own all its capital stock, their holdings being in

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[1] "Captive" mines are thus designated as they produce chiefly for the consumption of the owners.

[2] Defendants contend that, in calculating their position upon a percentage basis, surrounding territory should be included and that their percentage thus lies "somewhere between 54-21 and 64 per cent." The District Court found: "The coal produced in the surrounding territory is the same kind of coal as that produced in the Appalachian territory and is suitable for the same purposes and available to the same markets, generally on the same freight rates, and for all practical purposes might have been included in the territory described as Appalachian territory."

proportion to their production. The majority of the common stock, which has exclusive voting right, is held by seventeen defendants. By uniform contracts, separately made, each defendant producer constitutes the Company an exclusive agent for the sale of all coal (with certain exceptions) which the producer mines in Appalachian territory.[3] The Company agrees to establish standard classifications, to sell all the coal of all its principals at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis. The plan contemplates that prices are to be fixed by the officers of the Company at its central office, save that, upon contracts calling for future deliveries after sixty days, the Company must obtain the producer's consent. The Company is to be paid a commission of ten per cent of the gross selling prices f. o. b. at the mines, and guarantees accounts. In order to preserve their existing sales' outlets, the producers may designate sub-agents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent. The Company has not yet begun to operate as selling agent; the contracts with it run to April 1, 1935, and from year to year thereafter unless terminated by either party on six months' notice.

The Government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act,—in the view that it eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. On the latter point the District Court made the general finding that "this elimination of competition and con-

[3] Exception is made of deliveries on contracts then outstanding and of coal used in the operations of defendant's mines or sold to its employees.

certed action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." The court added that the selling agency "will not have monopoly control of any market nor the power to fix monopoly prices."

Defendants insist that the primary purpose of the formation of the selling agency was to increase the sale, and thus the production, of Appalachian coal through better methods of distribution, intensive advertising and research; to achieve economies in marketing, and to eliminate abnormal, deceptive and destructive trade practices. They disclaim any intent to restrain or monopolize interstate commerce; and in justification of their design they point to the statement of the District Court that "it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices, and the inroads of competing industries." 1 F. Supp., p. 341. Defendants contend that the evidence establishes that the selling agency will not have the power to dominate or fix the price of coal in any consuming market; that the price of coal will continue to be set in an open competitive market; and that their plan by increasing the sale of bituminous coal from Appalachian territory will promote, rather than restrain, interstate commerce.

First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The decisions establish, said this Court in *Nash* v. *United States,* 229 U. S. 373, 376, "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade." See *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States,* 263 U. S. 403, 412; *Maple Flooring Association* v. *United States,* 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30, 43; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169.

In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States, supra.* The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Second. The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, " for many years has been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, " the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons " to meet a demand " of less than 500,000,000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. The court below found that " Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than 200,000,000 tons per year." [4] While proper allowance must be made for differences in consumption in different parts of the country,[5] the adverse influence upon the coal industry, including the branch of it under review, of the use of substitute fuels and of improved methods is apparent.

This unfavorable condition has been aggravated by particular practices. One of these relates to what is called "distress coal." The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of

[4] The findings show that "The number of domestic oil burners in use has increased more than sixty fold . . . from 1921 to 1931. . . . About fifty per cent of all oil burners, both domestic and commercial, are in the markets in which Appalachian coals are sold. The railroads have improved combustion methods and reduced their fuel consumption from 1916 to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929. The electric industries decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds and thereby reduced their requirements for coal in excess of 47,000,000 tons. Efficiency in the smelting of pig iron decreased the consumption of coal in relation to the pig iron made by 10,000,000 tons. The saving in by-product coke manufactures over the bee hive system amounted to 12,000,000 tons."

[5] The court below points out that "the use of natural gas and fuel oil is limited to certain areas. Gas is not available to all sections of the country and the great centers of fuel oil consumption are California, the southwest, the midcontinent field and the Atlantic seaboard. Moreover, in the States in which Appalachian coal is chiefly marketed, the substitute fuels combined supply only about ten per cent of the total energy consumption. In the year 1929 about fifty per cent of defendants' coal, other than railroad fuel, went into the States of Ohio, Michigan, Indiana and Illinois." In these States the percentage of total energy consumption derived from bituminous coal in 1929 ranged from 88.7 per cent to 92.7 per cent.

the industry is thus involved in the practice "of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes." Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of "distress coal" presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity.

