give flexibility to the trust and discretion to the donee;[26] a donee would seldom wish his appointment to be irrevocable, even though he might foresee no need for revocation. These considerations apply to the instant case and should have created a presumption in favor of revocability.

Interstate Commerce—Restraint of Trade—Dividends from Oil Pipe Line Subsidiaries Rebates under Elkins Act—[Federal].—On September 30, 1940, the Anti-Trust Division of the Department of Justice brought suits in the name of the United States under the Elkins Act[1] against certain shipper-owner oil companies and subsidiary pipe line companies.[2] The shipper-owner oil companies were receiving dividends or profits from their subsidiary common carrier pipe line companies or from the operation of common carrier pipe line departments, which, the complaints alleged, were prohibited by the Interstate Commerce Act[3] and the Elkins Act as rebates from the rates filed by the common carrier with the ICC.[4] The United States asked that the defendant pipe lines and shippers be enjoined from granting and receiving the alleged rebates and that the defendant shippers be required, as provided by Section 1(3) of the Elkins Act,[5] to pay the United States three times the total amount of rebates found to have been illegally paid since January 1, 1939. A consent decree was entered into on December 23, 1941, in a new action filed for this purpose by the United States against twenty major oil companies and fifty-nine pipe line companies. The decree provided that no defendant shipper-owner shall receive in any year from its pipe line subsidiaries or departments more than a 7 per cent return on its ownership share of the ICC valuation of the pipe line properties,[6] and that earnings over this amount must be retained by the subsidiary or department in a special surplus fund to be used only for its operations as a common carrier. *United States v. Atlantic Refining Co.*[7]

The control by a few corporations of interstate pipe lines, by far the cheapest form

[26] Leach, Powers of Appointment, 24 A.B.A.J. 807 (1938); Powell, Powers of Appointment, 10 Brooklyn L. Rev. 232 (1941).

[1] 32 Stat. 847–48 (1903), amended by 34 Stat. 587–89 (1907), 49 U.S.C.A. §§ 41–43 (1929).

[2] United States v. Phillips Petroleum Co. and Phillips Pipe Line Co., Civil Action No. 182, U.S.D.C. Del. (1940); United States v. Great Lakes Pipe Line Co., Civil Action No. 183, U.S.D.C. Del. (1940); United States v. Standard Oil Co. (Indiana), Civil Action No. 201, U.S.D.C. N.D. Ind. (1940).

[3] 24 Stat. 379, 381 (1887) as amended, 49 U.S.C.A. §§ 2, 6(7) (1929).

[4] The complaint in the Standard Oil suit alleged that the dividends paid by the Stanolind Pipe Line Company (crude oil) to the Standard Oil Company (Indiana) between 1931 and 1939 amounted to 48 per cent of Stanolind's transportation revenues for the same period; the corresponding figures for the Great Lakes Pipe Line Company (gasoline) and the Phillips Pipe Line Company (gasoline) were alleged to be 49.5 per cent and 38.1 per cent, respectively. The complaints were based on data taken from the annual reports of the pipe lines to the ICC.

[5] 34 Stat. 588 (1907), 49 U.S.C.A. § 41(3) (1929).

[6] A pipe line corporation which fails to earn 7 per cent in any year may, however, pay in dividends the difference between its earnings and the permitted 7 per cent for that year within the next three years, in addition to the 7 per cent payments allowed for those years.

[7] Civil Action No. 14060, D.C. D.C. (1941) (unreported).

of overland oil and gasoline transportation,[8] has long been an important source of monopoly in the petroleum industry.[9] By the Hepburn Act of 1906[10] and subsequent judicial interpretation,[11] all interstate pipe lines which were not strictly plant facilities were made common carriers subject to the Interstate Commerce Act and such supplementary legislation as the Elkins Act. Prior to the Hepburn Act many pipe lines refused to carry oil unless it was sold to the pipe line owners.[12] Although this device is not available to common carriers,[13] a similar monopolistic result is reached by setting minimum tenders (the minimum amount accepted in a single shipment) too large for a refinery without large storage capacity,[14] and, more important, by charging relatively high transportation rates.[15] The shipper-owner pays or credits to its pipe line subsidiary or department the same rates for transportation of its oil as does the independent shipper. But the payment back to the shipper-owner of the dividends or profits derived from the shipment of its own oil in effect reduces the shipper-owner's cost of transportation to the cost to the common carrier, however high the published rates;

