NOTES

RETAIL MARKETING OF PETROLEUM PRODUCTS AFTER THE STANDARD AND RICHFIELD CASES

Retail Marketing of petroleum and sponsored TBA products[1] has been accomplished primarily through retail stations tied exclusively to a given oil company and selling only that company's products.[2] Competition is thus principally waged between relatively few economic units, each of which is efficiently integrated from the oil fields down through the retail stations.[3] The major oil companies often have preferred to leave earmarks of independence in the operators, avoiding many ownership risks and responsibilties,[4] while exercising control over retail sales policy by means of exclusive dealing arrangements.[5] The effectiveness of this device has recently been jeopardized by Supreme Court decisions that full requirements contracts between the oil companies and dealers may violate the federal antitrust laws under certain circumstances.[6] Remaining to be determined is whether the companies must establish an employee relationship with the operators in order to utilize them as exclusive outlets; whether such vertical integration would itself run afoul of the antitrust laws;[7] and, finally, whether vertical integration would best serve the long-term interests of the oil companies.

1. Trade terminology for tires, batteries and accessories. Sponsored items are those not manufactured by an oil company itself but which the company carries as its own, often under a distinctive brand name.

2. Rostow, A National Policy for the Oil Industry 70, 71 (1948).

3. *Id.* at 75.

4. Black, *Exclusive Dealer Devices of Petroleum Products,* 29 Geo. L.J. 429 (1940): "In any comprehensive history of government regulation of business in America, one chapter must be reserved to relate the strange story of the ingenious strategy of the major oil companies in marketing their products . . . whereby the operator simulates the appearance of an independent dealer and the major producing companies thereby acquire an exclusive outlet and attempt to evade the obligations of chain store taxes, social security legislation, Workmen's Compensation Laws, public liability insurance and labor troubles from attempts at unionization and collective bargaining."

5. American Petroleum Institute, Petroleum Industry Hearings Before the TNEC, 103-114 (1942).

6. Standard Oil Co. of California v. United States, 337 U.S. 293 (1949); Richfield Oil Corp. v. United States, 72 Sup. Ct. 665 (1952).

7. Of course the second problem will not arise if the oil companies are permitted to do business through exclusive retail outlets without "legal" integration of these outlets being required. Before the courts are faced with this problem of vertical integration there must be (1) adverse judgments against "economically" but not

Section 3 of the Clayton Act[8] is the primary obstacle to exclusive dealing agreements. Under this Section goods may not be leased or sold on the condition that the vendee will refrain from dealing in the goods of a competitior where the effect of such agreement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." There have been three important interpretations of the Section applicable to retail petroleum outlets.

F.T.C. v. Sinclair Refining Co.[9] found no violation of the tying agreement aspect of Section 3 where an oil company leased gas pumps on condition that only gas supplied by the lessor company should be pumped therefrom, the leases to terminate upon a violation. The Court indicated that the retail operator could purchase other pumps if he cared to operate a split-pump station. Though the decision could be said to conflict with the earlier *United Shoe Machinery Corp. v. United States*[10] and the later *International Business Machines v. United States*[11] cases, a distinction can be made on the large portion of the entire market served by those two companies.[12]

Twenty-six years elapsed before another important Section 3 decision was made concerning the retail petroleum industry. In *Standard Oil Co. of California v. United States*,[13] operators of 5,937 independent retail outlets, constituting 16% of the retail gasoline outlets in the western market area, signed full requirements contracts with Standard.[14]

"legally" integrated units, followed by (2) vertical integration of the retail outlets as part of the legal entities of the oil companies.

8. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1946).

9. 261 U.S. 463 (1923). Tying agreements involve leases or sales of one product, usually patented, on condition that the lessee or vendee shall use exclusively certain other products marketed by the lessor or vendor. Note, *Tying Restrictions: Changing Standards of Legality*, 48 COL. L. REV. 733 (1948). Distinguish these tying agreements from requirements contracts, note 14 *infra*.

10. 258 U.S. 451 (1922). The Court held illegal attempts by the shoe machinery company to contractually bind its lessees to use only its equipment on certain manufacturing processes.