"Pyramiding" of coal is another "destructive practice." It occurs when a producer authorizes several persons to sell the same coal, and they may in turn offer it for sale to other dealers. In consequence "the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market." Again, there is misrepresentation by some producers in selling one size of coal and shipping another size which they happen to have on hand. "The lack of standardization of sizes and the misrepresentation as to sizes" are found to have been injurious to the coal industry as a whole. The court added, however, that the evidence did not show the existence of any trade war or widespread fraudulent conduct. The industry also suffers through "credit losses," which are due to the lack of agencies for the collection of comprehensive data with respect to the credits that can safely be extended.

In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, "constitute unfavorable forces." "The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

It also appears that the "unprofitable condition" of the industry has existed particularly in the Appalachian territory where there is little local consumption, as the region is not industrialized. "The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate which imposes an unfavorable differential from 35 cents to 50 cents per ton."[6] And in a graphic summary of the economic situation, the court found that "numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the States in which coal producing companies are located have found it increasingly difficult to collect taxes."

Third. The findings also fully disclose the proceedings of the defendants in formulating their plan and the reasons for its adoption. The serious economic conditions had led to discussions among coal operators and state and national officials, seeking improvement of the industry. Governors of States had held meetings with coal producers. The limits of official authority were apparent. A general meeting of producers, sales agents and attorneys was held in New York in October, 1931, a committee was appointed and various suggestions were considered. At a second general meeting in December, 1931, there was further discussion and a report which recommended

[6] Defendants insist that "the real spread is from 25 cents to $1.84 per ton."

the organization of regional sales agencies, and was supported by the opinion of counsel as to the legality of proposed forms of contract, was approved. Committees to present the plan to producers were constituted for eighteen producing districts including the eight districts in Appalachian territory. Meetings of the representatives of the latter districts resulted in the organization of defendant Appalachian Coals, Inc. It was agreed that a minimum of 70 per cent and a maximum of 80 per cent of the commercial tonnage of the territory should be secured before the plan should become effective. Approximately 73 per cent was obtained. A resolution to fix the maximum at 90 per cent was defeated. The maximum of 80 per cent was adopted because a majority of the producers felt that an organization with a greater degree of control might unduly restrict competition in local markets. The minimum of 70 per cent was fixed because it was agreed that the organization would not be effective without this degree of control. The court below also found that it was the expectation that similar agencies would be organized in other producing districts including those which were competitive with Appalachian coal, and that it was "the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73 per cent of the commercial production." But the court added: "However, the formation of Appalachian Coals was not made dependent upon the formation of other regional selling agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to coöperate in any way." When, in January, 1932, the Department of Justice announced its adverse opinion, the producers outside Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts. The District Court found that "the evidence tended to show that other selling agencies with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed"; that in that event "there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold."

Defendants refer to the statement of purposes in their published plan of organization,—that it was intended to bring about "a better and more orderly marketing of the coals from the region to be served by this company (the selling agency) and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business." The District Court found that among their purposes, defendants sought to remedy "the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market irrespective of the demand"; "to eliminate the pyramiding of offers for the sale of coal"; to promote "the systematic study of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions"; to maintain an inspection and engineering department which would keep in constant contact with customers "in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals"; to promote an extensive advertising campaign which would show "the advantages of using coal as a fuel and the advantages of Appalachian coal particularly"; to provide a research department employing combustion engineers which would demonstrate "proper and efficient methods of burning coal in factories and in homes" and thus aid producers in their competition with substitute fuels; and to operate a credit department which would build up a record with respect to the "reliability of purchasers." The court also found that "Defendants believe that the result of all these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the selling agent is perfected and developed." But in view of the designation of sub-agents, economies in selling expenses would be attained "only after a year or so of operation."

