THE DEFECTS OF THE SHERMAN ANTI-TRUST LAW

For nearly twenty years, it has been a crime against the United States to make a contract which shall in any degree restrain trade among the several States. For nearly thirteen years, the interpretation of this law by the courts has tended to show that two-thirds of the business of the country is carried on in defiance of law, and that a strict enforcement of the law would prohibit the normal growth of almost every commercial enterprise.

The purpose of the Sherman Anti-Trust Act was the prevention of monopoly. One clause of the Act effectively accomplished this. The defect of the Act has been its sweeping denunciation of "*every* contract, combination in the form of trust or otherwise *in restraint of trade* among the several States, or with foreign nations." This defect escaped notice when the bill was under discussion in Congress. Senator Edmunds and Senator Hoar, who together had most to do with the framing of the bill, were both of the opinion that this form of language merely described such contracts and combinations as were made for the express purpose of preventing competition and thereby controlling prices and unduly enhancing profits.[1] For seven years this construction of the Act was generally accepted. In 1897, however, the Supreme Court of the United States adopted a literal construction of the broad prohibition of the Act. Justice Peckham, writing the opinion of the Court in *United States v. Trans-Missouri Freight Association,* said:[2]

"It may be that the policy evidenced by the passage of the Act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the Act ought to read as contended for by the defendants, Congress is the body to amend it and not this court by a process of judicial legislation wholly unjustifiable."

Consciously, with full appreciation of the effect of its decision, the Supreme Court of the United States enforced the literal pro-

[1] Senator Edmunds: Speech in Senate, March 27, 1890; Senator Hoar: Speech in Senate, April 8, 1890.

[2] *U. S. v. Trans-Missouri Freight Association,* 166 U. S., 290, 340.

hibition of the Sherman Anti-Trust Act; expecting, no doubt, that its clear exposition of the significance of the Act would induce an amendment of the law.

The reasons why the Act has not yet been amended are involved with the most important political and financial developments of the past thirteen years.

The Harrison administration, which was the first to execute the Sherman Anti-Trust Act, commenced seven proceedings—four to dissolve combinations and three to punish combinations with criminal penalties. The three criminal proceedings were all unsuccessful. Minor successes were achieved in the dissolution proceedings, but the more important suits were still pending when the Harrison adminisration expired. The second Cleveland administration was frankly distrustful of the Act. Attorney General Olney in his annual report for 1893 wrote:

"There has been, and probably still is, a widespread impression that the aim and effect of this statute are to prohibit and prevent those aggregations of capital which are so common at the present day and which are sometimes on so large a scale as to control practically all the branches of an extensive industry. * * * But as all ownership of property is of itself a monopoly, and as every business contract or transaction may be viewed as a combination which more or less restrains some part or kind of trade or commerce, any literal application of the provisions of the statute is out of the question."

In his annual report for 1895 Attorney General Harmon referred to the defeat of the Government in its prosecution of the "Sugar Trust," and added:

"Combinations and monopolies, therefore, although they may unlawfully control production and prices of articles in general use, cannot be reached under this law merely because they are combinations and monopolies nor because they may engage in interstate commerce as one of the incidents of their business."

In the following year Attorney General Harmon declared:[8]

"The restricted scope of the provisions of this law as they have been construed by the courts, especially in the case of *United States v. E. C. Knight Co.* (156 U. S. 1), makes amendment necessary if any effective action is expected from this department."

Until that time the Act had proved efficacious in only two directions: the dissolution of oppressive trade agreements and—"strikingly illustrating the perversion of a law from the real purpose of its authors," to quote Attorney Olney's sardonic com-

[8] *Annual Report of the Attorney General of the United States*, 1896.

ment—the punishment of lawless combinations of laborers and railroad employés. In remarkable prophecy of his subsequent career, Judge William H. Taft, then a Federal Circuit Judge in Ohio, interpreted and applied the law in the two most conspicuous cases of this description. Upon the eve of the decision holding the Trans-Missouri Freight Association in violation of the Sherman Anti-Trust Act, Attorney General Harmon, discussing some of the defenses urged by the Association, declared:[4]

"While I maintain the opposite view and feel confident of its correctness, the fact that such a question can be raised, and has already been raised successfully in one court, affords an instance of the indefiniteness of the terms of this law, which is a serious obstacle in the way of its prompt enforcement."