11. 298 U.S. 131 (1936). Here the Court held violative of the Clayton Act Section 3 contracts by which lessees of the defendant's machines agreed to use only the defendant's tabulation cards in the machines. An attempt was made to distinguish the *Sinclair* case: "As the only use made [there] of the gasoline was to sell it, and as there was no restraint on the purchase and sale of competing gasoline, there was no violation of the Clayton Act." *Id.* at 135.

12. United Shoe controlled 95% of the business of supplying shoe machinery to United States firms. International Business Machines made and sold 81% of the total tabulating cards in the country. While no figures were given as to the market served by Sinclair, it is safe to assume it was much less than these percentages.

13. 337 U.S. 293 (1949).

14. Exclusive dealing arrangements are of two primary types—tying agreements and requirements contracts. And the requirement contracts are, in turn, subject to a dichotomous classification. *Retail level requirements contracts* arise in those cases where the subject matter of the contract will be sold by the vendee in the same form as

In a five to four decision it was held that these contracts violated the Clayton Act. The Court adopted the "quantitative test" of substantiality of market affected, here 6.8% of the gasoline sales and 2% of the TBA sales in the western area, thus applying to requirements contracts what had previously been determinative of substantiality only in cases involving tying agreements.[15] The Court pointed out that since the dealers were required to pay "going" prices to the companies, most of the economic utility of a bona fide requirements contract was absent.[16] While other language in the case gives the impression that the Court refused to consider the economic justification for these agreements, previous Section 3 judicial precedent,[17] together with the fact that the Standard contracts *were* inspected, dictates care in embracing language of *per se* illegality in this area.[18]

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received from the vendor. *Manufacturing level requirements contracts* involve contracts where the product as received by the vendee enters into a process of production before it is ready for re-sale. Retail level requirement contracts mainly assure the vendee that he will not have to enter the unpredictable market place. But manufacturing level requirement contracts often serve a more desirable economic purpose in that they assure a supply of component goods when needed, facilitate budgeting, production control, and cost accounting procedures.

15. International Salt Co. v. United States, 332 U.S. 392 (1947). Prior to the *International Salt* case the "comparative" test had been applied to determine whether there was an unreasonable lessening of competition in cases involving all alleged violations of Section 3. Under the comparative test the court examined the defendant's share of the sectional market; if he controlled a sufficiently large proportion, then he would be subject to close scrutiny of his actions. The quantitative test, on the other hand, only requires that the market withdrawn from competitors be "substantial." For a discussion of the standards applied by the courts see Comment, 49 COL. L. REV. 241 (1949).

16. 337 U.S. 293-324 (1949). "This advantage is not conferred by Standard's contracts, each of which provides that the price to be paid by the dealer is to be the 'Company's posted price to its dealers generally at time and place of delivery.'" *Id.* at 306 n.9.

17. Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936). Here auto manufacturers bound dealers not to sell or use in the repair of the manufacturer's cars used parts or parts not manufactured by or authorized by the manufacturer. The Court upheld the two lower federal courts which had found the effect of the clause had not been to substantially lessen competition. Despite this case, it is often said that tying agreements are *per se* illegal. As to the validity of a similar contention in regards to requirements contracts, see note 18 *infra*.

18. It has been argued as follows: In the *International Salt* case (note 15 *supra*) the courts held that tying agreements were *per se* illegal and applied the quantitative test of substantiality. In the *Standard* case the courts applied the quantitative test while holding the requirements contracts involved illegal. Therefore, requirements contracts are likewise illegal *per se*.

