European Antitrust Policy

by DR. HANS B. THORELLI

In November 1958, Dr. Hans B. Thorell, Research Consultant to the General Electric Company, gave a series of three lectures at the Law School on the subject of European Antitrust Policy. The first of these lectures, dealing with the socio-economic and political background against which recent European efforts to control monopolistic phenomena should be viewed, is presented below. The second lecture, which was concerned with a comparative survey and analysis of current national policies, is published in Volume 62, Number 2, of The University of Chicago Law Review. The final lecture, which treats of European participation in international efforts to control restrictive business practices and deals primarily with the Coal and Steel and European Economic Communities, appears also in this issue of the Record, beginning on page 19.

I. THE CARTELIZATION OF EUROPE, 1914-1945

It would seem that in recent years government and business relations in general and public monopoly control policies in particular have been moving in increasingly similar directions in the United States and Europe. Indeed, individual policies in individual European countries frequently have a striking affinity with corresponding policies here. But there are still basic differences on many points, and behind superficial similarity one will often find principal differences of economic and social philosophy, which are subject only to secular change. Thus, if we want to avoid being misled by apparent similarity in form, if we want to learn something by comparative study, if we are interested in the possibilities of international cooperation in this field, and, indeed, if we want to study law as an expression of public policy rather than as a mere body of rules and cases, we are per force obliged to start out with a review of economic organization and its social and political environment, at least during the period immediately preceding the present one. For reasons continued on page 2

Levy Mayer

by FRANK D. MAYER, JD’23

The paper which follows was delivered by Mr. Mayer at the invitation of the Law School on February 17, 1959. It is the latest in the School’s series on distinguished Chicago lawyers.

People often forget that post-Civil War midwesterners met and overcame in scarcely a lifetime three great problems, which in Europe came to the fore gradually over a number of centuries. The first was to build part of a unified nation out of an almost virgin continent, the second was to endow their towns and cities with modern machinery of production and communication and, third, midwesterners had to develop and modify their systems of law and government to meet the changing business and industrial conditions while they were tackling the first two problems.

In that tumultuous and fast-moving era, lawyers like Silas Strawn, John P. Wilson, S. S. Gregory, Horace Tenney, Levy Mayer and others helped to lift Chicago from a frontier swamp town which was merely the center of an agricultural area to today’s industrial metropolis of the midwest and one of the great cities of the world. In so doing they helped usher in what has been called the new Industrial Era.

Levy Mayer was born of revolution and fierce times. His parents, Clara and Henry Mayer, had fled their little village in Bavaria, Germany, in the aftermath of the 1848 upheavals. The Mayers settled in Richmond, Virginia, where Levy Mayer was born October 23, 1858, the sixth of 13 children. There the immigrant family was soon caught up in the ferment of the Civil War. Finding security in Richmond illusory, in 1863 Henry Mayer moved his family to Chicago, then a town of less than 300,000. (Had this somewhat dangerous migration to Chicago not occurred, you might be sleeping comfortably in your respective beds instead of drowsing here.) In Chicago he set up a small business in furnishings, tobacco and other merchandise on

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the so-called Northwest Plank Road. Chicago was then still in the "horse and buggy" age. Electric lights were unknown and telephones were not used until a number of years later. Residences were generally lighted by kerosene lamps and a little later by gas. Buildings were generally heated by coal stoves. Public transportation was largely by horse or cable car, and private transportation, of course, completely by horse-drawn vehicles. There were livery stables in what is now downtown. Michigan Avenue and other downtown streets were still part of the residential sections.

The family was poor—really poor—as Mr. Henry Mayer was never much of a success in business although he was an educated and cultured man. Accordingly, all the children worked as soon as they were able. The oldest boy, David Mayer, went into business with his brother-in-law, Leopold Schlesinger, under the name of Schlesinger & Mayer and eventually did business as a department store in the building which is now occupied by Carson Pirie Scott & Co. The women of the family also helped out either in housework, in the store, or in giving piano lessons.

Levy Mayer attended the Jones Grammar School and the Chicago High School on the west side. From the very beginning he showed evidence of the tremendous intellect which later brought about his great success. He was not only an excellent student but was a voracious reader, particularly of classical literature. When Levy Mayer finished high school in '74 he had already made up his mind to study law. By that time his older brother David had sufficient funds to see Levy Mayer through the then two year course at the Yale Law School, where the 18 year age requirement was waived for the 16 year old scholar. In 1876 he graduated from the Law School, standing second in his class. On the graduating platform with him was General William Tecumseh Sherman, then commanding general of the Army.

Coming home to Chicago, Levy Mayer was too young to be admitted to the bar, but he procured a job as Assistant Librarian in the Chicago Law Institute, the law library on the top floor of the Court House, at a salary of $4.00 a week. There he gained valuable experience in legal research, and made numerous contacts with members of the bar. To supplement the small salary he wrote for legal periodicals, prepared a catalog of the Library, edited several books and aided other lawyers in the preparation of cases.

We still have in our firm library a book, which is also in the Law School library, some 500 pages long by David Rorer entitled A Treatise on the Law of Judicial and Execution Sales published in 1878, the preface of which states:

"The favorable reception by the courts and legal profession of the original edition of this work encourages the author to lay before them a second edition, greatly enlarged, and so rearranged as to afford a more ready reference to the contents. All the cases cited, both old and new, have been carefully verified. This has been done by L. Mayer, Esq., of the Chicago bar, to whom also its editing has been confided. His faithful and able discharge of those duties is hereby acknowledged."

He also edited a book by the same author on so-called "interstate law" which is presently termed "conflicts of law." This was at a time when Mr. Mayer was only 20 years of age.