[8] Transportation of crude oil by rail costs approximately 8.3 mills per ton-mile, by pipe line approximately 3.2 mills per ton-mile. Shipment by tanker, however, is still cheaper, being approximately 1.25 mills per ton-mile. Cook, Control of the Petroleum Industry by Major Oil Companies, TNEC Monograph No. 39, at 19 (1941). Gasoline transportation costs are about the same. Ibid., at 37.

[9] See The Pipe Line Cases, 234 U.S. 548, 558 (1914).

[10] 34 Stat. 584 (1907), 49 U.S.C.A. § 1(1)(b) (1929).

[11] The Pipe Line Cases, 234 U.S. 548 (1914); Valvoline Oil Co. v. United States, 308 U.S. 141 (1939). These cases hold that a pipe line transporting only its own oil for its own use is subject to the act if the oil is purchased from other sources and does not come from its own wells. See 2 Sharfman, The Interstate Commerce Commission 96–105 (1931).

[12] The Pipe Line Cases, 234 U.S. 548, 559 (1914). The transportation rates of those pipe lines which accepted shipments of other refineries before 1906 were generally the same as the railroad tank car rates. Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 124 (1940).

[13] Certain pipe lines, however, still claim that they are not common carriers. Valvoline Oil Co. v. United States, 308 U.S. 141 (1939). The complaint in United States v. American Petroleum Institute, Civil Action No. 8524, D.C. D.C., filed Sept. 30, 1940, asked that the major oil companies be enjoined from operating common carrier pipe lines as private carriers.

[14] Many pipe lines have set minimum tenders as high as 100,000 barrels. Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 134 (1940). In Brundred Bros. v. Prairie Pipe Line Co., 68 I.C.C. 458 (1922), the ICC found that requirement of a tender in excess of 10,000 barrels was unreasonable; this figure is taken as a general basis in Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 136 (1940). In addition to minimum tenders, some gasoline pipe lines have exceedingly restrictive specifications as to the gasoline which may be shipped; the Sun Oil Company practically restricts shipments to gasoline equivalent to "New Blue Sunoco," thus excluding lower grade gasoline, which is the sole product of many independent refineries. Cook, op. cit. supra note 8, at 39.

[15] Since the Hepburn Act crude oil pipe line rates have been reduced to some extent, perhaps more because of competition from tankers than because of ICC action. Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 124 (1940). Corporate income taxes, especially since 1933, have also forced pipe line subsidiary corporations to lower their rates somewhat. Ibid., at 127, 139; Hamilton and Associates, Prices and Price Policies 152 (1938). Gasoline pipe line rates, however, are still only slightly lower than rail rates. Prewitt, The Operation and Regulation of Crude Oil and Gasoline Pipe Lines, 56 Q. J. of Econ. 177, 190 (1942).

this represents a competitive advantage to the shipper-owner over the independent shipper. The shipper-owner gains a further competitive advantage from its receipt of dividends or profits derived from the shipment of independent oil.[16]

The United States contended in its original suits that the payment of these dividends to the shipper-owner amounts to a rebate under the Elkins Act, since it was, in effect, a deduction from the published rates. This contention is supported by the principle of equality among shippers under the Interstate Commerce Act,[17] as illustrated by the case of *New York, New Haven & Hartford R. Co. v. ICC*.[18] Moreover, many dicta indicate that the Elkins Act, which was enacted in 1903 to make more effective the anti-rebate provisions of the Interstate Commerce Act,[19] was intended to reach all devices by which property may be transported for less than the published rate,[20] and that results, not intentions, determine whether the commerce acts have been violated.[21]

[16] The complaint in the Phillips case alleged that, if dividends are set off against payments for transportation of gasoline from Borger, Tex., to Kansas City, Kan., a shipper-owner has an advantage of 1.4 cents a gallon over an independent shipper paying the same published rates. This is approximately 25 per cent of the value of the gasoline at the refinery.