The *non sequitor* here is partially due to the opinions of the courts. The proviso of Section 3 is that the prohibited agreements will be illegal where the effect "may be to substantially lessen competition." But decision after decision give the impression that the courts have interpreted the proviso as reading "where the effect may be to lessen competition in a substantial share of the market." While the controlled share of the market should probably be the principal consideration in the determination of unreasonable restraints, it should not be used as the line of legality. Such important

A slight factual variance from the *Standard* case was inadequate to circumvent the Act in *Richfield Oil Corp. v. United States,* recently decided *per curiam* by the Supreme Court.[19] The district court[20] held Richfield had violated the Sherman Act Section 1[21] and the Clayton Act Section 3. Richfield had sought to enforce oral exclusive dealing arrangements by leasing stations to the operators subject to twenty-four hour termination clauses if any provisions of the leases or the oral agreements were violated.[22] The district court said that the number of these leased stations (1343) was "substantial" and brought the agreements within the scope of the antitrust laws; that even a tenant-at-will was an independent businessman who bore all of the enterprise risks; that the agreements therefore could not be said to be merely between Richfield and itself. Hence, the agreements constituted a clear violation of the Sherman and Clayton Acts since they had the effect of preventing the dealers from carrying products of other sellers in competition with Richfield petroleum and sponsored TBA products.

The *per curiam* affirmance by the Supreme Court was based on the controlling *Standard* case. But while the voting alignment was 7-0, the four judges who had dissented in the *Standard* case ". . . while adhering

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variables as intent of the parties and the economic impact of the agreements should be simultaneously considered.

The argument that this case holds that requirements contracts (no breakdown being made) are illegal *per se* is, therefore, very questionable. In fact the judgment may not even be good authority for the contention that *retail* level requirement contracts are *per se* illegal. "It may be noted in passing that the exclusive supply provisions for tires, tubes, batteries and other accessories which are a part of some of Standards contracts with dealers who have also agreed to purchase their requirements of petroleum products should perhaps be considered, as a matter of classification, tying rather than requirements agreements." Standard Oil Co. v. United States, 337 U.S. 293 at 305 n.8.

Judgment has thus not been foreclosed on the legality of manufacturing level requirements contracts nor on bona fide retail level requirements contracts. While all retail level requirements might be illegal *per se,* at least one lower federal court decision since the *Standard* Case has indicated that inquiry will be made into the reasonableness of manufacturing level contracts. United States v. American Can Co., 87 F. Supp. 18 (1949).

See Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 HARV. L. REV. 913 (1952).

19. 72 Sup. Ct. 665 (1952).

20. 99 F. Supp. 280 (1951).

21. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946).

22. Actually, there were two types of stations involved in the case, dealer stations and LO (Leased Out) stations. The dealer stations were owned by the operators and various methods were employed to restrict them exclusively to Richfield products; these were undoubtedly attempts to restrict independent businessmen. In the case of the LO stations, the stations were owned or at least previously leased by Richfield. Here the argument advanced by Richfield was that the operator-tenants were not independent businessmen for purposes of the antitrust law and hence there could be no violation thereof.

to their views expressed in (the *Standard* Case) join[ed] in affirming the judgment of the district court in this case."[23] Since the gist of three of the dissents in the *Standard* case was that the economic impact of the requirements contracts should have been inspected, the prior admonition regarding language of *per se* illegality is doubly pertinent.

Perhaps the basis of the Court's decision can be better understood by an investigation of the economic and legal consequences of these exclusive dealing arrangements. When an oil company requires a retail station to sell only that company's products, the station is, for the time being, *economically* integrated into that particular oil company. Its sole purpose is to serve the marketing needs of that company. At the same time, the station is not a *legally* integrated component part of the oil company—that is, there is no employer-employee relationship between the company and the operators. The Richfield arrangements differed from those of Standard primarily in that the Richfield operators were tenants-at-will while the Standard operators had longer tenancies or even owned the fee. However, in neither case did an employer-employee relationship exist between the companies and the operators. Both situations precluded the operators being classified as anything but entrepreneurs, and a violation of the Clayton Act clearly resulted from the exclusive dealing agreements.

Other and perhaps more promising methods of utilizing the retail stations as exclusive outlets are, of course, potentially available to the oil companies. Mr. Justice Douglas, dissenting in the *Standard* Case, suggested that: "[t]he elimination of these requirements contracts sets the stage for Standard and the other oil companies to build service station empires of their own. . . . The formula [impliedly] suggested by the court is either the use of the 'agency' device, which in practical effect means control by the oil companies, or the outright acquisition of them by subsidiary corporations or otherwise."[24] The retail operator who *buys* the company products would seem to be an entrepreneur within the meaning of the *Standard* and *Richfield* decisions regardless of any interest he might have in the retail premises. But Mr. Justice Douglas' predictions as to agency arrangements or vertical integration merit inspection to determine which method, if either, would best be employed by the oil companies in the future.