At this stage of his life, Mr. Mayer was described by the late Judge Jesse Holdom, who had observed him while he was Assistant Librarian at the Law Institute as—

"a great student of the law who expended all of his time not devoted to his duties, in digging into the law books at his hand. He was courteous and obliging and quite helpful to lawyers as he knew the library thoroughly and had practically every book at his fingertips. At that early age he had a remarkable knowledge of case law."

It was while working in the Law Institute that he became acquainted with Adolf Kraus, of whom more will be said hereafter.

As soon as he became 21, Levy Mayer was admitted to the bar of Illinois. One of his first cases was the de

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Frank D. Mayer, JD'23, delivering his lecture on Levy Mayer to a full house in Breasted Hall.

The Honorable Charles E. Wyzanski, Jr., delivering the biennial Ernst Freund Lecture in Mandel Hall. At left is Professor Bernard Meltzer, who introduced the speaker.

Three generations at the Mayer Lecture. Right to left, Isaac Mayer, grandfather of Frank D. Mayer, Jr., Class of 1959 (center), and on the left, Frank D. Mayer, JD'23, speaker for the evening.
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fense of his brother David in a lawsuit which contained not a trace of his future practice or of the so-called new Industrial Era. David Mayer was negotiating to buy a horse, and in the course of the negotiations tried it out. He decided not to buy it, and the owner alleged that the horse was returned to him lame. The owner had retained Adolf Kraus, a lawyer who was then coming into prominence. Mr. Kraus was a Bohemian by birth, was self-educated and at that time was about 30 years old. Mr. Kraus’ client (possibly because of Mr. Kraus’ greater experience) procured a judgment in the trial court against David Mayer for $200. While the case was pending on appeal, Mr. Kraus, who had been impressed by Levy Mayer both in his contact with him at the Law Institute and in the trial of the horse case, concluded to offer Mr. Mayer a partnership. In order to form the partnership, it was necessary to settle the horse case, so Mr. Kraus and Mr. Levy Mayer each contributed $100 towards satisfying the judgment. It is said that Mr. Mayer used up the rest of his savings to buy a desk and some books.

According to Mr. Kraus, who published his reminiscences some years ago, young Mr. Mayer from the beginning was able to do more work in a day than the average lawyer could do in two days and to do it well besides. For the first year of his practice, Mr. Mayer did office work: drawing contracts, examining abstracts, investigating legal authorities, preparing memoranda and attending to office routine. Mr. Mayer, as is not unusual, was at first extremely nervous at the thought of trying a case in court. However, before the year was up Mr. Kraus told him to take charge of a case. Young Mayer tried it, won it and from that time on had no lack of self-confidence, and in fact acquired great courtroom presence.

In its first year the partnership handled a variety of minor matters, both civil and criminal. There were small contract and real estate disputes, in addition to charges of adultery, and allowing a minor to play cards in a saloon. Of course the firm also handled collections, leases, contracts and other matters for Schlesinger & Mayer, the growing department store operated by Levy Mayer’s brother and brother-in-law. In those early days, before the Bankruptcy Act of 1898, when a person or business got into financial difficulties he made an assignment to a trustee for the benefit of creditors. These assignments frequently became involved in litigation in much of which the firm participated. After the Bankruptcy Act, the firm was required from time to time to handle claims and other matters requiring knowledge of the bankruptcy law.

Mr. Mayer went through a number of severe depressions, those of 1893, 1907 and 1921 and so was familiar with legal and business problems arising from them.
court battles he remained calm. Even after he attained great prominence he was always readily approachable by persons in all walks of life.

Mr. Mayer’s assistant for many years, Mr. Matthews, relates the following story:

“It was my custom to stay in the office until Levy Mayer went home and sometimes he left quite late. The evening before the bar examination he came out of his room at about 7 o’clock, hat and coat on, ready to go home. He had just heard that I planned to take the examination and he asked whether I thought I had done enough studying to do so. I told him what I had read and he started to ask me questions which I answered readily. He finally asked me a difficult question involving the applicability of the Rule of Shelley’s case in a real estate transaction. I answered him and he said I was wrong. I said I thought I was right and I cited a case to him which supported my answer. He took off his hat and coat, walked into the library and started to pull down books. I found further decisions supporting my answer and showed them to him and finally he said, ‘I believe you are right.’ Then he put on his hat and coat and as he walked out he said, ‘I guess you will do.’”

This demonstrates his interest not only in legal questions but also in the young men who worked for him; also his open-mindedness and readiness to admit error.

Here, although it may not prove any particular point, I would like to interpolate and tell one of my own recollections of Mr. Mayer: The evening of my first day at this Law School, Mr. Mayer was at our house for dinner. Naively, I told him about the first case which we discussed in personal property under the late Professor Bigelow, who subsequently became the Dean of the Law School. The case involved a question, seemingly a simple one (although I have since learned better) as to whether the true owner, the finder or the owner of the property had the right to possession of a ring which had been lost in a hen shed. To my amazement, Mr. Levy Mayer and his brother, my father, Mr. Isaac H. Mayer, became engaged in an argument which lasted for hours. But these nestors of the bar never came to an agreement over the correct answer. I wondered to myself whether I should not immediately drop out of Law School, rather than pursue a career concerned with questions to which apparently there are no answers. But, I continued and am therefore here before you.

However, it was not merely an advocate that Levy Mayer attained his claim to greatness, but soon he became widely known for his expertise in the intricate field of corporate, business, and antitrust law, and his keen perception of business itself. Chicago was growing with great rapidity. So were the businesses located here. Mr. Mayer not only acquired an astonishing knowledge of a great diversity of businesses, such as grain, meat packing, banks, utilities and newspapers, but he also kept up with the legal and business developments in the corporate and business field. He
had among other assets great imagination and skill in working out new legal machinery adapted to the era of rapid business expansion.

