

**INDUSTRIAL COMBINATIONS AND THE LAW**  
A PREVIEW

By  
HEINRICH KRONSTEIN

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## INDUSTRIAL COMBINATIONS AND THE LAW

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BY HEINRICH KRONSTEIN\*

In *Radio Corporation of America (RCA) v. Philadelphia Storage Battery Company (PSB)*<sup>1</sup> the court found the following basic fact element:

RCA (Radio Corporation of America) licensed PSB (Philadelphia Storage Battery Company) to manufacture radio sets under RCA patents. The license agreement of October 31, 1930 provided that RCA should receive a certain percentage of PSB's sales price. The sales price of PSB's purchaser, however, was agreed to be the basis of the royalty payments if PSB should sell its products to a corporation, firm or association in which PSB or its stockholders owned a controlling interest by stock ownership or otherwise. PSB established a wholly owned subsidiary, Philco Radio & Television Company (PRT), which was PSB's exclusive sales organization in the radio set field. In accordance with the agreement the sales prices of PRT (Philco Radio & Television) were considered as the basis of the royalty payments of PSB to RCA.

In 1934 the PSB-PRT structure was reorganized. "The object sought by PSB to be accomplished by the reorganization was to secure a new and reduced base on which its royalties to RCA would be calculated, viz., the selling price to PRT (cost plus 5%) instead of the old base of PRT's selling price to the trade. There can be no doubt of that."<sup>2</sup>

The issue in this case was whether or not this object was accomplished and if under the new set-up the connection between PSB and PRT "was sufficiently severed to bring PRT out of the controlling interest of PSB in the conception of the license agreement."<sup>3</sup>

Under the reorganization scheme:

1. PRT (Philco Radio & Television) remained the exclusive seller of PSB's (Philadelphia Storage Battery's) products and PRT did not sell anything else.

\*Special Attorney, Department of Justice, Antitrust Division, and Professor of Law, Georgetown Law School. The author had the pleasure of discussing the problems presented here with Walton Hamilton, professor of Yale Law School, and is glad to have this opportunity to express his appreciation to Mr. Hamilton for his inspiration and advice. The opinions expressed in this article are those of the writer and do not necessarily reflect the opinions of the Department of Justice.

<sup>1</sup>Radio Corp. of America v. Philadelphia Storage Battery Co., 22 Del. Chanc. 22, 194 Atl. 414 (1937), *aff'd*, 6 A. (2d) 329 (1939).

<sup>2</sup>*Id.* at 421.

<sup>3</sup>*Ibid.*

2. PRT was "to market products under PSB's trademark 'Philco' which at a not distant day was to return to PSB's exclusive control."
3. The price practically remained under the control of PSB.
4. PSB decided what designs were brought on the market.
5. The office of PRT remained in the building of PSB.

On the other hand the shares of PRT were given, for "fair consideration", to the leading officials of PRT who remained at the same time officials of PSB, and "rent" was paid to PSB for the use of the office.<sup>4</sup>

The District Court and the Court of Appeals decided that PSB was successful in its attempt to save royalties which should have been paid otherwise. The two principal reasons of these decisions were:

1. The language (of the original RCA-PSB contract) was "shall own a controlling interest by stock ownership or otherwise". "These words", said the Delaware court, "clearly express the idea of a power of control derived from a property right. It is a control that arises from an interest that is owned. This excludes the conception of the control that is exerted through friendship, good will, apprehension of loss or duress."<sup>5</sup>

2. The court said, further: "The business fate of each of the corporation hangs by the same thread. This does not make them one but it has been held in many cases that courts will disregard corporate forms and the fictional personality which the law ascribed hereto in order to prevent the accomplishment of wrong, "the perpetuation of frauds and the evasion of statutory inhibitions. It has never been held that a corporation loses its distinct and separate personality by the mere fact of its joining hands with another in a common enterprise."<sup>6</sup>

The court discussed all "legal" reasons why PRT (Philco Radio & Television) did not remain an instrumentality or agency or PSB (Philadelphia Storage Battery) under the reorganization scheme but it did not consider the economic effects of the following facts:

1. Since PSB controlled the trademark "Philco", it remained in control of the marketing of the product which PRT could sell.
2. PSB was clearly of the opinion that they earned more under the established "5% plus cost" than under the old regulation. Therefore the only possible "profit" of PRT was a certain percent of the saved royalties, which profit came back to PSB as rent and otherwise.

I cannot deny that I was shocked at the basic philosophy of this decision. PSB by a mere change of appearance successfully deprived another concern of its contractual rights. Is that an extraordinary decision? I

<sup>4</sup>For a complete statement of facts compare the opinion of the lower court.

<sup>5</sup>*Id.* at 422.

<sup>6</sup>*Ibid.*

am afraid it is not. It is the logical consequence of the prevailing legal rule. It is the logical consequence of the general approach of our courts to the problem of the connections between corporations.

The development of the law of corporations during the last twenty years shows an increasing sterility. The positivists are satisfied to explain the literal contents of all statutes, charts, by-laws and decisions, while the realists are satisfied to look behind the motivations of the court in deciding each particular case. The interest of both has been limited to the facts with which statutes and cases deal. They did not learn from other tests.<sup>7</sup> Both have followed a method of analysis of insufficient factual material. The appearance of Berle-Means classical book<sup>8</sup> gave the lawyers, positivists and realists alike, a real headache because it confronted them with a development of the trend and the forces within the present-day private corporation not expressed in statutes or cases. However, the shock was not strong enough. Berle-Means suggest not only a new point of view about the development of a corporation from within, but an entirely new approach to the corporation from without. The only meager result of this suggestion has been the enactment of a number of provisions in the field of security legislation.<sup>9</sup>

Lawyers have emasculated their definition of the corporation more and more so as to bring within its terms all forms of corporations whose existence they admitted—a process which may be defensible as a matter of logic. The best "legal" definition may run as follows: "A corporation is a being to which property and choses in action, and against which debt can be related."<sup>10</sup> That is a distressingly meager definition, which can be reconciled with the principles of legal logic. Gierke's theory of the corporation<sup>11</sup> as a social organism was ridiculed by the logicians and by the historians who believed that this theory is not in line with their documents, but we should wish to re-acquire Gierke's general approach to any social institution. For him no difference existed, whether he looked upon it as a lawyer, as a sociologist, or as a historian.

In the period of the legal specialist, the economic conception of the corporation became more and more dynamic. The same dynamic development which compelled the static lawyer, anxious to keep his conceptions in line with all facts, to withdraw step by step, encouraged the business-

<sup>7</sup>This article intends to discuss legal methodology impliedly: the only practical way to discuss them.