In the final decision of the case concerning which the Attorney General entertained these doubts, the Supreme Court showed that the "indefiniteness" of the law, instead of being an "obstacle," was a tremendous error.

The immediate result of this decision was a rush to consolidation in every branch of industry. If contracts, associations and loose combinations restraining trade in the slightest degree were illegal—the corporation lawyers reasoned—then contracts, associations and loose combinations should be abandoned for consolidation under single ownership in "holding corporations." Gigantic "holding corporations," designed to concentrate in single control power which previously had been diffused among groups of concerns, were formed on every hand. Before 1897 there existed scarcely sixty concerns that were dominant in their respective trades. During the next three years 183 such corporations were organized—seventy-nine in the year 1899 alone —with a total capitalization of over four billions of dollars. These enormous combinations comprised one-seventh of the manufacturing industry of the United States, one-twentieth of the total wealth of the nation, nearly twice the amount of money in circulation in the country, and more than four times the capitalization of all the manufacturing consolidations that were organized between 1860 and 1893. In rapid succession various concerns in the steel business combined, until in 1901 the United States Steel Corporation was organized with a capitalization of one billion four million dollars, for the purpose of acquiring the stock of ten of the largest corporations in the world. The consolidation among the railroads was still more

[4] *Annual Report of the Attorney General of the United States,* 1896.

remarkable. Ninety per cent. of the total railroad mileage fell into the control of fifty-seven railroad systems, which together represented ninety-two per cent. of the total capital stock and ninety-eight per cent. of the total capitalization, including stock and bonds, of all the railroads of the country.[5]

Throughout this period there was little desire on the part of the administration or the community to prevent this rush toward consolidation. The defeat of free silver and the election of McKinley in 1896 had diffused a sense of relief which expressed itself in a resolute effort to hasten business prosperity. The forces that assisted McKinley to the presidency and directed his policy during his first administration were not favorable to any statute that stood as an obstacle to the most conspicuous economic movement of a generation. For the first time since the enactment of the Sherman Anti-Trust Act, the administration in power was relieved of the clamor of discontent which had forced the passage of the Act and had compelled repressive measures against various forms of aggregated capital. The Spanish War and the subsequent occupation of the Philippines, Porto Rico and Cuba diverted still further the attention of the community from thoughts of controlling industrial development. Had the corporation managers realized at that time that the Sherman Anti-Trust Act really forbade every combination in restraint of trade between the States—whether in the form of a loose association, as in the Trans Missouri Freight Association, or in the form of a "holding corporation" such as they were busily organizing—the Act undoubtedly would have been repealed or at least amended; and this could doubtless have then been accomplished with as little commotion as the final establishment of the gold standard. But while the "holding corporation" held out safe refuge from the Sherman Anti-Trust Act, its repeal or amendment seemed unnecessary.

The McKinley administration closed with a record of only three inconspicuous prosecutions under the Act. In his annual report for 1899, Attorney General Griggs wrote:

"In all instances the Department has been governed only by a sincere desire to enforce the law as it exists and to avoid subjecting the Government to useless expense and all officers of the Government to humiliating defeat by bringing actions where there was a clear want of jurisdiction under the well defined limits

[5] G. H. Montague: *Trusts of Today*, p. 23; Moody: *Manual of Railroad and Corporation Securities*, 1900-1909.

of federal jurisdiction so clearly laid down by the Supreme Court in cases already decided."

By 1902, however, commercial forces were fast losing political dominance. The advent in 1901 of an accidental President, who owed nothing to the influences that had controlled the Government since 1897, brought into power an administration less trammelled by practical considerations and more responsive to moral and sentimental impulses than any previous administration. These impulses, though unexpressed, were close to the surface of events. An acrimonious opposition to McKinley's policy of territorial expansion, while unsuccessful in its avowed purpose, had sown grave doubts respecting the justice of trade aggression and the perfection of economic success. The reaction from the commercial prosperity immediately following the Spanish War had disproved the claim that combinations would make business depression impossible. A decline in the securities of certain ill-advised mergers, which quickened in 1903 into a brief panic, had discredited the idea that combination was a universal solvent. Finally, the strain of increasing prices and living expenses upon families sustained by wages, salaries, and fixed incomes—a strain incident to every period of prolonged prosperity—had induced discontent in the most thoughtful portion of the community. While popular attention was still focused upon vast industrial consolidations, the vicissitudes of their securities in the market, and the effect of their operations upon their competitors, their consumers and the public generally, it was but natural that an alert President should turn in that direction the impulses which he felt stirring vaguely about him.