Professor James Willard Hurst, in his book on The Growth of American Law, says with respect to the changing functions of lawyers as business became more complicated in the last and earlier in this century:

"After 1850 the handling of facts took on a new importance both in advocacy and in counseling. By the 1890's the complex facts of the economy in particular offered both the setting and the pressure for the lawyer to take on a new role -- as a specialist in incisive, accurate, fast appraisal of snarled or complicated situations. Law was too close to affairs for the lawyer ever to have been wholly a man of books. Nonetheless, there now came a change in emphasis that amounted to a change in function. * * *

When Levy Mayer began his practice, the financial, business and industrial centers and the great markets were still in Europe. Even as late as 1900 over a third of the American wheat crop was shipped abroad, and in 1906 the export of beef reached a peak of 732,000,000 pounds. During the 80's and 90's cheap American grain and beef blanketed the English market, contributing to a prolonged depression in that country and causing the great English landlords and capitalists to shift their investments to American farming, ranching, railroads and industry.

Thus it was that Douglas Gordon McCrae, the editor of the London Financial Times, came to Chicago in 1889 to invest capital entrusted to him. His contact with Levy Mayer soon resulted in the organization by the latter of the Chicago & Northwestern Granaries Company, merging a great many grain elevator concerns in the Lake Michigan and Lake Superior regions. The contacts with Mr. McCrae lasted long and profitably for both parties and their principals. Incidentally, to digress for a moment, it may be of interest to note that Mr. McCrae's daughter became the wife of Lord Webb-Johnson, the surgeon of the former King of England and the head of one of the great English hospitals.

These English contacts also led to the organization by Mr. Mayer of a corporation under the Companies Act of England to control a line of elevators along one of the large American railroads. English capital represented by him was also invested in Chicago breweries and in certain packing companies, among them Hately Brothers, Chicago Packing & Provision Company and International Packing Company, all three of which were later consolidated into one company.

In 1889 Mr. Mayer organized American Trust and Savings Bank, which through various consolidations, changes of name and other transfers became the present Continental Illinois National Bank and Trust Company of Chicago, which is among the large financial institutions of the country today. From that time on Mr. Mayer, with the able help of his brother Isaac H. Mayer and his brothers-in-law, the Messrs. Carl and Abraham Meyer, became the legal adviser to these banks and to their chief executive officers. In fact, one of the last matters Mr. Mayer was working on at the time of his death was the acquisition of the Fort Dearborn Banks by the Continental.

As Chicago and its business enterprises grew, the business of the firm grew rapidly in the 80's and 90's. This was fortunate because not only had Philip Stein, who later went on the bench, become a partner, but also Mr. Mayer's brother, Isaac H. Mayer, who is beginning his 75th year with the firm and who is present tonight at the age of 94. His wife's two brothers, Carl Meyer and Abraham Meyer had also joined the firm. All of these very competent lawyers were soon to become leaders of the bar, Mr. Isaac H. Mayer particularly in the trial field and Messrs. Meyer in banking and corporation law. Subsequently a number of nephews also entered the firm so in the earlier days it was more or less a family organization. Accordingly, had the firm not done well, the entire family might have died of starvation. Seriously, however, one of Mr. Mayer's great assets was his organizing ability. Under his leadership, both his and his wife's relatives worked together harmoniously. After it became impossible for him personally to attend to all of the matters in which he was retained, he had the ability to select able men and delegate to them the legal matters for which he was accountable. Although he did delegate, he also had the faculty of remaining responsible for and keeping sufficient contact with the various problems so that the clients felt, and properly so, that they were receiving Mr. Mayer's own attention to their work.

In addition to the persons previously mentioned, in 1892 Judge Thomas A. Moran of the Illinois Appellate Court, who was one of the city's ablest lawyers, joined the firm.

Mr. Mayer's practice became more and more diversified as the years passed.

Long before the days of the Wagner or the Taft-Hartley Act, and as early as 1905, Mr. Mayer was engaged in bitter labor litigation. He represented an employers' association which sought an injunction in a federal equity court to restrain picketing and violence on the part of the Teamsters Union, which then, as it is now, was a powerful organization. History may be repeating itself and apparently is, according to recent testimony before the Senate Committee, but I can recall when Mr. Mayer during the pendency of this litigation had to be accompanied by a bodyguard because of threats of bodily injury made by the Union. In spite of these threats he fought on, the injunction was granted, and the violence terminated within a short time.
As might be expected, complicated antitrust litigation grew out of the consolidation of the large grain and cattle concerns. For a decade the Distillers and Cattle Feeders Trust, popularly known as the Whiskey Trust, was under attack, and Mr. Mayer defended it as well as the Corn Products Refining Company, which had been organized by him.

But he was not always on the side of big business or the so-called monopolies. In 1895 as counsel for certain independent companies, he procured a court decree upsetting the exclusive franchise of Peoples Gas Light & Coke Company.

He organized the Illinois Manufacturers Association in 1893, and as counsel for the Association he succeeded in litigation to compel the Chicago Telephone Company to submit its rates to the City Council for approval, and enjoining the phone company from putting into effect increased rates which had not been submitted to the Council.

There are three printed volumes of opinions which Mr. Mayer rendered to the Illinois Manufacturers Association from 1899 to 1907. They cover almost every conceivable question of business law. For example, they answer questions as to the liability of railroads for damages or loss of goods under a variety of circumstances, whether foreign corporations under the particular facts set forth were doing business within a state, and whether they were subject to its taxes, various questions of liability under sales contracts, whether under the laws of Iowa and North Dakota a manufacturer was obliged to print his formula on packages of birdseed, and whether there is any method for the owner of real estate of guarding against claims from more than one broker in a single real estate transaction.