<sup>8</sup>BERLE-MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>9</sup>Tracy and MacChesney, *The Securities Exchange Act of 1934* (1934) 32 MICH. L. REV. 1025.

<sup>10</sup>Martin Wolf, *On the Nature of Legal Persons* (1938) 54 Law Quarterly Review 494.

<sup>11</sup>GIERCKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (1868).

man to build up many different types of corporations, some as mere instrumentalities of other corporations or persons, and others as corporations which influence the entire market by their very existence. A sociological or economic definition of the legal entity *Inc.* cannot be found. The sociologist or economist may describe a "corporation" about as follows: "A corporation is an enterprise organized in its central organization on the basis of shares, obeying one unified command in the establishment of its aims and in the principal policies to accomplish them." It does not make any difference how many branches or legal entities this being may have.<sup>12</sup>

The same difference between the legal and economic approach can be found in the definition of "control" of a corporation. From the point of view of a lawyer "control" is "ownership", or at least sufficient ownership of the shares to control the votes. From the economic point of view control is a decisive influence on the activities of the corporation.

This discrepancy between the legal and economic definitions is obvious and exciting. Law and fact are inseparable. If the lawyer permits the facts to develop in a direction not recognized by him, he suffers the worse possible defeat. He cannot even begin to fight to make life consistent with the principles entrusted to his custody and finally becomes subject to those facts which become so strong that they change the law and the lawyer rather than being changed by them.

The first decisive step in the development of the outside relations of the "legal corporation" which should have been given the most careful consideration was the vertical dependency of one corporation upon another, which, even at an early stage of the development, made every act of the controlled corporation an act of the controlling corporation. The recognition which the lawyers gave to this fact is absolutely insufficient. The straight impact of the economic and factual entity of the concern or enterprise on the law has not been fully realized up to this date.<sup>13</sup>

Only when fraud can be found do the courts look behind what they

<sup>12</sup>To distinguish the legal conception of a corporation from the economic I shall use the word "concern" to describe the economic fact. Unfortunately this word is used in some other connections. However, that is the case with all pertinent words of our language, wherefore we have only the choice of establishing new words or of ascribing certain meaning to words already known.

<sup>13</sup>LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936). Kronstein, *The Legal Relationships Between American Parent Corporations and Their Foreign Subsidiaries* (Doctor Dissertation, Georgetown Law School, 1940). The language of the recent decision of Judge Parker in *Stone v. Eache*, 127 F. (2d) 284 (C. C. A. 4th, 1942), seems encouraging. The facts of the case, however, are almost identical with other cases in which fraud was found. For more cases consult Judge Parker's decision.

call the legal entity of a corporation. ". . . A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."<sup>14</sup> This quoted statement must be considered as the present law. The decision in the case of *Radio Corporation of America v. Philadelphia Storage Battery Company* makes clear, and shows its striking consequences.

In this article I do not intend to deal principally with the problem as to what legal conclusions are necessarily to be drawn from the modern economic vertical business structure, which I designate as a *concern*. I have done this elsewhere.<sup>15</sup> My principal aim is to give an introduction to the legal problems arising out of horizontal combinations of enterprises or, better, concerns as defined above, especially to cases in which a concern becomes a part of those horizontal combinations by virtue of activities of its subsidiaries.

The horizontal combination, which I designate as a *cartel*, is an understanding between concerns from which a division of market, or a regulation of production or of marketing results. The vertical set-up and the horizontal combinations of concerns meet each other almost with mathematical punctuality at certain intersecting lines. Take as an illustration the case in which the combinations between the concerns are not based on a cooperation between the central organization of the two concerns but on a cooperation between a subsidiary on the one side and a central organization on the other side or between two subsidiaries of two concerns on both sides. The legal study of the horizontal combinations remained, if possible, farther behind the facts than the study of the corporation law. While the principles of the Sherman Act, as applied by the courts, seemed to condemn any horizontal combination, a net of international combinations developed in which American industry participated, mostly through the device of subsidiaries. By these forms of organization the American domestic market was strongly affected. We have no choice but to make them one of the objects of our legal study. That means we have to establish the facts and the effects on individuals, on our social institutions and the state, and the rules and principles relating to the internal and external relations of business organizations and the reactions of the states and other organizations to their actions.

A hypothetical case may be helpful: An American concern X may establish plants all over the world which are owned by legal entities,

<sup>14</sup>United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (1905).

<sup>15</sup>Kronstein, *op. cit. supra* note 13.

in turn owned by a holding company in this country.<sup>16</sup> It may be assumed that in accordance with the general practice in the country Y the legal entities of the X concern situated in Y entered into agreements with its principal competitors in Y not to export any products to certain countries. Would a part of the X concern situated in a third country, be entitled to supply the country from which the Y parts of the X concern are excluded, or could the American X concern properly supply them, or at least direct some one else, especially other parts of its organization, to do that?

Certainly a court, in applying the test of the *RCA-PSB case*, would not even consider the possibility of a legal rule that X may be bound by the actions of its Y parts in the above assumed case. It would even be hesitant to hold X liable for violation of a contract signed by the American X concern itself if such violation is committed by one of the foreign parts of the concern, unless it can be established that X actually directed such violation. There is no legalistic basis whatsoever for any liability if X or any of its parts outside of the country violates an actual obligation of its part situated in the country Y and organized in the form of a legal entity, unless the case can be brought within the narrow rule of cases in which the supporter of a breach of contract is made liable.<sup>17</sup>

That does not mean that every parent corporation shall be liable for every debt of its subsidiary. Such a conclusion would be inconsistent with economic facts, since all parties making regular business contracts with the parts of a concern, organized as a legal entity, know that only the assets of such entity can be reached in case of a failure to perform. The legalists, however, like very much to argue that it would logically follow that all corporations belonging to the same concern are one legal entity.<sup>18</sup> Our problem is to find a clear test to distinguish obligations of the concern from obligations of one of its members, itself organized in the form of a legal entity.

I suggest the use of the following test: All obligations of a subsidiary which are supposed to appear as debts in the balance sheet of the subsidiary are exclusively obligations of the subsidiary, unless the participation of the parent corporation establishes its own liability. However, obligations which are usually not included in the balance sheet as debts

<sup>16</sup>For the best collection of those cases, see ROBERT LIEFMANN, *BETEILIGUNGS UND FINANZIERUNGSGESELLSCHAFTEN* (6th Ed. 1932).

<sup>17</sup>HAUSSMANN, *DIE TOCHTERGESELLSCHAFT* (Berlin, 1923) 26.