No attempt was made to limit production. The producers decided that it could not legally be limited and, in any event, it could not be limited practically. The finding is that "it was designed that the producer should produce and the selling agent should sell as much coal as possible." The importance of increasing sales is said to lie in the fact that the cost of production is directly related to the actual running time of the mines.

Fourth. Voluminous evidence was received with respect to the effect of defendants' plan upon market prices. As the plan has not gone into operation, there are no actual results upon which to base conclusions. The question is necessarily one of prediction. The court below found that, as between defendants themselves, competition would be eliminated. This was deemed to be the necessary consequence of a common selling agency with power to fix the prices at which it would make sales for its principals. Defendants insist that the finding is too broad and that the differences in grades of coal of the same sizes, and the market demands at different times, would induce competition between the coals sold by the agency " depending upon the use and the quality of the coals."

The more serious question relates to the effect of the plan upon competition between defendants and other producers. As already noted, the District Court found that " the great bulk " of the coal produced in Appalachian territory is sold " in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate." Elaborate statistics were introduced with respect to the production and distribution of bituminous coal and the transportation rates from the different producing sections to the consuming markets, as bearing upon defendants' competitive position, together with evidence as to the requirements of various sections and consumers and the relative advantages possessed by reason of the different qualities and uses of the coals produced. It would be impossible to make even a condensed statement of this evidence, (which has been carefully analyzed by both parties,) but an examination of it fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command. While strikes and interruptions of transportation may create temporary and abnormal dislocations, the bituminous coal industry under normal conditions affords most exceptional competitive opportunities. Figures as to developed and potential productive capacity are impressive. The court below found upon this point that the capacity of the mines in the Appalachian region operated by others than defendants is 82,660,760 tons, as against the capacity of defendants' mines of 86,628,880 tons, while the present yearly capacity of all mines in southern West Virginia, Virginia, eastern Kentucky and Tennessee is 245,-233,560 tons, based upon an eight-hour working day.

"This excess capacity over actual production," the court said, "could be brought into production at moderate expense and with reasonable promptness." As to potential, undeveloped capacity in Appalachian territory, the court found that in the eight districts in this region not held by any operating, or by any captive, company, there are approximately 760,000 acres containing more than 4,300,000,000 tons of recoverable coal. In addition, in the same territory "owned by captive companies and not being operated, or owned by operating companies who are using only a very small proportion of their holdings," there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal. Within the twenty-four counties in which defendants' mines are located, and immediately adjacent to them, on railroads already operating, "with the exception of short, feeder extensions," there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal "comparable both in quality and mining conditions with the coal now being mined in that region." "The opening up of this acreage would involve only the extension of short branch lines from the railroads and the building of mining plants. The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis. Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies." In connection with this proof of developed and potential capacity, the "highly organized and concentrated buying power" that can be exerted must also have appropriate consideration.[7]

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[7] J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, a large consumer of Appalachian coal, testified: "It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching

Consumers testified that defendants' plan will be a benefit to the coal industry and will not restrain competition. Testimony to that effect was given by representatives of the Louisville & Nashville Railroad, the Norfolk & Western Railroad, and the Chesapeake & Ohio Railroad, "the largest railroad users of coal operating in the Appalachian region," and by representatives of large utility companies and manufacturing concerns.[8] There

than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about Appalachian Coals or somebody else dictating the price that they are going to pay. They dictate their own price. The purchaser makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal."

[8] The District Court in its findings, after referring to the railroads above mentioned, continues: "A representative of a large public utility company" (with extensive power lines in the middle west and on the Atlantic seaboard) "consuming annually approximately 2,485,000 tons of coal has stated that the organization and operation of Appalachian Coals, Inc. will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry. A representative of a power company operating throughout the State of Georgia . . . using from 30,000 to 125,000 tons of coal annually, has stated that the organization and operation of Appalachian Coals, Inc. will not restrain competition in the markets in which his company buys coal. A representative of the Carbide and Carbon Corporation which uses annually about 250,000 tons of bituminous coal, 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia; Niagara Falls, New York; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Inc., will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal. The largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and eastern Tennessee who purchases approximately 600,000 tons of coal annually under normal conditions for use by textile mills, located in those States, has stated that the organization and operation of Appalachian

was similar testimony by wholesale and retail dealers in coal. There are 130 producers of coal other than defendants in Appalachian territory who sell coal commercially. There are also " a large number of mines that have been shut down and could be opened up by the owners on short notice." Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not hurt their business. Producers in western Pennsylvania, Alabama, Ohio and Illinois testified to like effect. Referring to this testimony, the court below added, " The small coal producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies, and is not prevented by higher cost of operation from being a competitor in the market."