In the last opinion mentioned, Mr. Mayer disclosed not only his knowledge of law but his common sense. His opinion concluded:

“There is no absolute way by which real estate owners can always avoid being made defendants in suits for unjust demands. The most efficacious course is to employ only one firm of brokers and to refuse to have any correspondence or negotiations of any kind with any others. This may at times be a somewhat harsh and brusque course, but it comes nearest to being the safest way in a community, where a mere look, a word or a nod is sometimes made the basis of a claim for commissions.”

One of the so-called trusts which Mr. Mayer had helped to create was the American Preservers Trust. He represented it in early litigation against one Andrew Bishop, who contended that the contract under which the company had purchased his business was void on the ground that it was an illegal contract in restraint of trade under the common law. Although the Sherman Act had been adopted at the time the suit was filed, the Supreme Court of Illinois in the case of Bishop v. American Preservers Company, 157 Ill. 284 (decided in 1895) did not rely upon any statute but merely upon the common law policy that contracts and combinations in restraint of trade are illegal and void.

The Company after buying Mr. Bishop’s business had made him a manager and given him possession of the assets as its agent. The action was one in replevin by the Company against Bishop to recover possession from him of its property which it had bought from him. The Supreme Court of Illinois held (157 Ill. 289) that because of its illegality the contract would not be enforced. When, however, suit was brought upon the replevin bond in the Federal Court (which case is reported as Gilbert v. American Surety Co., 121 F. 499 (decided in 1902) the Court of Appeals of this circuit held that under the doctrine of Steiff v. Tyson (it being long before the days of Erie Railroad v. Tompkins, the Federal Court was not bound to follow the decision of the state court. The court further held that regardless of the possible illegality of the contract, the agreement having been executed and Bishop having received the consideration for the sale and holding the assets merely as the Company’s agent or as trustee, that he was estopped from attacking the title of his principal. Accordingly American Preservers Company was the ultimate winner. The Court of Appeals quoted the observation of Lord MacNaghten in Nordenfelt v. Ammunition Co., English App. Cas. 535:

“There is a homely proverb in my part of the country which says you may not ‘sell the cow and sap the milk’. It seems almost absurd to talk of public policy in such a case. It is a public scandal when the law is forced to uphold a dishonest act.”

In 1901 Mr. Mayer participated in the Union Stockyards and Transit Company suit. In that case he represented independent packers and was attacking large New York financial interests, which were defended by William D. Guthrie of the Cravath firm. Mr. Guthrie apparently developed considerable bitterness toward his antagonist but the court ordered the Transit Company to treat the independent packers, represented by Mr. Mayer, with the same consideration that it was according the large packers.

Other transit affairs with which Levy Mayer was concerned involved the traction magnate, Charles T. Yerkes, who gained posthumous although rather unsavory fame in Theodore Dreiser’s novels, “The Financier” and “The Titan.” The electrification of the street cars, which originally had been horse cars and were later cable cars, involved large concentrations of capital, and then as now it apparently was exceedingly difficult to operate the transit lines profitably.

Early in the century receivership proceedings were instituted against the Yerkes controlled traction lines and Judge Grosscup in the Federal Court issued an injunction restraining certain state court proceedings in
which Mr. Mayer was involved. Judge Moran and Mr. Mayer were of the opinion that Judge Grosscup’s in-junction was invalid, and advised their clients that they might safely ignore it. This led to considerable ill feeling at the time between the Judge and the attorneys.

One of Chicago’s leading reforms was the establishment of the merit or civil service system for a large number of civic jobs. In 1897 Adolf Kraus resigned as a partner to become head of the Civil Service Commission, newly created by Mayor Carter Harrison. A storm immediately was instigated by certain politicians, who had lost their patronage, and Mr. Kraus and the other Commissioners were indicted and imprisoned allegedly for hiring a policeman who was 5 foot 7½ inches instead of the required 5 foot 8 inches, actually for political reasons. Mr. Mayer and his partner, Judge Moran, obtained a writ of habeas corpus, and Mr. Kraus and the other defendants were discharged in accordance with a colorful opinion by Judge Waterman.

Several years later, in 1904 Mr. Mayer was retained in one of the major criminal cases of his career. It took courage and showed a willingness on the part of Mr. Mayer to take on an exceedingly unpopular cause when he assumed the defense of Will J. Davis in the Iroquois fire case. On December 30, 1903 Eddie Foy, the father of the present Eddie Foy, was playing in “Mr. Bluebeard” to an overflow crowd of more than 1600 in Chicago’s Iroquois Theatre. This was located on Randolph Street at the site of the present Oriental moving picture theatre. A flash of flames suddenly spurted from an electrical circuit and set fire to a flimsy drapery at the side of the stage. It is said a stagehand tried to lower the asbestos curtain, which snagged when partially closed; the tunnel formed between the curtain and the front of the stage acted like a tremendous suction tube which swept a jetlike blast of fire out into the audience. In the ensuing panic 397 persons, mainly women and children, lost their lives.