<sup>18</sup>HAMBURGER, *DIE SCHACHTELSGESELLSCHAFT* (Mannheim 1932) arguing against KRONSTEIN'S *DIE ABHAENGIGE JURISTISCHE PERSON* (Muenchen 1932).

because their transformation into a money debt is too remote, may bind the entire concern. They do always so bind the entire concern if the future management in its positive business policy is involved, since this policy is necessarily a part of the concern policy. A concern may limit its liability for definite transactions, but it cannot limit its liability for its own business policy of which the subsidiary is the instrumentality.

The business world well knows how to utilize the theory of the corporation as a legal entity. From an early date in the development of the concern, corporations have been established in foreign countries for the sole purpose of limiting the liability of persons behind them or in the hope of obtaining certain political or commercial advantages by having the appearance of a domestic entity, without actually being one. These advantages may be in the international field or they may have to do with evasion of the law which governs the central organization of the corporation.<sup>19</sup> "Limited liability" is inseparable from the purpose of the "capital" of a corporation as a certain guaranty for the claims of the creditors. Those claims are either straight claims for money itself, or they may become claims for money, as for instance, claims for the delivery of products, etc. The person acquiring such claims knows very well that he can only rely on the "capital" of the corporation within the scope of statutory provisions governing liability, but on nothing else.

The capital does not determine or even influence the activities or potentialities of a subsidiary of a concern. They are determined by the unified command of a concern management. A lawyer, believing in the independence of cases rather than in the interconnections of human relations and economic facts, may be inclined to overlook the entire problem by stating that every contract may become the basis of claims for damages. His legalistic position does not let him see the distinction between those transactions designed to describe or to affect the scope of the activities of the concern in whole or in part, and those transactions designed to be fulfilled exclusively out of the capital of the subsidiary.

In many cases dealing with the problem of the specific performance of marketing contracts of a cooperative,<sup>20</sup> the courts recognized the basic difference between a usual purchase or sales contract with a regular dealer and a similar agreement with a cooperative. The life and useful-

<sup>19</sup>*Daimler Co. Ltd. v. Continental Tyre & Rubber Co.*, (1916) 2 A. C. 307, holding that the enemy character of a corporation is not decided by the test of what law governs the corporation but by the position of the people behind it, was quite a shock to this view. In the first World War the Daimler case did not represent the law of the United States. *Behn, Meyer & Co. v. Miller*, 266 U. S. 457 (1924). In this war the situation is different but far from being clear.

<sup>20</sup>EVANS-STOCKDYK, *THE LAW OF AGRICULTURAL COOPERATIVE MARKETING* (1937) 128, 129.

ness of the cooperative depends entirely upon the fidelity of the members in observing the agreement. The failure to comply with it would necessarily lead to the dissolution of the cooperative.<sup>21</sup> The courts discussed only the effect of the interest of one party to the contract, the member, in the existence of the other party to the contract, the cooperative, and the effect of a failure of performance by one party on the existence of the other as a basis of a bill of specific performance.

From this conclusion it is only a short step to the distinction between, (1) those contracts of the concern by which it only assumes eventual payment of damages out of the capital of a subsidiary to which it limited its liability; and (2) those contracts which are parts of a system of a contractual market regulation and which are dependent for their existence upon the performance of the agreement by each party. The question may be raised why we, in view of our antitrust legislation, should even discuss the question of a possible liability of an American concern, arising out of such marketing regulations. Wherever a potential liability exists, a responsibility for the establishment of such a situation should not be denied.

In the case of X's business structure in Y, we assumed that its parts, organized in Y as legal entities, promised other Y concerns not to export certain products into certain countries, while those other concerns promised to restrict their exports to other countries. The Y parts of X have only the power to operate in or to dispose of any market as a part of X. They have no market independent of the market of X. Their patents, licenses, trademarks, and their secret processes and other expressions of good will are in their possession as parts of X. Again the legalist will stress the point that the patent-and-trademark relationship between X and its Y parts, which is often the technical basis of the agreements between the concern and third persons, is regulated by cross-licensing agreements, a well-known device of an "agreement between two equal parties". These agreements, however, cannot be considered as independent of the fact that X controls the business and the very existence of the Y parts by shareholding, membership in boards, loans, etc. The relationship in its entirety is, if legal "conceptions" are helpful, in the nature of a general agency of X in the countries involved in the fields of regulation of the market. X's "liability" or "responsibility" cannot be limited where the scope of the activities of the concern is involved.

Other legal constructions may lead us to the same practical result, which is based on the clear understanding of existing facts. X has the

<sup>21</sup>Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 105 S. W. 710 (1908).

benefit of market regulations made outside the U.S.A. by taking the profit from the markets granted to it or its parts.

What about the liability of other parts of X, for instance, the parts situated in V, for the performance of an agreement relating to the distribution of markets? If a person is an agent, he is an agent of each part of the principal. For the same reason, while we consider the Y corporations as a part of X, and, as a matter of legalistic form only, as general agents of X, we consider the V corporations as other parts of the same total. The border lines between the parts, their power to act and to bind the total, are finally established by the central organization and its command. The acts of the parts can only be imagined as possible if authorized by the entity, the concern. Therefore each part is bound by each act of each other part affecting the activities of the whole concern and not only with those legal transactions which are usually protected by the capital.

These situations in which parts are organized as legal entities, and the problems arising out of them, are to be found in the most varied directions. Just as we find X's parts in Y, we find I. G. Farben parts here in the United States. Just as X regulates its markets by agreements of its subsidiaries, which, at least by their own interpretation, are not hindered by our antitrust legislation, so also I. G. Farben, before Pearl Harbor, used its parts to evade the provisions of the German currency legislation. The unified command unites the legal entities, wherever they may be situated. Certainly their production must be considered as one and the same, since its restriction or retention at any place in the whole world affects the market everywhere. In the discussion of the copper case in the T.N.E.C. report,<sup>22</sup> typical facts are reported:

"The Chairman: I notice in the first paragraph which is entitled 'Recital' it is stated as follows 'and it is specifically provided that none of the terms hereof shall apply to the United States.' Why was that phrase put in?"

"Mr. Stannard: Because this covered production outside of the United States; it had no reference whatsoever to production within the United States. As far as Kennecott was concerned, it was our Braden property in Chile that participated in this understanding and it referred only to Chilean production. The same applied to the Chile Copper Co., Andes, and Greene Cananea, whose properties are in Chile and in Mexico—all are subsidiaries of Anaconda.