By 1903, proceedings against the Northern Securities Company had been commenced. Various bills to increase the penalties and enlarge the scope of the Sherman Anti-Trust Act had been introduced and favorably considered by the judiciary committees of both branches of Congress. Five hundred thousand dollars had been appropriated to be expended by the Attorney General of the United States in prosecutions under the Sherman Anti-Trust and the Interstate Commerce Act.[6]

In 1904 the Supreme Court of the United States decided that the Northern Securities Company was in violation of the Sherman Anti-Trust Act and declared illegal all combinations in

[6] Act of February 25, 1903.

restraint of trade effected through the device of "holding corporations."[7]

This decision, which had been vaguely foreshadowed in the Trans-Missouri Freight Association case, produced widespread consternation. Its effect, to borrow a phrase of Edmund Burke, was to indict the whole American people. It outlawed almost every industrial concern of first importance. Failure to enforce the Act would condone crime and foster the most insidious lawlessness. The administration hastened to assure the business community through the press that it would not "run amuck," but would merely enforce the law against the "bad" trusts. The misfortune of the business community lay in the fact that the criterion of "good" and "bad" trusts lay not in the statute but in the mind of the administration; and that the administration might determine, without the formality of a trial, that the object of its disfavor was a "bad" trust, and might boldly attack any trust in the public prints or in the courts, in the confident assurance that whether it were a "bad" trust or a "good" trust it was guilty before the law.

In 1905 the Government procured an injunction restraining Swift & Company and several other large meat packers from combining[8] and commenced similar proceedings against combinations of paper manufacturers, grocers, beef packers, lumber dealers and transportation companies widely scattered throughout the United States from Alaska to Florida and from Hawaii to Missouri. In his annual report for 1906 Attorney General Moody wrote:

"From the date of the enactment of the law to the beginning of President Roosevelt's administration in 1901 sixteen proceedings were begun and have been concluded—five of them indictments, in all of which the Government has failed, and eleven of them petitions in equity, in which the Government prevailed in eight and failed in three * * *. Since the beginning of President Roosevelt's administration twenty-three proceedings have been begun under this law, seven of which have been concluded and sixteen are pending. Ten of the proceedings were indictments and thirteen proceedings in equity."

Among these proceedings the Attorney General enumerated a suit against the American Tobacco Company and several other companies interested in the tobacco and licorice business; a suit against thirty-one corporations and twenty-five individuals en-

[7] *Northern Securities Co. v. U. S.*, 193 U. S., 197.
[8] *Swift & Co. v. U. S.*, 196 U. S., 375.

gaged in the manufacture of fertilizer; a suit against the Standard Oil Company and seventy other corporations and individuals concerned in the manufacture of refined oil and petroleum products; and suits against combinations in transportation, paper, groceries, elevators, salt, meat, lumber, drugs, oil, tobacco, fertilizer and ice throughout the United States.

During the following year proceedings were commenced to dissolve three of the largest railroad systems of the country. Before its close in 1909 the administration had commenced thirty-seven proceedings under the Sherman Anti-Trust Act.

Court dockets, however, are inadequate to portray the fury of this Anti-Trust crusade. Newspapers and magazine writers fed the popular imagination with sensational stories of industrial leaders and business enterprises. The chief burden of the President's political utterances was the subject of trusts. A decision unfavorable to the Government made by a Federal District Judge was denounced by the President in a special message to Congress as "measurably near making the law a farce." [9] A well-known corporation, in advance of trial and even of indictment, was denounced by the President in a special message to Congress as having "benefitted enormously, up almost to the present time, by secret rates, many of these rates being clearly unlawful."[10] After a subsidiary company of this corporation had been tried on account of these rates, while public attention was still fastened upon this trial and before the court had rendered its decision, the administration published another report accusing this corporation of "crippling existing rivals and preventing the rise of new ones by vexatious and offensive attacks upon them and by securing for itself most unfair and wide-reaching discriminations in transportation facilities and rates."[11] Having found that the unpopular corporation owned stock in the defendant company, the trial judge, voicing the popular clamor, declared that the unpopular corporation was the real defendant and fined the defendant $29,240,000.[12] Two days after the fine was announced the administration published another report declaring that the unpopular corporation had used "power unfairly gained to op-

[9] Message to Congress, April 18, 1906.