The community, at first numbed by the horror of the holocaust, soon gave vent to its rage and the numerous lawsuits which followed made nationwide news. As a result of the outcry, manslaughter indictments were returned against Will J. Davis, who was the President, manager, and a director of Iroquois Theatre Company, and against others who were connected with the operation and management of the theatre. The indictments charged that Chicago city ordinances providing safety measures for theatres had not been complied with. The feeling was so great that defendants sought a change of venue. The motion was opposed by the State. Judge Smith in the Circuit Court in granting the motion said (1 Ill. Circ. Ct. Rep. 215-16):

“It would seem that there are very few occasions that in a court suit like this a man would be entitled to a change of venue. So far as we can look forward and anticipate cases it is very seldom that circumstances arise that would make a situation in a great cosmopolitan city where a man would not get a fair and impartial trial.”

He then commented on the fact that the defense had presented over 12,000 affidavits as to prejudice and the State something like 4,000 counter-affidavits. He also remarked on the fact that such men as Judge John Barton Payne, Dr. Emil G. Hirsch (grandfather of the present Dean of the Law School), Dr. Frank Billings and hundreds of other eminent citizens had been among those who had furnished the affidavits. The fact that Mr. Mayer had procured such a large number of affidavits is not only a demonstration of his great industry, but is evidence of the thoroughness with which he prepared cases and the foresight with which he anticipated arguments of his opponents.

After the cases were transferred to the Circuit Court of Vermilion County at Danville, Mr. Mayer, who had briefed the law thoroughly (in fact his trial brief was 231 pages long), argued that the safety ordinances pleaded were invalid because beyond the power of the City under the Illinois constitution and the statutes thereunder. He further pressed the point that the City only has such power as is delegated to it by the legislature, and that no such powers had been delegated to the City Council. Furthermore he urged that there had been an unlawful delegation of power to the Board of Underwriters. Accordingly, he argued the common law count of negligence could not rest as it did on the failure of the defendants to supply the equipment provided for in the ordinances; that a reasonable man is not required to take all possible precautions but merely those which would be taken by an ordinary prudent man under the circumstances. At the conclusion of the arguments the Court ruled that the ordinances were invalid and inadmissible. The State therupon asked leave to nolle prose the indictment. Mr. Mayer at once insisted that this not be done but that a jury be brought in and because the State had insufficient proof without the ordinances, Judge Kibbrough directed the jury to return a verdict for the defendants. Had later indictments been returned the defense of double jeopardy would have been sustained.

Over 100 civil actions were similarly resolved and none ever got as far as a jury. This total victory was the result of the great legal ability displayed by Mr. Mayer and resulted in his later retention by important theatrical people, such as Klav & Erlanger, the Shuberts, and Florenz Ziegfeld, the producer of the “Ziegfeld Follies.”

He also represented Charles Frohman in an interesting copyright case, which had been decided adversely to Mr. Frohman’s position by the Appellate Court of Illinois before he retained Mr. Mayer. Under the law,
if a play is published the owner loses his exclusive right to produce it. The play in question, "The Fatal Card", had been produced in England. Both the Supreme Courts of Illinois and of the United States ruled in favor of Mr. Mayer's contention that a production of the play in England was not a publication within the meaning of the law so that Mr. Frohman had not lost his exclusive rights in the United States. The opinion of the Supreme Court of the United States was rendered by Mr. Justice Hughes and is reported at 223 U.S. 424. The case has been relied upon and cited with approval by a Federal Court as recently as 1957.

A great deal of other theatrical legal business came to Mr. Mayer as a result of his successful defense of Mr. Davis in the Iroquois fire case.

A number of injunction suits were filed by him against the Actors Equity Association and the members thereof to prevent them from striking. These cases involved the negative covenant in the actors' contracts and the uniqueness of their services. In one of the suits, to prove uniqueness, Mr. Mayer placed Willie Howard, a noted comedian of his day, on the stand and asked him whether anyone else was competent to play his part. He replied, "No one, except possibly David Warfield," the leading actor of that day, who was unavailable. In a number of these suits Clarence Darrow represented defendants.

Probably as a result of the reputation acquired in the fire litigation, Mr. Mayer was retained to represent certain directors of the Mattoon City Railway Company,
who were indicted on a charge of criminal negligence when a collision occurred in which 16 people were killed. One of the directors indicted was Judge Peter Grosscup, who retained Mr. Mayer to defend him in spite of the hard feeling which the Yerkes injunction case had promoted between them. Motions were filed to quash the indictments, which were argued in the little town of Charleston in Coles County, Illinois. The State’s Attorney made a fiery appeal to the court not to permit citizens of Chicago to come downstate and kill the citizens of Coles County. Mr. Mayer’s argument prevailed, however, and the indictments were quashed.

In 1904 Mr. Mayer was retained by the State of New Jersey in litigation testing out the question as to whether the franchise fee, levied by New Jersey upon capital stocks of corporations incorporated there, was a tax entitled to prior payment in bankruptcy proceedings. At that time many of the large corporations were incorporated in New Jersey just as they are in Delaware today, so that the question was a rather important one. There were conflicting decisions in various states. The lower courts ruled that a franchise fee was not such a tax as to be entitled to priority, but the decision was reversed by the Supreme Court in favor of the State of New Jersey, which was granted priority.