Although pipe lines are legally common carriers they are operated by the major oil companies to a very large extent as plant facilities; relatively little oil of independent shippers is carried. Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 121, 138 (1940). Consequently, while major oil companies have been able to establish refineries close to the market for gasoline in metropolitan and other populous areas, small independent refineries, unable to build their own trunk pipe line systems, have been forced to remain close to their sources of supply in the oil fields, with the attendant hazard of exhaustion of the field and the expense of shipping gasoline to market by gasoline pipe lines owned by the majors or by even more expensive forms of transportation. Hamilton and Associates, op. cit. supra note 15, at 147, 151.

[17] 3-B Sharfman, The Interstate Commerce Commission 359 et seq. (1936).

[18] 200 U.S. 361, 391 (1906). In this case the New Haven and the Chesapeake & Ohio railroads were enjoined under the Elkins Act from performing a contract whereby the C. & O. sold West Virginia coal for delivery to the New Haven in Connecticut for less than the sum of the cost of the coal to the C. & O. and the published rate for transportation to Connecticut. The Court refused to attribute the deficit to the C. & O. as a dealer, looking to the real result of the transaction. For an able analysis of this case from the point of view of the United States in the instant case, see Black, Oil Pipe Line Divorcement by Litigation and Legislation, 25 Cornell L. Q. 510, 514–19 (1940). It should be noted, however, that the Court in the New Haven case did not assert that the mere receipt of profits on the transportation of its own coal at the published rate was illegal; what was held unlawful was an actual sale at a price lower than would cover transportation charges. New York, New Haven & Hartford R. Co. v. ICC, 200 U.S. 361, 398 (1906). But this is the type of unfair competition which is made possible for a shipper-owner by the receipt of profits on its own shipments. In addition see note 47 infra.

[19] Aitchison, The Evolution of the Interstate Commerce Act, 5 Geo. Wash. L. Rev. 289, 324 (1937). The object of the act was to maintain the revenue of railroads against general rebating. Ripley, Railroads: Rates and Regulations 492–93 (1916). But it has been continuously used to further the purposes of the Interstate Commerce Act in attacking discriminations. New York, New Haven & Hartford R. Co. v. ICC, 200 U.S. 361 (1906); notes 20 and 21 infra.

[20] Armour Packing Co. v. United States, 209 U.S. 56, 72 (1908); New York, New Haven & Hartford R. Co. v. ICC, 200 U.S. 361, 391 (1906); United States v. Union Stockyard & Transit Co., 226 U.S. 286, 309 (1912); United States v. Koenig Coal Co., 270 U.S. 512, 519 (1926); see Black, op. cit. supra note 18, at 519–23.

[21] Union Pacific R. Co. v. United States, 313 U.S. 450, 462 (1941).

The Interstate Commerce Act and the Elkins Act, however, do not seek to equalize all advantages one shipper may have over another;[22] even if a rebate is defined as any payment back to the shipper, it must be an "illegal rebate" to come within the prohibitions of the acts.[23] Section 15(13) of the Interstate Commerce Act[24] implies that an allowance shall be paid for services or facilities furnished by the shipper in connection with transportation by the common carrier, provided only that the allowance is reasonable.[25] The normal arrangement under this section has been the payment to the shipper of a fixed allowance for individual facilities and services.[26] It might be argued in the instant case, however, that the reasonable allowance to the shipper-owner of the common carrier is profits, the return usual to ownership and development, since the profits are derived from rates under the supervision of the ICC. The strategic importance of these profits as monopolistic devices, however, should lead to a particularly close scrutiny of rates with regard to the return they yield to ownership. The ICC in setting rates usually takes into account factors other than the return to ownership;[27] this is likely to lead to returns excessive in the light of the problem of discrimination between shipper-owners and independents. The large profits made by many pipe line companies[28] further indicate that the ICC has not in the past exercised a close supervision with regard to this problem.[29] Thus it seems desirable that limits should be set