The common law agent-for-sale is actually the alter ego of the principal through which the principal and third parties do business. Title to the goods involved passes directly from the principal to the

23. Richfield Oil Corp. v. United States, 72 Sup. Ct. 665 (1952).
24. Standard Oil Co. v. United States, 337 U.S. 293, 320 (1949).

third party.[25] Attempts to control the marketing function, which would be invalid when goods are *sold* to retailers, have been upheld when the goods were consigned to agents. For example, the *Dr. Miles*[26] case prevented a manufacturer from controlling the retail price of an article once it had been sold. Subsequently, the *General Electric*[27] case upheld retail level price control by a manufacturer where in his status as principal he assumed all fire, flood, obsolescence and price decline risks and paid all necessary taxes on the goods that were consigned to agent dealers. While the case is not directly in point as to the exclusive agency problem, it does indicate the nature of the agency relationship and its tentative utility in the antitrust field. Using "possessory estate" as meaning an interest in land belonging to one who has the immediate right to exclusive possession at a given time,[28] an analysis of this exclusive agency potential is best made in light of two possible alternative situations: (1) the retail station possessory estate in the company; (2) the retail station possessory estate in the operators.

Where an oil company held the possessory estate in a bulk retail station, stocked the shelves with merchandise, and put a commission agent in charge of station operations, that "agent" was held to be an employee by the taxing authorities.[29] Under these circumstances, where all the earmarks of an independent contractor are lacking, it is hard to imagine a situation in which the commission man would not be held to be an employee.[30] Hence, an arrangement of this nature would be, in fact, vertical integration and would raise no problem of an exclusive agency device.

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25. Mechem, Agency § 48 (2d ed. 1914).

26. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1910).

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

28. 2 Powell, Real Property § 172 (1950). "The word possessory as used in this phrase excludes all such interests as easements, profits, restrictive covenants, other agreements affecting the use of land, powers of appointment and rents." *Ibid.*

29. Hudspeth v. Esso Standard Oil Company, 170 F.2d 418 (8th Cir. 1948).

30. See National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944). Hearst contended, *inter alia,* that it need not bargain with certain newsboys since they were not "employees" within the meaning of the National Labor Relations Act. The court replied in part: ". . . The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment. . . . Enmeshed in such [common law] distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee—independent contractor dichotomy in the court for other purposes. . . . Unless the common law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, *as a matter of economic fact,* to the evils the statute was designed to eradicate." *Id.* at 124-127 (emphasis supplied).

But the contention could be made that if the oil company stocks the retail shelves with goods in which it retains all title and risk, and the retail possessory estate is held by the retail operator, then the company has every right to limit the operator to dealing exclusively in the company's goods. Even though the retail operator is an independent businessman,[31] can he not contract to deal only in the company's products when he obtains them by bailment rather than by sale? Section 3 of the Clayton Act only prevents "leases" or "sales" or "contracts for sale" on condition, and a consignor who retains the product risks enters into none of these relationships. There is certainly some precedent available to sustain this contention.[32] While such arrangements would entail large retail inventory investments by the oil companies, station investments would be placed on the retail operators and absorption of the operators as employees of the companies would not be necessary. And the desired purpose of tying given retail stations exclusively to the various oil companies would still be achieved.