In 1905 the major and a number of smaller meat packers in Chicago were indicted for violation of the Sherman Antitrust Law. This was the beginning of criminal proceedings in long drawn out litigation in which Mr. Mayer appeared as counsel for J. Ogden Armour, the President of Armour & Company. These indictments were eventually quashed but new ones were returned in 1910. After motions to quash and other motions had been overruled and habeas corpus proceedings had been dismissed, the trial of the packers commenced in November of 1911 before Judge Carpenter in the U.S. District Court at Chicago. The Government introduced its evidence for a period commencing December 6 until March of the following year. The Times of that day gave a rather graphic and dramatic description of the trial and I shall quote in part from it:

“But while we have been following Mr. Veeder [counsel for Swift & Company] through the details of the old beef pool, the courtroom has been filling. In the end seat at the prosecutor’s table sits United States Senator Kenyon of Iowa, consulting counsel for the Government. * * * He already has behind him a distinguished career as lawyer and judge and Government counsel. The dapper young man with whom he is talking is United States District Attorney Wilkerson. And now, unnoticeably, the jury has filed into its seats at the side of the room. The jurors are evidently impressed with the importance and the dignity of the duty imposed on them. They are all dressed up. At the start they sit in more or less constrained and awkward attitudes. On these twelve rests the decision as to whether or no the Beef Kings go to jail or be fined. One has been a grocer all his life in a tiny hamlet of fifty people; three are farmers; there is a carpenter, an insurance solicitor, a grocer’s clerk, a millwright, a drug salesman, a telephone inspector, and a baker. The most prominent is president of a merchant tailoring company.

“The joint wealth of the panel is estimated at perhaps $100,000. J. Ogden Armour alone is credited with a fortune of $100,000,000. Whatever the outcome of the trial, each of the jurors will have a subject of conversation for the rest of his life.

“The fat bailiff stands up in his brass buttons, and everybody in the court room rises with him.

‘Hear ye! Hear ye!’ he intones. Out from his chambers onto the broad platform behind the bench walks Judge Carpenter, a tall, well-built man in his early forties, with a smooth-shaven, rather stern face, his eyes looking out through gold-rimmed spectacles. He bows the bar, the defendants, and the spectators to their chairs, then seats himself, leans forward to the bench and rests his chin on his hand, his fingers partly concealing his mouth. . . .

“As Judge Carpenter seats himself the jurymen settle back patiently into their chairs. Then, just as Levy Mayer rises to address the court, the swinging doors open and a small man, carrying his black overcoat over his arm, comes in and slips quietly across the room. There is nothing about him to attract attention but as he nears ‘Packers’ Row’ three or four men rise to offer him a chair. Plainly this is a personage of importance who deserves a closer inspection. He is a short, rather slender man, nearing fifty years in age. His brown hair begins to grow thin, his shoulders are a bit stooped. He whispers behind his hand to a man who leans forward eagerly to listen. It is J. Ogden Armour, president of Armour & Company, president of the Fort Worth Stock Yards Company, director of the Armour Car Lines, Armour Grain Company, Chicago, Milwaukee & St. Paul Railroad Company, Continental National Bank, National Packing Company, Northwestern National Insurance Company, Illinois Central Railroad Company, National City Bank of New York, Kansas City Railway & Light Company.

“Gossip says that originally the custody of the great packing business was intended for his brother Philip, and that J. Ogden’s primal tastes were more artistic and literary. But when Philip and his father both died J. Ogden took the place of power. He has greatly increased the widespread business interests left by his father.

“The corporation of Armour & Company alone has total assets which are estimated at $125,000,000.”

At the conclusion of the Government’s case there was considerable difference of opinion among counsel for the various defendants as to whether defendants should introduce evidence. Mr. Mayer’s view, which at that time was thought to be a rather risky one, was that defendants should introduce no evidence but should argue first to the court and, if necessary, to the jury that the defendants were not guilty. His view prevailed. Arguments were made to the court to instruct the jury that they should return a verdict of not guilty. Judge Carpenter overruled these motions, arguments on which lasted for four days. Thereupon arguments made before the jury from March 18 to March
25, on which date the jury returned its verdict of not guilty.

At the time that these prosecutions commenced the Government attempted to enforce the Sherman Act to the letter, whenever an effort was made to enforce it at all. Prosecutions were not conducted on the basis that an unreasonable restraint of trade, or restraint of trade leading to monopoly or to unfair competition was illegal, but the Government took the position that every contract or conspiracy in restraint of trade was illegal. At that time very few cases had been decided construing the Act, and as has since been demonstrated by the great confusion of both courts and lawyers in the interpretation of the Sherman Act and the other Antitrust Acts, there was and is great doubt as to the meaning of the antitrust laws. Mr. Mayer, however, fortified by great experience both in business and the law, insisted that the literal words of the Sherman Act could not be the law, and persuaded the court to instruct the jury accordingly.

Some of the principles argued by Mr. Mayer in his construction of the Sherman Act were later embodied by Judge William Howard Taft in his book entitled "The Antitrust Act and the Supreme Court." In it Judge Taft wrote:

"The object of the antitrust law was to suppress the abuses of business of the kind described. It was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby, and took no advantage of its size by methods akin to duress to stifle competition with it. * * * Mere bigness is not an evidence of violating the Act. It is the purpose and not the necessary effect of controlling prices and putting the industry under the domination of one management that is within the statute."

In the light of more recent decisions, such as the Alcoa case, the above quotation from Judge Taft probably no longer states the law.

Historically it also may be interesting to note that the counsel in the packers' prosecution included, in addition to those already mentioned, Pierce Butler, later a Judge of the Supreme Court of the United States, John Barton Payne, who had been a Circuit Judge and later became a partner of the late Silas Strawn, and James M. Sheehan, at that time one of Chicago's ablest trial lawyers.

By the time this case had been tried, Judge Moran had been in his grave for almost 10 years. In addition to the persons previously mentioned, Alfred S. Austrian and Mr. Henry Russell Platt, two of Chicago's leading lawyers, had joined the firm. Mr. Platt's daughter, Mrs. George V. Bobriksoy is here tonight, as is his son Sherwood K. Platt, unless he has skipped out.