"The Chairman: Would it be proper to say that you were making it clear that you were not doing anything with respect to production control in the United States that might be condemned by the Sherman antitrust law?"

"Mr. Stannard: That is correct. And I would like to point out away from any price control; each of the participants kept its own selling agency in Europe, and there was the same competition as before in keeping outlets.

<sup>22</sup>T.N.E.C., *Investigation of Concentration of Economic Power*, pt. 25 p. 13235.

"The Chairman: In other words, you were careful to confine this agreement to the regulation of production and not to the control of price?"

"Mr. Stannard: That is true.

"The Chairman: Of course, the regulation of production would necessarily affect the price, would it not?"

"Mr. Stannard: Perhaps slightly. . . ."

While our courts have not discussed the effect upon our own production and markets, of an organization of the foreign markets by American concerns, or of their participation in such organization, the courts have discussed the case of an organization of foreign products to be shipped to the United States. In *United States v. Sisal Corporation*<sup>23</sup> the Supreme Court treated as an unlawful monopolistic combination, one which was built up by American firms in Mexico, and which made one of the American participants its sole and exclusive agent.<sup>24</sup>

A clear and correct understanding of the relationship of the parent concern to outside persons, to foreign governments and finally to its own government, is important for many reasons. An American economic organization cannot avoid the application of American legislation by establishing itself in the form of a legal entity organized under the law of another country.<sup>25</sup> On the other hand, the part of an enemy concern cannot avoid being treated as such, by virtue of its organization in the form of a legal entity, whoever the shareholders may be. The mere fact that American concerns in the regulation of markets use the name of a legal entity outside the United States, does not change the fact that the regulation of market was made by an American concern. The only reasonable test in connection with the application of our antitrust legislation is whether or not the market of the United States, domestic or foreign, is affected,<sup>26</sup> which necessarily is the case whenever there is any export from or import to the U.S.A. Whoever studies the agreements between subsidiaries of one concern and the central organization of another concern, or between the subsidiaries of two different concerns, finds the most complicated formulations to accomplish the result suggested here, although the drafter of the contracts may try to accomplish such result only to the extent that it serves the private interest of the

<sup>23</sup>*United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927).

<sup>24</sup>Hodges, *Antitrust Act and the Supreme Court* (Doctor Dissertation, Georgetown Law School, 1941).

<sup>25</sup>The problem came up, without being answered, in 39 OPS. ATT'Y GEN. (1938) 398.

<sup>26</sup>Compare with the test applied in the following cases: *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940); *United States v. Gold*, 115 F. (2d) 236 (C. C. A. 2d, 1940); *United States v. Hamburg*, 200 Fed. 806, 807 (C. C. S. D. N. Y. 1911). The *Alcoa* decision, *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S. D. N. Y. 1941) is not final now, wherefore I do not feel free to discuss the conclusions reached and the test used there.

contractee and not third parties or the public. In one case I found the statement that all rights growing out of a contract shall be given not only to the subsidiary but to all "associated companies", defined as follows: "All companies which manufacture the product or own patents or exclusive rights relating to or applicable to such product and are now or in the future controlled by X (the subsidiary) or controlling X or controlled by the same interests which control X. . . ."

The vertical order of the set-up is organized and exists by one will, while the horizontal order is the product of a union, an act of as many wills as there are concerns participating. The British subsidiary of an American concern, a vertical order set-up, becomes a member of the horizontal order by virtue of the will of the American concern. As soon as it becomes a member of the horizontal order, subsidiary and concern alike become subject to the decision of the agency of the horizontal order. The horizontal union is an act of "integration"<sup>27</sup> and is based on the continuous effect of the integration. Smend, the German constitutional lawyer, found the principal significance of the integration of the wills, aims and powers of the citizens and their organizations in a state organization or state government. He does not deny the significance of a government, a territory, the inhabitants, or of the individual voting rights as the elements of a democracy, as formal elements of a state from a mechanical aspect, but he realizes that the actually living state, as well as the powers of each individual or each organization within the state, depends on the strength of the integration of the living elements in every moment of the life of the state organization.

Today, after our experiences with governments in exile, with the relativity of border lines and territories, we see the tremendous significance of the means of integration and its effect. Smend's theory of integration is even more helpful in the understanding of the status and effect of the horizontal order discussed here, since this order has no territory and many less mechanical elements than the state order. While the agreements or contracts establishing the horizontal combination are the expression of the intention to establish such order, they do not actually limit the scope of its activities or describe the power of the order as it shall exist at any time. As a matter of form it may satisfy us to learn that all agencies of this order have in one way or another their legal basis in the original agreements. Materially, however, it is quite impossible to argue that the regulation of the entire world market under the most diverse conditions, is obeyed by the participants in the performance of the contract. They abandoned a certain part of their free-

<sup>27</sup>SMEND, VERFASSUNG AND VERFASSUNGSRECHT (Muenchen 1928).

dom of action. They became something different from what they were before. The effect on the internal organization of participants in the horizontal order, especially on corporations, is to be studied and will certainly be realized as of great importance. How contrary to the fact that managements lost much of their independence to the command of the horizontal order after the corporation was integrated into it, is the common law rule that a corporation cannot join a partnership because it shall not come under any other management than that established under the laws of the state of incorporation. All the rules relating to the protection of the shareholders and creditors against transactions between the dominant shareholder and the corporation take on a new aspect as soon as we have to admit the already existing effect of the horizontal order on our economy. The historian tells us how a state changed its own internal organization as soon as it joined even the weakest confederation. The same is true in the case of the corporation.

The power of the integrative forces of a horizontal order to change its purpose within a certain limit is remarkable. Combinations established to restrict production in times of alleged overproduction suddenly develop into combinations to distribute an underproduction to a limited number of favored customers.

In a state the most conspicuous "integrators" are the persons acting as leaders and representatives of the state and political parties, and symbols such as flags, hymns, etc.

In the horizontal order, the flag symbol has its corresponding device in the peculiar use of the trademark. A recent English case, *Crofter Handwoven Harris Tweed Co. v. Veitch*,<sup>28</sup> reports a combination which established a trademark "Harris Tweed", which could only be used by enterprises integrated in a combination. The formal difficulties arising out of the necessary connections between the business and the trademark have been overcome easily by the establishment of a corporation as sales agency of the firms belonging to the combination.