But despite the aforementioned precedent, the success of such exclusive agency relationships cannot be assured. An argument can be advanced that the basic lesson of both the *Standard* and *Richfield* cases is that the Clayton Act prohibits situations in which a retail operator is simultaneously an independent businessman and an exclusive dealer. These independent dealers are eliminated as potential customers of the other oil companies just as effectually when they receive goods on consignment as when they buy the goods. If the purpose of the Clayton Act is to eliminate this type of market constriction, which market is otherwise available to all companies on a competitive basis, then the courts might well say that exclusive agencies are merely a subterfuge to avoid the Act, even though the oil companies have made substantial investments in retail inventories.[33] Legally-sanctioned usage of the exclusive agency device is, at any rate, doubtful. However, the oil com-

31. Hudspeth v. Esso Standard Oil Company, 170 F.2d 418 (8th Cir. 1948). When Esso had been compelled to bear an employer's tax responsibilities, it leased its bulk plant to the commission agents for one year terms; the title and risk in the goods was retained in Esso. The court held the commission agents were independent businessmen rather than employees and were not entitled to reinstatement by the company under the Selective Service Act.

32. FTC v. Curtis Publishing Company, 260 U.S. 568 (1923). Here the court upheld arrangements by which Curtis contractually prevented consignee news dealers from selling competing publications. The court simply noted that since the contracts were agency arrangements and not sale-upon-condition the Clayton Act did not apply. See also Motion Picture Advertising Service Co. v. FTC., 194 F.2d 24 (5th Cir. 1952).

33. *Cf.* United States v. Masonite Corp., 316 U.S. 265, 280 (1942). "So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practice in terms of restraint of trade."

panies might still achieve exclusive outlets by resorting to vertical integration of the retail stations as bona fide legal units of the respective companies.

The acquisition of stock or the net assets of one corporation by another is prohibited by the Clayton Act Section 7 where the effect may be to substantially lessen competition.[34] But since very few retail outlets are corporations, since a question could be raised whether such stations are engaged in interstate commerce, and since the capital expenditure necessary to build retail outlets is relatively insignificant, this Section will probably not prove a serious deterrent to vertical integration.[35] Before one would advise this step, however, other areas of the antitrust law must be inspected.

The legality of the vertical integration process of a business entity may well depend upon the actual reasons for integration. If a business is vertically integrated "with the deliberate calculated purchase for control"[36] over a source of supply or a product outlet, the attempted vertical integration would be unlawful.[37] But if the integration is in "the normal course of business development" then the process of vertical integration will not be *per se* illegal.[38]

What will constitute "normal development" remains, necessarily, uncertain. It is not the same as the "rule of reason"[39] and is perhaps

34. 38 STAT. 731 (1914), as amended, 64 STAT. 1125 (1950), 15 U.S.C. § 18 (Supp. 1951).

35. The fact that the court would perhaps be willing to construe Section 7 liberally was indicated in United States v. Columbia Steel Co., 334 U.S. 495 (1948). Before Section 7 had been amended to prohibit, *haec verba,* acquisition of assets of a competitor, the court said: ". . . It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints." *Id.* at 507 n.7. See Comment, 46 ILL. L. REV. 444 (1951).

36. United States v. Reading Co., 253 U.S. 26 (1920). ". . . [T]his dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

"That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the Antitrust Act, has been frequently held by this court." *Id.* at 57.

37. See United States v. Yellow Cab Company, 332 U.S. 218 (1947). "If that theory [the *Reading* language] is borne out in this case by the evidence, coupled with an undue restraint of interstate trade, a plain violation of the Act has occurred." *Id.* at 228.

38. See United States v. Paramount Pictures, 334 U.S. 131, 173-174 (1948).

39. The "rule of reason" purports to look at the effects of an activity. Unless the conduct involved is *per se* illegal, the effects must result in an unreasonable restraint of trade to be violative of the Sherman Act. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). But the "normal development" test is applied before the effects of an action are in-

not as tenuous. It would be conceivable for the courts to establish that some methods of development are *per se* illegal, as those methods forbidden by Clayton Act Section 7. In cases not involving *per se* illegality, an oil company might find it difficult to explain why it purchased existing independent stations or constructed stations alongside independent dealers willing to handle the company's products on a competitive basis. But where an oil company builds new stations in newly entered areas, builds them alongside competing company's stations, or unsuccessfully attempts to have its products marketed by independent stations, one could hardly contend the company was not engaged in the normal development of its business.