The Government criticises the " opinion testimony " introduced by defendants as relating to a competitive situation not within the experience of the witnesses, and also animadverts upon their connections and interests, but the Government did not offer testimony of opposing opinions as to the effect upon prices of the operation of the selling agency. Consumers who testified for the Government explained their dependence upon coal from Appalachian territory.

The District Court commented upon the testimony of officers of the selling agency to the effect " that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal." " Other witnesses for the defendants " said the court, " indicated that there would be some tendency to raise the price but

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Coals, Inc. will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market."

that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes."

Fifth. We think that the evidence requires the following conclusions:

(1). With respect to defendant's purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Chicago Board of Trade* v. *United States, supra.* The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

(2). The question thus presented chiefly concerns the effect upon prices. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets. The ultimate finding of the District Court is that the defendants " will not have monopoly control of any market, nor the power to fix monopoly prices "; and in its opinion the court stated that " the selling agency will not be able, we think, to fix the market price of coal." Defendants' coal will continue to be subject to active competition. In addition to the coal actually produced and seeking markets in competition with defendants' coal, enormous additional quantities will be within reach and can readily be turned into the channels of trade if an advance of price invites that course. While conditions are more favorable to the position of defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or to involve the fixing of market prices.

The contention is, and the court below found, that while defendants could not fix market prices, the concerted action would " affect " them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A coöperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the coöperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. *Maple Flooring Association* v. *United States, supra; Cement Manufacturers Association* v. *United States,* 268 U. S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *United States*

v. *American Linseed Oil Co.*, 262 U. S. 371. Compare *Maple Flooring Association* v. *United States, supra,* at pp. 579–582. In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased. *Id.,* pp. 237, 238. In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved "power to control the market and to fix arbitrary and unreasonable prices," and that in such a case the difference between legal and illegal conduct could not "depend upon so uncertain a test" as whether the prices actually fixed were reasonable,—a determination which could "be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." See *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets.

(3). The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it. Emphasis is placed upon defendants' control of about 73 per cent of the commercial production in Appalachian territory. But only a small percentage of that production is sold in that territory. The finding of the court below is that "these coals are mined in a region where there is very little consumption." Defendants must go elsewhere to dispose of their products, and the extent of their production is to be considered in the light of the market conditions already described. Even in Appalachian territory it appears that the developed and potential capacity of other producers will afford effective competition.[9] Defendants insist that on the evidence adduced as to their competitive position in the consuming markets, and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a coöperative endeavor to

[9] *Supra*, pp. 10, 11.

remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Chicago Board of Trade* v. *United States, supra; United States* v. *Terminal Association,* 224 U. S. 383; *Window Glass Manufacturers* v. *United States, supra; Standard Oil Co.* v. *United States,* 283 U. S. 163, 169, 179.

The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be "a definite factual showing of illegality." *Standard Oil Co.* v. *United States,* 283 U. S. p. 179. We think that the Government has failed to show adequate grounds for an injunction in this case. We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts. We think also that, in the event of future controversy arising from the actual operation of the plan, the results of the labor of both parties in this litigation in presenting the voluminous evidence as to the industry, market conditions and transportation facilities and rates, should continue to be available, without the necessity of reproducing that evidence.

The decree will be reversed and the cause will be remanded to the District Court with instructions to enter a decree dismissing the bill of complaint without prejudice and with the provision that the court shall retain jurisdiction of the cause and may set aside the decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Reversed and remanded.

MR. JUSTICE MCREYNOLDS thinks that the court below reached the proper conclusion and that its decree should be affirmed.