The constitution of the state as a symbol is one of the strongest factors and means of integration. The individuals and the organizations within the state are integrated not in the words of the provisions of the constitution, but in the aims or purposes of the constitution as they are seen every day. The agreements between the members of the horizontal order or the provisions of by-laws of the associations constituting such horizontal order are even more subject to change by the factors of integration than the constitution of the state. The change of the business cycle, every political or economic change in the world, the

<sup>28</sup>[1942] 1 All. Eng. 142.

trend in each of the leading concerns participating in the combination, all have their influence on the direction and the scope of the combination. The smaller the group of the concerns participating in the combination the smaller the significance of the agreement. That goes so far that in a great number of very important cases no agreement at all is necessary to accomplish the result of a combination or horizontal order, since the integrating force of an existing unified will alone is great enough to accomplish the same. In *United States v. U. S. Steel Corporation*<sup>29</sup> the Supreme Court was confronted with such a situation.<sup>30</sup> The government stressed the point that "the combination embodied in the corporation unduly restrains competition by its necessary effect and therefore is unlawful regardless of purpose." Just as in the cases dealing with the legal conclusions from the dependency of corporations on each other, the court held that some criminal, or at least "bad" intent, in entering into agreements was a prerequisite of violation of antitrust legislation, thereby overlooking the fact of an integration without agreement—a factual union with all the effects discussed here.

The larger the number of concerns participating in the combination, the more complicated is the organization and the more important are the agreements. The combination is subject to the acts and decisions of their own judicial, administrative or legislative agencies.<sup>31</sup> Almost all "agreements" discussed here contain an arbitration clause. This device looks very innocent. Suppose one of the concerns should break its promise, why should not its contractee appeal to an arbitration previously agreed on?<sup>32</sup> In a usual case of arbitration the arbitration tribunal decides actual litigation between two parties. As soon as this litigation is settled by compromise or decision, its task and the significance of its work come to an end. The decision of a private arbitration tribunal is of no significance under the *stare decisis* rule, either for any ordinary court or for any arbitration tribunal, not even for the arbitration court issuing the decision. In the situation under discussion, however, the rule of private arbitration tribunal is law binding on all con-

<sup>29</sup>251 U. S. 417, 448 (1920).

<sup>30</sup>Compare cases on price leadership, for instance, *United States v. International Harvester Co.*, 274 U. S. 693 (1927); *United States v. Underwood Typewriter Co.*, Civil No. 8-317, S. D. N. Y. filed Apl. 20, 1940, Consent Decree entered Apl. 23, 1940.

<sup>31</sup>The problem of the "constitutionality" of these acts, which means their consistency with the original agreement, is just raised as the question of the constitutionality of state acts.

<sup>32</sup>H. E. Friedlander, *Arbitration in International Cartel Agreements* (1939) 3 ARBITRATION JOURNAL 271. The usual language of the arbitration clause is "differences arising directly or indirectly out of the contract are to be submitted to arbitration. . . ."

cerns belonging to the pertinent combinations, or even beyond that. The overruling of a decision of such an arbitration tribunal is actually more difficult to obtain than the overruling of a corresponding rule of an ordinary court.<sup>33</sup>

It is obvious that this arbitration tribunal is much more than an agency of judicial character which decides casual litigation. It establishes the law to which all members are subject in matters of their daily life and their very existence. The institutionalism of our time, which makes us inclined to be satisfied to deal with each institution as a sole, independent being, closed our eyes long enough to this development. The common law principles made each and every clause providing the submission of future litigation revocable, since any other rule "would oust" the courts of jurisdiction.<sup>34</sup> Even as late as in 1904 the Supreme Court of Georgia<sup>35</sup> expressed its anxieties by the following statement: "By first making the contract and declaring who should construe it, the strong could oppress the weak and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral or contrary to public policy." The discussion of the arbitration device in itself did not disclose reasons why persons shall be entitled to make contracts but not be entitled to give some one else the power to construe the contracts. The state statutes changed the common law. *Marchant v. Mead-Morrison Mfg. Co.*<sup>36</sup> states the prevailing law of today: "No one is under a duty to resort to these conventional tribunals, however helpful their process, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others." The same general attitude is the basis of the decision of our courts in regard to foreign arbitration tribunals which have been given jurisdiction by one American and one foreign party and before which the American party appeared.<sup>37</sup>

After some time of judicial activity of the arbitration tribunal of an international cartel, we realize that there exists something new—the law of the horizontal order. The states may interfere in this development in a double way: the state in which such an arbitration tribunal is acting may bind it by certain compulsory statutory provisions, and the state in which the defendant is domiciled may declare the judgment of such

<sup>33</sup>Meinhardt, *Das Schiedsgericht der Internationalen Gluehlampen Vereinigung* 2 Nussbaum's Jahrbuch (1930) 166.

<sup>34</sup>Kill v. Hollister, 1 Wils. 129, 95 Eng. Rep. 532 (K. B. 1746).

<sup>35</sup>Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696, 697 (1904).

<sup>36</sup>252 N. Y. 284, 169 N. E. 386, 388 (1929).

<sup>37</sup>WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS (1930) c. 17.

tribunal unenforceable. The flexibility of an international combination does not make it difficult to overcome both interferences. Combinations can always find a place in which no legislation exists compelling an arbitration tribunal to respect burdensome statutes protecting the public or consumer interests against the power of a combination. A substantial number of combinations considered Switzerland, and within her boundaries the canton of Geneva, as best suited to their purposes.<sup>38</sup> William Meinhardt<sup>39</sup> reported in a speech how the lamp cartel overcame the difficulty of the enforcement of the judgment of the decree of the arbitration court:

"Under these conditions of law, the endeavors to ease the enforcement of decisions of the court of arbitration are of great importance. Our basic agreement provides for a deposit to be furnished by all members. Two kinds of securities exist. One is deposited for cases of serious violations of the agreement which may entitle the other members of the cartel to cancel the agreement. I may note that these securities shall only be used in very special cases. Practically in all cases the involved partner may call for a final decision of the court of arbitration before this deposit of securities can be used. Ten per cent of the required securities have to be deposited in cash. The other part of these securities have to be deposited in such a way that they can be used in the country in which they are situated in accordance with the laws of those countries.

"In this connection, we are interested in the possibility of obtaining payment out of deposits made in cash or in bearer securities. No difficulty arises here, but 90% can be deposited in bills of exchange, guaranty-promises, etc. It is obvious that all members used the right to deposit 90% by other means but money and bearer securities since large amounts are involved. Is it possible to enforce the judgment of the court of arbitration by the sale of such 90% securities independent from the domestic law of the involved member? Guaranty-promises do not give any real security. Since an immediate enforcement against the promisor is not possible, the promisor must be sued again and his promise is not valid if the principal claim is not recognized as valid. These promises bring us into a *circulosus vitiosus* which I have to consider more in full. What about the most current device of security, the deposit by bill of exchange? You all know that the bill of exchange is the best device of security

<sup>38</sup>The president of the principal German partner of the "agreement" W. Meinhardt, told the German Manufacturers Association the following: "We found a solution by bringing our management in a country which is favorable in regard to its cartel legislation, or it is better to say that it did not now deal with cartels by any legislation. Therefore in such a country there is room for reasonable contracts and reasonable provisions." The record of the association published as a special publication in Berlin, 1931, mentioned that the reaction of the assembly was "laughter, bravos and clapping", which may especially be mentioned since his statement came directly after a reference to the antitrust legislation of the United States.