It would be shortsighted, however, to say that once a company has successfully satisfied the normal development test the antitrust law ceases to be a menace to its operation of retail outlets. The Sherman Act Section 2,[40] in addition to prohibiting "attempts to monopolize," also prevents "monopolization" of an industry. Early in the operation of the Act, the *United States Steel*[41] and *International Harvester*[42] cases established the proposition that unexerted power (bigness) is not a *per se* violation of the Section, that a prerequisite for illegality is an exercise of that power. This rationale was generally accepted and for twenty years the assumption of its validity pervaded the language used in antitrust cases.[43] Then in 1940 the *Socony Vacuum Oil* case,[44] following the prior *Trenton Potteries* case,[45] held that a combination which controls a substantial portion of an industry and regulates prices is illegal *per se* under Section 1. Later, in *United States v. Aluminum Co. of America*,[46] the Second Circuit, in an opinion by Judge Learned Hand,

spected. The pertinent inquiry is "was this station obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management" rather than "what is the effect of the acquisition of the station—does it unreasonably restrain competition."

40. 26 STAT. 209 (1890), 15 U.S.C. § 2 (1946).

41. United States v. United States Steel Corp., 251 U.S. 417 (1920).

42. United States v. International Harvester Co., 274 U.S. 693 (1927).

43. The dictum of these cases was somewhat narrowed by Mr. Justice Cardozo in United States v. Swift and Co., 286 U.S. 106 (1932). "Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *Id.* at 116.

44. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

45. United States v. Trenton Potteries Company, 273 U.S. 392 (1927).

46. 148 F.2d 416 (2d Cir. 1945). The case was decided by the court of appeals under an expediting statute which provides for certification of a case to a court of appeals when there is no quorum of Justices of the Supreme Court qualified to participate in the consideration of the case and for the designation of circuit judges in the event of disqualification from hearing the case. 58 STAT. 272 (1944), 15 U.S.C. § 29. (1946).

The Supreme Court endorsed the *Alcoa* case the following year. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

reasoned that since price fixing is illegal *per se* under Section 1, and since the essence of monopolization is the power to fix prices, monopolization is illegal *per se* under Section 2.[47] The argument that power can be a *per se* violation of the "monopolization" clause has found vigorous support since this decision.[48] The pertinent problem is now the degree of relative size necessary before a monopolization will be found. Much confusion would attend such an inquiry.[49]

However, it is certain that the courts have generally looked to the control exercised over a particular horizontal market only. Thus, a dictum in *United States v. Paramount Pictures, Inc.*[50] suggested that vertical integration is not illegal *per se,* and the Court, in determining whether a vertically integrated unit is monopolistic will examine each horizontal level of activity separately. If there is no monopoly at any one horizontal level, then the inference of the Court's dictum is that the vertically integrated unit cannot violate Section 2.

Since there are at least twenty major oil companies and many smaller ones, there is little probability that any one company has monopoly control at any given horizontal level. Nevertheless, it would be premature to conclude that Section 2 will not be a barrier to expansion of the oil companies into the retail service station field. At least three potential obstructions to vertical integration must be confronted: (1) some precedent indicates legislative and judicial antagonism to vertical integration; (2) the argument that disallowance of vertical integration in this field is necessary to carry out one version of the purpose of the antitrust law; (3) the possibility of an *Alcoa*-type analogy being used to bring the *Standard* and *Richfield* rule within Section 2.

So far as the past is concerned, Congress has expressly prohibited vertical integration in some areas as a matter of policy.[51] But even case

47. United States v. Aluminum Co. of America, *supra* note 46, at 427.

48. Rostow, *Monopoly Under the Sherman Act—Power or Purpose,* 43 ILL. L. REV. 745 (1949). But see also Stevens, *Monopoly or Monopolization—A Reply,* 44 ILL. L. REV. 269 (1949).

49. Judge Hand himself initiated the controversy when he wrote: ". . . That percentage [over ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not." United States v. Aluminum Company of America, 148 F.2d 416, 424 (2d Cir. 1945).

For good commentaries on the problem, see Roback, *Monopoly or Competition Through Surplus Plant Disposal: The Aluminum Case,* 31 CORNELL L.Q. 302 (1946); Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. CHI. L. REV. 567 (1947).