[22] See ICC v. Diffenbaugh, 222 U.S. 42, 46 (1911). For example, a railroad is not required to equalize transportation costs for competitors who are at different distances from the market; quite the contrary is true. See Ellis v. ICC, 237 U.S. 434, 445 (1915). But in the Assigned Car Cases, 274 U.S. 564, 583–84 (1927), the Court said that the ICC in limiting the use by coal companies of their own private cars in times of car shortage was not attempting to equalize fortunes; see Mr. Justice McReynolds' dissent, ibid., at 584; cf. The Pipe Line Cases, 234 U.S. 548 (1914).

[23] See United States v. Koenig Coal Co., 270 U.S. 512, 518 (1926).

[24] 34 Stat. 590 (1907) as amended, 49 U.S.C.A. § 15(13) (Supp. 1941).

[25] ICC v. Diffenbaugh, 222 U.S. 42 (1911); United States v. Baltimore & Ohio R. Co., 231 U.S. 274 (1913). The section itself does not in terms require that an allowance be paid; it merely limits the allowance to what is just and reasonable.

[26] Such allowances have been made to shippers for elevation services, ICC v. Diffenbaugh, 222 U.S. 42 (1911); for supplying terminal facilities and lighterage, United States v. Baltimore & Ohio R. Co., 231 U.S. 274 (1913); for trackage and lateral hauling, Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247 (1913); for supplying tank cars, General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940).

[27] Such factors include uniformity of rates among competing carriers, volume of traffic, competition of other forms of transportation, interests of localities served, effect of rates on other carriers under the commission's supervision, and interests of stockholders of the common carrier who are not shipper-owners. But see Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 144, 145 (1940), discussed page 508 infra.

[28] The 1935 earnings of thirty-five crude oil pipe line companies investigated by the ICC ranged from a deficit of 0.60 per cent to earnings of 46.86 per cent upon the ICC valuations of their properties. Nine pipe lines earned over 20 per cent and twenty-one earned over 8 per cent. Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 142 (1940).

[29] Prior to the ICC investigation, Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115 (1940), only two cases involving pipe lines had come before the commission in addition to The Pipe Line Cases, 234 U.S. 548 (1914). These were Crude Petroleum Oil from Kansas and Oklahoma to Lacy Station, Pa., 59 I.C.C. 483 (1920), and Brundred Bros. v. Prairie Pipe Line Co., 68 I.C.C. 458 (1922). Not until 1934 was a valuation of pipe line proper-

directly on the payment of profits by a common carrier to a shipper-owner.[30] The consent decree in the instant case, by limiting the receipts of the shipper-owner to 7 per cent, solves the problem in these terms.

When courts have been confronted with this problem of setting a reasonable return under Section 15(13), as distinguished from the problem of determining whether the shipper is entitled to any return,[31] they have taken the view that a rate-making function of the ICC is involved.[32] The desirability of uniform decisions in such questions, and the much greater experience and facilities of the ICC in dealing with such problems, led to the development of the doctrine of the primary jurisdiction of the ICC.[33] In the absence of a finding by the commission, the courts have held that they have no jurisdiction,[34] or have suspended action until the conclusion of an appropriate adminis-

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ties undertaken. See 2 Sharfman, The Interstate Commerce Commission 96–105 (1931); Prewitt, op. cit. supra note 15, at 203–6.

[30] Compare the recapture clause of the Transportation Act of 1920, applicable only to railroads. 41 Stat. 489 (1921), 49 U.S.C.A. § 15a(5), (6) (1929). This clause was repealed in 1933, 48 Stat. 220 (1934), 49 U.S.C.A. § 15b (Supp. 1941), because of its unworkability in the complex railroad situation. See 3-B Sharfman, The Interstate Commerce Commission 221–55 (1936).

[31] Pennsylvania R. Co. v. Internat'l Coal Mining Co., 230 U.S. 184 (1913).

[32] General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940); Mitchell Coal Co. v. Pennsylvania R. Co., 230 U.S. 247 (1913).