In 1908 Mr. Mayer had been retained by the California Fruit Growers Exchange, composed of over 10,000 growers of oranges and lemons in California, in a rate controversy with the railroads. He filed a complaint before the Interstate Commerce Commission. His assistant, Mr. Matthews, spent a month in California studying the industry, including the costs of growing, gathering, packing and shipping the fruit in order to determine to what extent the operations were profitable and what charges the traffic could reasonably bear. The Commission held that the proposed increase in rates on the shipping of lemons was unreasonable. From this case knowledge was acquired of Interstate Commerce Commission matters which led to a study of the forms of bills of lading used by the railroads, and Mr. Mayer helped to draft the form presently in use. He also was of considerable assistance in the drafting of the Federal Bills of Lading Act of 1916, which is similar to the Uniform Act adopted by many states, and which is still in force.

Mr. Mayer also represented various newspapers at different times. Until 1914 he was counsel for the Chicago Tribune. In that year he was a member of a group which organized the Chicago Record-Herald, a morning newspaper, which became a competitor of the Tribune, and thereafter he was unable to represent the latter. He also represented at various times the Chicago Journal owned by John C. Eastman, and Herman Kohlsaat who was interested in several newspapers, among them the Inter-Ocean, the Chicago Times Herald and the Evening Post, later owned by Mr. John C. Schaffer. Mr. Mayer represented the Associated Press in its litigation with the Hearst papers, wherein they unsuccessfully sought to secure an Associated Press franchise. He later became quite friendly with Hearst and a number of his executives and writers, such as Arthur Brisbane, the noted columnist, and Emil Friend, the financial writer who wrote for the Hearst Papers under the name of "Boerstaner."

Mr. Mayer in 1916 represented Great Lakes Transit Corporation, which he had organized, in the acquisition of 36 railroad-owned steamships. Later Mr. Mayer consummated a deal in behalf of the same corporation for the purchase of docks and warehouses in Chicago covering 105,000 square feet on the railway and river front east of the Kirk soap factory.

Mr. Mayer was in many other interesting cases and business transactions, including consolidations, mergers and similar matters. Time permits me to mention only a few of them. One is the case of Stafford v. Wal­lace, (reported at 255 U.S. 495) in which Mr. Mayer represented a number of dealers engaged in business in the Union Stockyards at Chicago. In their behalf he sought to enjoin the Secretary of Agriculture from enforcing orders made under the Packers and Stockyards Act of 1921 on the grounds that the Act could not constitutionally regulate persons such as commis-
sion merchants or dealers who, he contended, were not engaged in interstate commerce. The court speaking through Mr. Chief Justice Taft overruled his contention, upheld the validity of the Packers and Stockyards Act and in so doing stated that:

"they [referring to the commissionmen and dealers] create a legal change of title it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with but on the contrary, being indispensable to its continuity ** *. The stockyards and the sales are the necessary factors in the middle of this current of commerce."

This case has been frequently cited in subsequent decisions dealing with the meaning in the constitution of the term "commerce."

In 1914 in the case of Scoun v. Czarnecki (reported in 264 Ill. 305) Mr. Mayer attacked the validity of the state law granting women suffrage. Although the Supreme Court of Illinois overruled his contentions, there were sufficiently strong dissenting opinions so that great doubt was cast upon the legality of granting of votes to women without a federal constitutional amendment. This probably led to the adoption of the 19th Amendment, granting women suffrage on a national basis.

Although apparently Mr. Mayer's practice did not embrace international law, his interests and clients reached into many countries. He represented Messrs. Wexler and Dinkins, who controlled Pan-American Commission Corporation, a company which handled and marketed the sisal crop of Yucatan. Sisal is used for the manufacture of binder twine. It was contended that the Corporation tended to fix prices and create a monopoly in this crop. In arguments before the United States Circuit Judge Hough, sitting near his summer home in the old court house at Windsor, Vermont, Mr. Mayer's motion to dismiss the complaint was heard and sustained, mainly on the ground that by that time the questions had become moot.

For many years Mr. Mayer represented large distilleries and other whiskey interests which had moved their headquarters to New York. There was so much legal business for these clients that Mr. Mayer for a time maintained a New York office. In representing the liquor concerns in litigation, Mr. Mayer in a number of instances opposed Benjamin N. Cardozo, later famed as a justice of the Supreme Court of the U.S.

In litigation involving a new process of yeast manufacturing, pending before the Federal Trade Commission, wherein it was contended that Mr. Mayer's client illegally acquired an important invention, he caused depositions to be taken not only in numerous states but in England. In a tax case of Mr. Mayer's, involving the meaning of the term "whiskey", he had depositions taken throughout the United States, in England and in Russia to establish its origin and meaning.

During the First World War Mr. Mayer was very active on the State Council of Defense, to which he had been appointed by Governor Lowden. This Council had serious problems to meet, such as threatened labor and production troubles in the coal mines and other production stoppages. Mr. Mayer also made many patriotic speeches and aided materially in the sale of Liberty Bonds.

Levy Mayer needed all his resources and those of his firm for the battle against Prohibition. It was not just another case of Big Business against the Public. In the early decades of the present century, distillers and industrialists fought their own civil war — while the nation lined up as Wets and Drys. Many ranking employers contributed heavily to the Anti-Saloon League, often less for moral reasons than because their drunken workers were inefficient and a menace. Furthermore, saloon and liquor dealers were predominantly Democrats. Thus during the First World War the need for conserving grain for food served as a convenient excuse for large pressure groups to urge suppression of the saloon.

On the national scene, the first big case to test the constitutionality of the Wartime Prohibition Act was Hamilton v. Kentucky Distilleries. Before the Supreme Court in 1919 Levy Mayer and William Marshall Bullitt of Louisville, Kentucky, former Solicitor General of the United States under Taft, argued that the Act took property without compensation and that the statute had lapsed because war had ended. But the court held that the distillers had had sufficient time to dispose of their property — ignoring the right to future profits — and that demobilization had not yet ended completely.