50. 334 U.S. 131, 174 (1948).

51. 48 STAT. 162, 194, as amended, 12 U.S.C. § 78 (1946) (Banking Act of 1933); 34 STAT. 585 (1906), 49 U.S.C. § 1 (8) (1946) (Commodities clause); Panama Canal Act, 37 STAT. 566 (1912), 49 U.S.C. § 5 (14) (1946). The present vitality of congressional suspicion of vertical integration is indicated by the 1950 amendment to

law is not without its precedents which have disallowed vertical integration. In *United States v. Reading Co.*,[52] control over railroads by coal companies was enjoined. The Court in 1932 refused to modify a consent decree which would have permitted a meat packer to operate retail meat markets.[53] While such cases are not precedent for finding that a vertically integrated firm, as such, violates Section 2,[54] the Court did appreciate the undesirable effects of vertical integration in some areas of the economy. Hence, one could realistically contend that the court should establish a bifarious standard when inspecting alleged monopolization violations, the standard dependent upon the presence of vertical as well as horizontal integration.

The basic question is whether the Antitrust Law only requires the maintenance of competition, even though it be between relatively few integrated units, or whether it seeks to preserve a system of small competitive units in the economy. There has, of course, been much disagreement as to its purpose.[55] But some people believe that competition should be a dynamic concept which is not satisfied by that type of competition that exists between a few big businesses; that smaller competitive units, where feasible, infuse their vigor into the social and economic life of the entire community; and that the nearby retail petroleum operator should be able to stock his shelves with those products *he* considers best and upon which selection he will, in part, stand or fall as a competitive businessman.

The Court's attitude towards vertical integration, resulting from its resolution of these conflicting viewpoints, will probably determine

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Clayton Act Section 7 which prohibits the acquisition of assets of certain going businesses. See notes 34 and 35 *supra*, and text.

52. 226 U.S. 324 (1912).

53. United States v. Swift and Company, 286 U.S. 106 (1932).

54. In the *Columbia Steel* case the vertical integration of an independent fabricator into a subsidiary of U.S. Steel was permitted. There was held to be no violation of Section 2. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

55. "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. The considerations, which we have suggested only as possible purposes of the act, we think the decisions prove to have been in fact its purposes." United States v. Aluminum Co. of America, 148 F.2d 416 at 427 (2d Cir. 1945). And see Mr. Justice Brandeis, dissenting, in Liggett Co. v. Lee, 288 U.S. 517, 541 (1933).

But see United States v. Columbia Steel Co., 334 U.S. 495 (1948). ". . . United States Steel, despite its large sales, many acquisitions and leading position in the industry, has declined in the proportion of rolled steel products it manufactures in comparison with its early days. . . . Its size is impressive. Size has a significance also in an appraisal of alleged violations of the Sherman Act. But the steel industry is also of impressive size and the welcome westward extension of that industry requires that the existing companies go into production there or abandon that market to other organizations." *Id.* at 533.

See also note 48 *supra*.

whether the oil companies will be faced with an *Alcoa*-type analogy. Vertical integration in this area involves the same vice as requirement contracts which were prohibited by the *Standard* and *Richfield* cases. Since these are *per se* illegal,[56] a vertically integrated concern which must utilize, in effect, full requirement contracts among its various horizontal units as soon as it operates, is illegal *per se* under Sherman Act Section 2.[57]

Many will contend, perhaps correctly, that the oil companies need never fear judicial interference if they vertically integrate through the retail level. But some of these same people will also warn that the companies would do most for big business by allowing the existence of independent retailers. One scholar has recently termed the re-establishment of smaller competitive units a "life factor of free enterprise."[58] It cannot be considered irrelevant that in April, 1952, the Congressional Subcommittee on Monopoly began investigating alleged big business monopoly effect on smaller and weaker competitors.[59]

The final result of the present retail level problem in the petroleum industry is uncertain. The oil companies can estimate the possibilities of different arrangements being upheld and can then attempt them or reject them. Court review of the arrangements—whether they be exclusive agencies or vertical integrations—will determine the immediate wisdom of the selections. Legislation will perhaps ultimately decide their desirability. But regardless of the *modus operandi* of any approved system, the companies can always compete for the retail trade on the basis of merit. The company that can convince the public it produces

56. This is not inconsistent with the position previously taken that all requirement contracts are not necessarily *per se* illegal. Note 18 *supra*. For the present argument, all that it is necessary to concede is that agreements which restrict retail service stations to exclusive dealing with one oil company are illegal if the oil company does a substantial amount of business. Many types of requirements contracts are naturally unaffected by this position.