[33] Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (no common law action for unreasonable rates where rates not found unreasonable by ICC); Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481 (1910) (discrimination in car distribution); United States v. Pacific & Arctic R. & Navigation Co., 228 U.S. 87 (1913) (restriction of through rates and joint rates to particular carrier); Texas & Pacific R. Co. v. American Tie & Timber Co., Ltd., 234 U.S. 138 (1914) (whether crossties were included in tariff); cases cited note 32 supra (allowances for services by shippers); cf. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922) (construction of carrier tariff, where no question of fact or discretion is involved, requires no preliminary resort to commission); see Rochester Tel. Corp. v. United States, 307 U.S. 125, 139 (1939); 2 Sharfman, The Interstate Commerce Commission 393–406 (1931). A distinction can be made between private suits and suits by the United States, but the possibility of divergence among courts on questions of fact and discretion would seem to make the principle equally applicable. United States v. Pacific & Arctic R. & Navigation Co., 228 U.S. 87 (1913). On the question of the constancy of the policy of the prosecuting agency, see Arnold, The Folklore of Capitalism 207–29 (1937) (anti-trust laws).

The principle of the primary jurisdiction of the ICC has been extended to suits for triple damages under the Sherman Act where there are no circumstances creating a wrong irremediable under the commerce acts. Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500 (1936), noted in 46 Yale L. J. 156 (1936); cf. Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922), noted in 36 Harv. L. Rev. 456 (1923) (private shipper cannot recover under Sherman Act where railroad rates are subject of complaint); U.S. Navigation Co., Inc. v. Cunard Steamship Co., Ltd., 284 U.S. 474 (1932) (Shipping Act supersedes Clayton Act). Whether the principle extends to suits by the United States under the Sherman Act is dubious. United States v. Pacific & Arctic R. & Navigation Co., 228 U.S. 87 (1913) (prosecution allowed).

[34] St. Louis, Brownsville & Mexico R. Co. v. Brownsville Navigation District, 304 U.S. 295 (1938); United States v. Pacific & Arctic R. & Navigation Co., 228 U.S. 87 (1913).

trative proceeding.[35] The long-continued acquiescence of the commission in the payment of dividends or profits to shipper-owners by common carrier pipe lines making large profits[36] would make a court very reluctant to disturb the situation without affirmative action by the commission.[37]

It is interesting to note that the ICC has recently entered an order to show cause why rates of each crude oil pipe line company should not be reduced to a point where it would earn not more than 8 per cent of the value of its pipe line properties.[38] Though this proposal of the commission differs in approach from the suits and the consent decree in the instant case, since it operates on receipts of the common carrier rather than on payments by the common carrier to the shipper, it is aimed at the same objective.[39] Disregarding uniformity of rates among pipe lines between the same points, the commission's proposal makes the return to ownership of each pipe line the exclusive basis of rates.[40]

Union of financial interest between a shipper and a common carrier, or the merging of the two functions, has been recognized as highly productive of discriminations against other shippers, often leading to monopoly.[41] In the case of the railroads this led to the inclusion of the commodities clause[42] in the Hepburn Act of 1906, forbidding railroads to transport commodities owned by them. As the clause was first drafted, it applied to

[35] Cases cited note 32 supra.

[36] The ICC has not attempted to set a reasonable return under § 15(13), as it may of its own motion, nor has it readjusted pipe line rates, even though the basic facts on which the complaints in the instant case were based were before the ICC in the annual reports of the pipe lines. Note 4 supra. Although the ICC undertook an investigation of crude oil pipe lines in 1934, no final order has been entered. Reduced Rates and Gathering Charges, 243 I.C.C. 115 (1940).

[37] The acquiescence of the ICC might even be held to be evidence that the shipper-owners did not *knowingly* take rebates. Lehigh Coal & Navigation Co. v. United States, 250 U.S. 556 (1919). It is difficult to reconcile this case with Armour Packing Co. v. United States, 209 U.S. 56 (1908), and other cases cited notes 20 and 21 supra; the Lehigh Coal case has never since been cited. But the acquiescence of the ICC and the novelty of the theory of the Anti-Trust Division might incline the Court to construe the statute against the United States. Cf. United States v. Cooper Corp., 312 U.S. 600, 613–14 (1941) (alluding to novelty of construction of Sherman Act).