In 1920 Mr. Mayer and William Marshall Bullitt argued the case of Kentucky Distilleries and Warehouse Company v. Gregory, et al. before the Supreme Court of the United States. In that case the Distilleries Company had sought to enjoin the enforcement of the Prohibition Amendment and the Volstead Act which had been adopted by the Congress pursuant thereto, on the ground, among others, that the power of amendment contained in Article Five of the Constitution does not authorize the invasion of the sovereign powers expressly reserved to the states and the people by the Ninth and Tenth Amendments except with the consent of all the states. He argued the unique theory, which as far as I know had never been raised before and to this day has never been satisfactorily answered by any court, that if the amendments authorized under Article Five were unlimited the legislatures of three-fourths of the states would have it in their power to amend the Constitution so as to establish a state religion and prohibit free exercise of other religious beliefs; to quarter a standing army in the houses of citizens; to do away with trial by jury and republican form of government;
to repeal the provision for a president; and to abolish the Supreme Court and with it the whole judicial power vested by the Constitution. In other words, he argued, the power to amend was to amend within the framework of the Constitution, that without unanimity on the part of all the states there was no right to take away the police power of states which it has always been held was reserved to the states by the Ninth and Tenth Amendments any more than there was or is the right to take away by amendment the fundamental rights above described and granted by the early amendments constituting the so-called Bill of Rights.

Another powerful argument made was that the provision of Article Five of the Constitution to the effect that "the Congress whenever two-thirds of both Houses shall deem it necessary" shall propose amendments to the states for ratification means that two-thirds of all the members of each house or both houses must vote affirmatively and not merely two-thirds of a quorum. The question therefore was whether the language of Article Five was complied with by a vote of only two-thirds of a quorum voting; that is, two-thirds of 51% which is only 34% of the full membership.

Finally he argued that inasmuch as 19 states had adopted the initiative and referendum into their constitutions, it was necessary for an amendment to be passed upon by the people in addition to the legislatures in those states, and that had not been done. The Government contended that the actions taken were sufficient and its contention on this point as well as on
the first point was accepted by the court, but in the opinions filed, which may be found in 253 U.S. at p. 350, no reasons are given for the conclusion reached that the Amendment had been validly adopted, the opinions dealing mainly with the meaning of the Amendment and the constitutionality of the National Prohibition Act.

Mr. Mayer's wisdom and philosophy in fighting national prohibition has certainly been proven by subsequent events. The wave of lawlessness and disrespect for law in general which overcame the country as a result of prohibition cannot be denied. His philosophy that law, particularly a sumptuary law such as this one, must have the sanction of public opinion, was eventually recognized by the repeal of the Eighteenth Amendment in 1934.

Mr. Mayer's only election to public office was his election as a delegate to the abortive State Constitutional Convention of 1922. However, he was from his early days interested in public affairs and did not hesitate to express himself on them. At the convention he attended many laborious sessions in 1922, but did not live to see the defeat of the constitution which the Convention had brought forth. An example of his interest in public affairs is a statement that he made early in the century after the Supreme Court had rendered a decision relating to the status of Puerto Rico. Mr. Mayer in a press interview regarding that decision said:

"In the Delima case the court holds that as soon as the territory is annexed by treaty, purchase or conquest, it becomes a part of our national sovereignty and subject to the constitution—in other words, that the constitution follows the flag. The assertion of this doctrine I regard as a great victory, not for the administration of President McKinley but for all the people."

In an address which he delivered in 1914 he advocated reforms in our criminal law and the codification thereof, many of which suggestions have since been adopted.

In another public speech which he made, he compared the industry and commerce of the United States with those of foreign countries. He said, among other things:

"Comparison of the manner in which the German, English and French governments stimulate, help and foster trade, puts us to shame."

Just recently the Chairman of a Subcommittee of the House Ways and Means Committee has announced that he will introduce in Congress a bill to give further tax exemptions to foreign trade so as to foster American exports. In this respect as well as in many others, Mr. Mayer was years ahead of his time.

Mr. Mayer was married in 1884 to Miss Rachel Meyer of this city. He had a very happy home life and was a devoted husband and father. Unfortunatel, Mrs. Mayer was seriously ill a great part of her life. They had two daughters, both of whom married and lived in New York, and both of whom have carried on through themselves and their families the intellectual and other attainments of their father. Two grandsons and one grandson-in-law are now practicing law in New York. In addition to his success as a lawyer and his interest in his home, Mr. Mayer had a great diversity of interests running all the way from the growing of cranberries at his summer home near Plymouth, Massachusetts, to active participation in public affairs. He was most hospitable and enjoyed entertaining and was himself very fond of good food and wines. Mr. Mayer's virtues have been so extolled that the listener may have received the impression that he was not entirely human. That notion is incorrect. He was exceedingly human, and had and showed great tenderness and affection for the members of his family and his friends.

Mr. Mayer's untimely death occurred in 1922 when he was only 63 years of age. At that time he was working on a merger of steel companies, which was never consummated. Overwork was undoubtedly a contributing factor to the early ending of his life. He left his imprint on the times and on the many clients whom he had represented with such rare vigor and ability. He left to his successors a sterling example of industry, integrity and tremendous intellectual power. His success was due not only to his intellect, his unremitting work and his loyalty to his clients, but to an almost unequalled ability to express himself simply and clearly, both orally and in his briefs. In this age of specialization, we may learn from his life that it was and is possible, if one works hard and enthusiastically enough, to be a specialist in many fields.