57. In the *Alcoa* case, the court first established that Alcoa monopolized and then applied the price-fixing analogy in order to hold a monopoly *per se* illegal. Where a firm is vertically integrated but does not control an adequate horizontal level of the market to be guilty of a conventional monopoly, see note 49 *supra*, it will be contended Section 2 is an inadequate sanction. But this note has attempted to indicate that conventional usages of "monopolize" will perhaps be adapted to what some believe is the purpose of the Sherman Act. Few have ever contended that the Act was ever intended to be construed by strict application of economic terminology. Application of the described dichotomy would make Section 2 a potent instrument. See Rostow, *supra* note 49.

Of course Section 1 is also available; the integrated business could be said to be a ". . . combination in the form of trust or otherwise . . . in restraint of trade. . . ." 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946).

58. DIMOCK, FREE ENTERPRISE AND THE ADMINISTRATIVE STATE 1-40 (1951).

59. N.Y. Times, April 14, 1952, p.32, col. 2. One of the three stated purposes of the investigation is specifically ". . . whether the [antitrust] laws are tough enough,"

the best products, guarantees fair dealing and offers the best facilities for the public comfort will benefit. The companies will still be able to train retail dealers in courtesy and efficiency. But instead of compulsion being the sanction for the continuance of the relationship, the oil companies will compete vigorously for the business of the retail operators. And the resultant smaller competitive unit at the retail level could establish a type of competition that some have implied is inconsistent with our ologopolistic economy.[60] For those who believe our free enterprise system is adaptive enough to allow the co-existence of efficient bigness, where necessary, and individualistic smallness, the result would be eminently satisfactory.

THE DIRECTED VERDICT AND APPLICABILITY OF STATE PROCEDURAL RULES IN FELA CASES: THE ROLE OF THE SUPREME COURT

Implicit in the scheme of concurrent enforcement of national legislative enactments by state and federal courts is the question of the proper procedural rules to be observed in the state forum. A serious contention has been that the state's interest in administering its own judicial system is so significant that local rules of pleading and practice must be applied even at the sacrifice of legitimate claims arising under federal law.[1] Adequate appraisal of the validity of this argument must

60. Marxists have long embraced the theory that concentration is an inevitable result of the capitalistic system. See SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 34 (2d ed. 1947).

Today this Marxian theory has been augmented, strangely enough, by those who contend that there exists an economic and technological necessity for bigness in today's industry. See Charles E. Wilson, *Big Business and Big Progress Go Together* (Privately Printed Brochure 1949); DRUCKER, CONCEPT OF THE CORPORATION 224 (1946).

1. The most important legal problem confronting our jurisprudential system is that inherent in the co-existence of national and state governments. Solution of the really significant social problems forced upon us by the interdependence of modern institutions requires a constant adjustment in this relationship. During the upheaval of the 1930's this truism was mirrored in the controversy over the limits of federal power under the commerce clause. Since this provision was found to be substantially co-extensive with national requirements, the problem is now focused in the extent of state power to tax and to regulate economic activity. Yet the limits of federal authority are still being probed with reference to the explosive issues of protection against state abuses of the criminal processes and of the other numerous safeguards, embodied in the 14th Amendment, against unjust state action.

Hardship resulting from arbitrary exercise of power by a strong central government provides the historical justification for our federal system; to allay the popular fear of tyranny caused by such centralized authority, our Federal Constitution created a national government with expressly limited powers. Nevertheless, as the United States grew geographically and industrially the functions of the national government