[38] Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115 (1940); see note 28 supra. Minimum tenders were also to be lowered to a maximum of 10,000 barrels. The consent decree does not deal with minimum tenders, which are a significant restriction on independent shipments.

[39] Conversely, the consent decree makes it desirable for pipe lines to reduce rates on the basis of earnings in order to avoid the accumulation of an idle fund.

[40] This is the point of difference between the majority opinion and Commissioner Mahaffie's dissent. Note 27 supra. See Prewitt, op. cit. supra note 15, at 206–11.

[41] New York, New Haven & Hartford R. Co. v. ICC, 200 U.S. 361 (1906); United States v. Reading Co., 253 U.S. 26 (1920); Red Rock Fuel Co. v. Baltimore & Ohio R. Co., 11 Inters. Com. Rep. 438, 449 (1905); Att'y Gen'l v. Great Northern R. Co., 1 Drew. & Sm. 154, 29 L.J. (CH.) 794 (1860); 1 Sharfman, The Interstate Commerce Commission 42 (1931).

[42] 34 Stat. 585 (1907), 49 U.S.C.A. § 1(8) (1929).

all common carriers;[43] but as it was finally passed it was limited in scope to the railroads, thereby excluding pipe lines from its operation. If the clause were extended to pipe lines, as has frequently been proposed,[44] and effectively implemented and interpreted,[45] a severance of pipe lines and oil companies would be achieved for all practical purposes.[46] The adoption of the theory of the Anti-Trust Division in the original suits in the instant case, which would lead to the imposition of severe penalties on shipper-owners taking any profits from operation of their pipe lines, would achieve much the same result by rendering it profitless for a shipper of oil to own pipe lines.[47] On the other hand, the result of severance might be directly reached by a prosecution under the Sherman Act,[48] such as that now pending against the major oil companies in *United States v. American Petroleum Institute*.[49] The consent decree in the instant case was

[43] Beard, Regulation of Pipe Lines as Common Carriers 114 (1941); Ripley, op. cit. supra note 19, at 514.

[44] Beard, op. cit. supra note 43, at 114–16; Black, op. cit. supra note 18, at 533.

[45] The commodities clause as interpreted is peculiarly full of loopholes suited to the oil industry. In United States v. Delaware & Hudson Co., 213 U.S. 366 (1909), it was held that commodities produced by the carrier must be owned by the carrier at the time of transportation to come within the clause, and that commodities owned by a "bona fide" separate, though affiliated, corporation may be carried. If in the course of dealing "the distinction is obliterated" between carrier and shipper corporations, the clause applies. United States v. Delaware, Lackawanna & Western R. Co., 238 U.S. 516 (1915). But 100 per cent stock ownership by the parent corporation is not in itself a sufficient showing of dominance to identify carrier and shipper. United States v. Elgin, Joliet & Eastern R. Co., 298 U.S. 492 (1936); see Kibler, The Commodities' Clause 98–150 (1916); Black, op. cit. supra note 18 at 532–36. It would be impossible to show that the Great Lakes Pipe Line Company, co-operatively owned by eight major oil companies, was "identified" with any one of its owner corporations.

[46] Arguments against the wisdom of this result are advanced in Beard, op. cit. supra note 43, at 120–26. National defense needs may also make it unwise to risk a period of transition in a vital industry. Note 49 infra.

[47] The enactment of the commodities clause, however, indicates that Congress, at least, thought that the Elkins Act alone could not bring about this result, even though the New Haven case, discussed in note 18 supra, had previously been decided. If the Elkins Act could accomplish severance, such suits as United States v. Delaware & Hudson R. Co., 213 U.S. 366 (1909), note 45 supra, failed because the United States relied on the commodities clause rather than the Elkins Act. This consideration applies equally to pipe lines, and Congress was persuaded in enacting the Hepburn Act of 1906 that it was not desirable in their case to force severance by means of the commodities clause. Yet it was this very act which brought pipe lines under ICC regulation.