<sup>39</sup>William Meinhardt, *The Legal Structure of International Cartels, Especially of the Electric Light Bulb Cartel*. Lecture at the International Association for Comparative Jurisprudence and Economics, Berlin, Feb. 10, 1928.

to make a claim independent. You know that the debtor can only raise a limited number of objections against the bill of exchange. Up to now, we had no chance to bring any suits based on deposited bills of exchange because every member has complied with his duties. It may be doubtful if bills of exchange deposited in a Swiss corporation would be a good device to compel an unfaithful member to perform the contract in his home country which may be hostile to any form of cartel. In any case, it is a very serious matter for every business man (and our members are all businessmen) and may even be a detriment to his credit not to pay a bill of exchange signed by him even if he would be successful in proving in court that the obligation for which the bill of exchange has been issued was void. However, it is clear that there is no certainty that we will be able to enforce a deposited bill of exchange against a member if he would violate his obligations in his home country."

Certainly the state interferences did not hinder the development of the law of a horizontal order.<sup>40</sup> This situation should bring Kelsen<sup>41</sup> in some trouble, since in his system law and state are described as identical. It would be interesting to learn if he describes the new "law" as the state or if he would be satisfied, as he certainly indicates,<sup>42</sup> with the general statement that the state is supreme and if necessary may abolish the law of these combinations by legislation whenever it so decides. In the international aspect he may be satisfied to state that an international treaty could abolish the law of the horizontal order or that one of the states may prohibit by law the adherence of any of its citizens to the order.

Although I am opposed to Kelsen's state theory that the law is identical with the state, I refer to this theory because it seems to me helpful in clarifying the arising problems. The existence of any law governing any group of people is conditioned by the fact that these people belong to one and the same social entity. The adherence of such entity affects each member in its very structure. The corporation which is only subject to the corporation law of the state under whose law it is organized is an entirely different being than a corporation subject to both laws. That is of importance not only in the description of the scope of the concern but also in the external and internal life of each entity. I shall discuss elsewhere instances of the necessary repercussions of this development on state corporation law.

The arbitration tribunal itself is not called as an "arbiter" only in

<sup>40</sup>It is of a symptomatic interest that the National Socialist government in one of its first decrees privileged the cartel arbitration courts compared with the ordinary arbitration courts. Statute of Dec. 18, 1933 relating to the arbitration clauses in cartel agreements, R.G.B.L. I, p. 1081.

<sup>41</sup>KELSEN, ALLGEMEINE STAATSLERE (Berlin, 1925) 47.

<sup>42</sup>*Id.* at 108.

actual differences of opinion. We find cases in which it may fix prices, especially where the number of members in the combination is small.<sup>43</sup> Some contracts provide that the arbitration tribunals may be called upon to change the provisions of the contract or to amend them or to establish a binding rule relating to the performance of the contract.<sup>44</sup> Even the most important single element of the combination, the quota, which determines the scope of the participation of each partner, may be changed by the decision of this court. Shortly, we find the arbitration court acting as a judicial, administrative or legislative agency.

In many combinations one or more committees or one or more trustees act as the principal administrative agency. They may appoint a management acting under them and employ as many officers as they consider fit. The most interesting form of managing agency is a managing corporation whose shareholders are the persons to be regulated in pursuance of the aim of the combination. In the international cartels as well as in the European cartels, especially under the rules of civil law, we very often find this form. It is on the way to the Western Hemisphere. A recent Canadian case, *Rex v. Container Materials Ltd.*<sup>45</sup> helps us very much to understand the status of this genuine form of a corporation as well as its structure under common law. The manufacturers of fiber board and corrugated box materials in Canada established a corporation for the "betterment of trade relations and for the development of business" in 1928. In the beginning of 1931 the members of the association signed the following statement:

"The undersigned manufacturers hereby approve the form of agreement hereto annexed and agree and undertake one with the other to properly execute the same when engrossed and to authorize Messrs. Hardy and Baden (a partnership of which Baden was a member, in fact the most active member in the industry) to add the appropriate figures and percentages, and they further agree that until the Container Materials Ltd. is ready to and does function that they will maintain the price adopted by the undersigned by resolution at meeting of this date which shall be deemed to be a meeting of the present association and binding as such, and that Messrs. Hardy & Naden have full power to deal with the deposits of the present association and transfer them to the Container Materials Ltd."<sup>46</sup>

<sup>43</sup>Friedlaender, *Arbitration in International Cartel Agreements* (1931) 3 *Arbitration Journal*. 273.

<sup>44</sup>"An international combination in a certain part of the electrical industry provides that the arbitration court has jurisdiction to decide 'disputes on the validity of the contracts and legal and substantial considerations in general, the scope and the consideration of any contractual obligation and after all, any matter of whatever kind which is directly or indirectly connected with the contract.'" FRIEDLANDER, *loc. cit. supra* note 43.

<sup>45</sup>[1942] D. L. R. 293.

<sup>46</sup>Watch the power of Messrs. Hardy & Baden. To this extent the case gives us a fair idea of the management by trustee.

For almost a year the Messrs. Hardy & Baden acted as managers of the combination until in 1932 the Container Materials Ltd. began to operate. The shares of this corporation were given to the firms belonging to the combination with the exception of one share per member company, which share was issued as a qualifying share to the nominee of the member company who acted as a director of Container Materials Ltd. There was one director for each member company. The volume and distribution of shares issued to each member company including the one share held by its member director was in exact ratio to the quota of business allowed to each company.

The corporation which covers almost 100% of the pertinent business made a number of agreements with the member firms:

- a. It purchased from these firms their entire output at prevailing market price, less a discount of 11%.
- b. It made the member firm its selling agent, and gave 10% commission, the result being that 1% remained with the Container Materials Ltd. The public dealing with the member firms did not realize that they were any one's agent.
- c. It divided the entire business among the member firms and established for each firm a quota of the total production.

The performance of these agreements was secured—

- a. By a strict inspection and supervision of the books of the member firms by the Container Materials Ltd.
- b. By giving Mr. Baden (one man) the power to impose fines and levy upon deposits of the member firms.

The case does not lose its interest by the fact that the Canadian courts decided against the Canadian fiber board and corrugated box pool. The courts did not decide against the pool because of any criticism of the device of the managing corporation. This form is known to our industrialists from their cooperation with European cartels. Reference may be made to Alliance Aluminum Co., a Swiss company which was to provide "the mechanics for carrying out the agreement"<sup>47</sup> of the aluminum combination, and to Phoebus A.G., a Swiss company exercising the same function in the international bulb cartel.

The Canadian case found a way to translate an institution grown up under the civil law system, into a common law system. The form developed in Germany in the beginning of this century, especially in the Rheinische Westfaelische Kohlensyndikat G.m.b.H.<sup>48</sup> Since under the civil law every contract can be specifically enforced, it is possible to

<sup>47</sup>United States v. Aluminum Co. of America, 44 F. Supp. 97, 280 (S. D. N. Y. 1941).

<sup>48</sup>FLECHTHEIM, KARTELLRECHT (2d ed. 1923) 1340.

make the managing corporation a party to the basic agreement establishing the combination. Thus the managing corporation can bring actions against any member firm not performing the contract. No member firm must be a plaintiff in a case against any other member. Thereby very important legal advantages are accomplished and hostile feelings between the member firms can be avoided.

The Geneva protocol on arbitration required that an arbitration tribunal consider certain compulsory statutory provisions of the states to which the parties to the litigation belong. The management corporation device made it possible for the plaintiff to be domiciled in the same place as the arbitration court. For instance, Phoebus A.G., mentioned above, is domiciled in Geneva where the arbitration tribunal of the bulb cartel is also situated.

The common law principle of damages as the only remedy in law and the reluctance of equity courts to grant specific performance, did not permit the utilization of the same device in the same form. The case *Rex v. Container Materials Ltd.*<sup>49</sup> shows the interested people how to do it. The Container corporation purchased the entire output while the member firms acted as agents of this corporation. Thereby the corporation obtained a direct interest in the products and in the proceeds obtained by its agents.

The combinations, through their judicial and administrative agencies, developed the most modern forms of ruling power as distinguished from legislative power. The ruling power of the arbitration tribunals of the cartel committee and of the administering corporation suggests itself. The manager of a member-concern certainly reads the daily rules of the group with at least the same care as he reads the administering rules of a governmental agency acting in a field with which he is connected.

The legislative power in its formal sense is entrusted to the meeting of all members of the combination. We find the most modern provisions relating to the judicial consideration of these legislative acts. In a number of cases the minority call on the arbitration tribunals and ask for a decision that the resolution of the legislature of the whole central order violates general principles governing the combinations. In other cases difference of opinion relating to the interpretation of such "statutes" can be submitted to a special court which may give its conclusive interpretation without any actual practical litigation.

The first impression which the reader may have is certainly that this order is a very democratic one and a very legally-minded one, at least as far as the internal relationship between the parties is concerned. Cer-

<sup>49</sup>[1942] D. L. R. 293.

tainly the forms are both democratic and legalistic but the undemocratic aim of the entire order has its effect on the weaker forces within itself. The order wants to impose its regulation on the market and to dictate to individuals and to other organizations of society how they can buy and what they can buy. The impact of the power of the horizontal order begins to be felt inside of the organization. The relatively weak member who has only a small production or sales quota, and therefore a relatively small voting power, is already in a position similar to any person subject to the command of the organization. So slowly the integrative power goes over in mere impact.

Thurman Arnold, asked how many of these international combinations may exist, answered the Truman Committee that he estimates the number at about 200. When this war began almost every finished product or raw material in the international market was in some way affected by such a horizontal order. Does that really mean that we have 200 or more "orders" as discussed in this article? If there were really 200 horizontal orders, one beside the other, differences of opinion and differences of interest between these 200 orders would be a substitute, however slight, for free competition. The national governments would obtain a quite far-reaching influence by acting as the arbiter between these 200 different orders. But as a matter of fact, the number of actual independent orders is much smaller, for the following reasons:

I have referred already to the inter-relationship between the vertical and the horizontal order in respect to the intersection of corporate structures. This concentration of control in the concerns has another decisive effect on the horizontal order. The forms under control fulfill the most various commercial tasks. They produce very different goods; they transport and sell; and they do any other economic act. Corporations not made a part of the concern are strongly influenced by shareholding and otherwise. In any case in which a large number of products manufactured or influenced by one concern are made the subject of combinations, the same concern is a party to horizontal orders. If we do not number the combinations by their products, but by the number of concerns participating, or by the number of persons finally deciding the trend, we come to a substantially smaller number than Thurman Arnold estimated. That does not make the significance of the order less important, but makes it much more serious. A thorough research of all orders which existed at the outbreak of the present war is under way.<sup>50</sup>

<sup>50</sup>*Reports of the Bone Committee*, Senate Committee on Patents on S. 2303 and 2491, 77th Cong., 2d Sess. (1942), gives us an idea of the research done by interested lawyers and economists.

The gap between the combinations is furthermore diminished by the interconnection of the products and the commercial activities relating to these products. One group deals with the production of electric bulbs, another group deals with the production of glass to be used for those bulbs, or with the production of mica necessary for the same production. A third group deals with the sale and retail distribution of the same products. A fourth group deals with the financing of the sale. It is obvious that all these groups are continuously in a process of integration while the influence of the forces within them may be varying from time to time. Today, in time of war, production is most important, and therefore the leading group of producers and industrialists is able to dictate its will to the other producers, while in a time of crisis the financing group may become more influential. In all these cases production (scope, standardization, etc.) and conditions of sale are not determined by competition but by the power of the integrative forces to make a "decision" rather than their willingness to observe the "result" of the competitive fight.

The number of combinations which are in actual competition with each other is very small. The process of integration is going on. The trend of the development to a closed horizontal order cannot be denied.

The less the need of the order to extend membership to a person the stronger will be the impact of the order on him. Outside of the combination every one is potentially subject to such impact. He feels those dictates of the combination which relate to the scope of the production and the conditions of sale. He may be informed that in his country a certain article cannot be obtained at all because his country is excluded from supply by the combination. He may be informed that he can get only a certain percent of his real needs because the production is restricted, or at least that his country is not supplied with more than a certain limited amount. He may be informed that he has to pay a price much higher than any price he can pay. He has no remedy, legal or of any other character. That is at least a symbolic distinction between his position as a person subject to the rules of the state administration and as a person subject to the rules of the combination. Since in the integration of the state organization he is at least in a slight respect, an "integrator", he can participate in establishing the will and the direction of the state by appealing to the courts for review of the administrative rule. His position in relation to the combination is different. He is only a victim. He is only subject to command. He is neither an integrator nor an integrative force. He is

accepting the commands. His contracts with the member firms are more symbolic of his obedience than the result of the "meeting of minds". That is behind the many "forms" of contract which we see in daily life.