[48] In United States v. Reading Co., 253 U.S. 26 (1920), the union of a railroad and a coal company under a dominant holding company was held illegal under both the commodities clause and the Sherman Act. Cf. United States v. Lehigh Valley R. Co., 254 U.S. 255 (1920); see Black, op. cit. supra note 18, at 523–32.

[49] Civil Action No. 8524, D.C. D.C., filed Sept. 30, 1940. The Anti-Trust Division planned to ask for severance in that action. N.Y. Times, p. 27, col. 5 (July 30, 1940). Filing of the suit was delayed, however, pending investigation of its effects by the National Defense Advisory Commission. N.Y. Times, p. 15, col. 2 (Aug. 1, 1940). The complaint actually filed asked, as far as pipe lines were concerned, merely that they fulfil their obligations as common carriers. Note 13 supra.

entered into expressly without prejudice to any rights in the *American Petroleum Institute* case.[50]

Labor Law—Specific Performance of Collective Bargaining Contract with Union Whose Majority Status Is Uncertain—[California].—Two AFL locals, the plaintiff paperworkers' union and a local of the pressmen's union, were engaged in a dispute as to which should be recognized as the exclusive bargaining agent for the employees of the defendant paper box manufacturer. The two locals agreed to a privately conducted election, which the plaintiff union won by a small majority. The plaintiff union and the defendant then entered into a closed-shop contract. Several months later the plaintiff union demanded that the defendant discharge those employees who were not members of the plaintiff union, while the pressmen's union threatened to strike if it did. Another election was held and the plaintiff union, winning again by the same majority, once more demanded that the defendant discharge members of the pressmen's union. The pressmen's union insisted that the second election had been fraudulent, claiming for itself the actual majority and repeating its threat to strike. The defendant thereupon refused to negotiate further with either union until the jurisdictional dispute had been settled between the two locals. The plaintiff union sought a decree for specific performance of the contract. The defendant contended not only that the contract was based upon the misapprehension that the contracting union had a majority, but also that specific performance might subject him to charges of unfair labor practice by the NLRB. *Held*, the principal consideration moving from a labor union to an employer in a collective bargaining agreement is the promise of "industrial peace." Upon the plaintiff union's failure to keep its promise of "industrial peace," the consideration failed. The parent body of both unions, the AFL, not the courts, should decide which is the appropriate bargaining agent. Petition dismissed. *Barnes v. Angelus Paper Box Co.*[1]

Many courts now grant specific performance of collective labor agreements,[2] and

[50] It is not to be expected that a lowering of pipe line rates as a result of the consent decree will have any immediate effect on the price of gasoline; the payment of rates and the receipt of profits being mere intercompany bookkeeping, the same profits will be shown on another phase of the operations of the integrated corporate system. In the past, profits on pipe lines have covered losses in other departments, especially marketing. Prewitt, op. cit. supra note 15, at 199–201. The effects of the consent decree are to be found not in any change in the costs of the major oil companies, but in a readjustment of the competitive situation.

[1] 9 Lab. Rel. Rep. 386 (Calif. Super. Ct. 1941).

[2] See the cases and articles collected in Witmer, Collective Labor Agreements in the Courts, 48 Yale L.J. 195 (1938). A reading of these cases gives a remarkable cross section of the social awareness of American courts. Thus we have, on the one hand, the eloquent and realistic dictum, "An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of a strike or lockout resembles in many ways a treaty. As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge." Yazoo & Mississippi Valley R. Co. v. Webb, 64 F. (2d) 902, 903 (C.C.A. 5th 1933). On the other hand, we find such statements as, "The breach of a contract to employ only members of a certain union will not be enjoined. 32 Corpus Juris 199." Bakery and Confectionery Workers' Internat'l Union v. Clifton Bakery Corp., 3 C.C.H. Lab. Cas. ¶ 60,066 (N.J. Ch. 1940).