In feudal times many different sources of law existed—the law of the guilds, the law of the municipality, the law of the manor, and others. Every person subject to any of these groups could ask his group for protection against other groups. Our state and law philosophy is based on state and individual as the only two building factors of society. The individual could look only to the state for help. States answered the call of the individual in most different ways. The smaller the territory of the state, the smaller its political influence on world politics, but the greater its interest in excluding others from its own market and participating in the market of others. Mere exclusion would be possible by prohibitive tariffs and similar devices, but actual participation in the world market at the same time is to a smaller country obtainable only by getting the support of stronger ones. These conditions made the smaller states not only dependent on the functioning of the horizontal order but even made them the most enthusiastic supporters of this development, either as a result of their own political philosophies or their political dependency on the support of the cartels. The student of the records of the League of Nations learns just that.<sup>51</sup> The United

<sup>51</sup>On Sept. 17, 1931 the French government submitted to the 2nd Committee of the 12th Ordinary Session of the League of Nations, the following resolutions: "Considering that it is more urgent than ever to put into cooperation means for improving the world economic situation, and considering that among these means the experts consulted during the last few years, and more recently the committee of economic experts, have emphasized the development of all economic agreements on account of the beneficial effects they may exercise on the organization of production and the regulation of trade; considering that these agreements would in particular tend to create favorable conditions for the progressive lowering of custom barriers; considering moreover, that assistance and guidance must be given to the parties taking steps in this direction:

"Recommends that governments should without delay support all efforts of this kind made by the producers of their countries; It requests the economic organizations immediately to promote such meetings as may lead to the conclusion of these agreements and to take all steps to insure their publicity, to follow their activities and to safeguard all legitimate interests, particularly those of consumers, either countries or persons; and

"While leaving the economic organization to select the products in respect to which these rapprochements appear to it most easily obtainable, it calls the attention of that organization to the following commodities which seem to it likely to fulfil most satisfactorily the conditions for this purpose; cereals, coal, wood, paper, artificial silk, leather, hides and skins, electrical material and chemical (!) products."

On September 20, 1930 the representative of Poland, Mr. Gliwil, made the following statement: (4th Meeting of the 11th Ordinary Session of the League of Nations)—"Those of us who have to deal with industry are well aware that the only means of coping with industrial depression is the conclusion of an understanding between the producers which

States tried to make a distinction between the domestic and the international market. In the domestic market the very existence of a horizontal order was considered irreconcilable with the language of the anti-trust legislation, although the courts so revised the principles of this statute that the existence of the horizontal order was not objected to unless a necessary criminal intent was found in the establishment of the order.<sup>52</sup> In the international market the antitrust policy was not actually pursued, either by the interpretation of the Sherman Act by our courts or by the policy of the State Department. In our discussion of the use of the device of the legal entity in foreign countries, and the regulation of the foreign market without allegedly affecting the domestic market, we have noted in what direction our legal and corporative policy has developed. The policy of the State Department followed the same pattern. In November, 1933, the Secretary of State submitted his suggestions "for a protracted truce against measures restrictive to international trade" to the League of Nations.<sup>53</sup> In section 1 of the suggestions the following is stated:

"The participating governments agree not to introduce any new obstacles, direct or indirect, to the movement of international commerce, whether such obstacles are embodied in new legislation or brought into existence by the exercise of administrative or executive power over existing legislation.—The preceding agreement shall be subject to the following reservations and exceptions:

"C. Arrangements, either of duties, quotas or other forms, applied in connection with multilateral agreements for the regulation of production and/or marketing of natural products, provided such agreements conform to principles which have received general approval."

Actually the distinction between "domestic" and "international" markets in dealing with the problem of a combination and the power of a

unites the latter in a common front in face of a disaster from which they all suffer. Cartels, to quote the well-known saying of a German economist, are only the children of misfortune.—the Agriculturists have no course but to follow the example of the industrialists and to come to an understanding.

"The Prime Minister of Denmark, Mr. Munch, made the following statement on Sept. 19, 1930 at the 11th Ordinary Session of the League of Nations—"In all the discussions organized by the League of Nations from the Brussels conference of ten years ago down to the present day, the ruling conception has been that the best way to foster the natural development of production and commerce is the gradual lowering of customs barriers which at present constitute such serious obstacles to the rational organization of production and commerce in the various countries of Europe.—The traders and the big economic organizations, the national and international combines and the cooperative associations, are called upon in the first instance to organize on the best possible lines the production of each country and the exchange of commodities between the various countries."

<sup>52</sup>United States v. Sisal Sales Corp., 274 U. S. 268 (1927).

<sup>53</sup>League of Nations, Official Journal 1933, p. 1505.

combination is untenable. Either there is an international market of the United States in any product or material in which we are interested or in which we are potential exporter, importer, or otherwise, or the United States has no interest whatsoever. If there is an international market of the United States in any product, the national and the foreign market in regard to the combinations covering such product cannot be distinguished. If we can produce more aluminum than we need and the world market is so organized—with the participation of American concerns—that we do not export, our production and the prices therefor are affected. The same statement can be made in regard to any import policy, price, etc. 'The horizontal order', if successful in the international market, affects the articles produced in our own country, provided that any export or import takes place or may take place.

A preview cannot be more than a description of the scope of the problems under consideration. Thurman Arnold, in his writings and in his administration as chief of the Antitrust Division of the Department of Justice, elevated the problems from an investigation of the number of violations of the Federal statutes to a fight against a system which he analyzed as adversely affecting not only our economic technique but the human value of any individual. No matter if one agrees with Mr. Arnold's conclusions, one has to be clear that the impression of his personality influences all studies in this field.

The scope of the study of the law of combinations includes an understanding of the acts of the firms, of the mechanics and of the effects of cooperation between the partners to the order, and of the significance of the legal instrumentalities involved, such as corporations, partnerships, contracts, arbitration tribunals, etc., arising out of the power of the combination. This study includes also the effects upon, and the reaction of the state and other social organizations and, finally, the legal position of the individual in a society in which the horizontal order is in the stage of final integration.

It is one of the principal tasks of our time to subordinate the self-seeking integrating forces in society to the needs of all society.