[10] Message to Congress, May 4, 1906.

[11] Letter from Commissioner of Corporations to the President, May 20, 1907, accompanying *Report on the Petroleum Industry.*

[12] *U. S. v. Standard Oil Co.,* 155 Fed., 305.

press the public through highly extortionate prices."[13] Several days later, after the President of the defendant company had ventured to express his belief that his company was really not guilty of the offense for which it was so roundly fined, the administration published still another report devoted entirely to a defense of the fine.[14] Several months later the President, in a special message to Congress, transmitted a collection of newspaper clippings commenting unfavorably upon the fine and denounced the authors as "writers and speakers who, consciously or unconsciously, act as the representative of predatory wealth—of wealth accumulated on a giant scale by all forms of inequity ranging from the oppression of wage workers to unfair and unwholesome methods of crushing out competition and to defrauding the public by stock jobbing and the manipulation of securities." [15] When the appellate court subsequently set aside this enormous fine and rebuked the trial court for its abuse of discretion,[16] the President promptly announced: "The reversal of the decision of the lower court does not in any shape or way touch the merits of the case excepting in so far as the size of the fine is concerned. There is absolutely no question of the guilt of the defendant or of the exceptionally grave character of the offense." The United States Circuit Court of Appeals, however, persisted in the contrary opinion and denied a reargument of the appeal, and the United States Supreme Court, in declining to hear the appeal, apparently shared the same belief.[17]

State legislatures, meanwhile, rivaled each other in harassing large corporations. In 1903, Texas passed laws relieving persons purchasing goods of a trust from liability to pay the purchase price and requiring every corporation that owned or leased the patent on a machine to offer such machines for sale instead of reserving them for exclusive use.[18] In 1905, Arkansas not only relieved persons purchasing goods from a trust from liability to pay therefor, but also authorized such persons to recover from

[13] Letter from Commissioner of Corporations to the President, August 5, 1907, accompanying *Report on the Petroleum Industry.*

[14] Statement of the Commissioner of Corporations in answer to the allegations of the Standard Oil Company, December 30, 1907.

[15] Message to Congress, January 31, 1908.

[16] *Standard Oil Co. v. U. S.*, 164 Fed., 376.

[17] *U. S. v. Standard Oil Co.*, 212 U. S., 579.

[18] See *Comparative Summary and Index of Legislation,* 1903, and *Review of Legislation,* 1903, New York State Library.

the trust any money or value which they had paid on account of the purchase price of such goods. Arkansas also enacted that in the prosecution of any trust the prosecuting attorney might compel any non-resident officer to appear with his books and papers within six days and the necessary time required to travel; and in the event of his failure to appear judgment might be rendered against the trust. The Legislatures of Kansas, Missouri and Oklahoma passed laws fixing rigid regulations regarding car service, demurrage and storage charges upon all railroads operating within those States. Kansas also prescribed by statute a schedule of rates on illuminating oil, gasoline, fuel oil and petroleum in every sort of package. Missouri enacted maximum rates on six classes of freight. Washington established a system of arbitrary rates to be enforced on all shipments of lumber in that State. North Carolina enacted that if a consignee claimed damages on a shipment, and the claim remained unpaid for sixty days, and the consignee recovered the full amount by suit, the railroad should pay fifty dollars forfeit. Florida prescribed a somewhat similar penalty in analogous circumstances.[19] In 1906, Ohio, Virginia and Maryland adopted laws limiting passenger rates, subject to minor exceptions, to two cents a mile. Similar bills were agitated in at least nine other States, most of which had railroad commissions abundantly qualified and empowered to determine the propriety of such rates and to enforce them. Arkansas also enacted that collection by the assignee of any damage claim not exceeding ten dollars might be made from the railroad agent at the destination provided that an itemized and verified statement of the damage be presented to the agent, within three days after the goods were received; and in the event that payment be refused, treble damages might be recovered. Georgia required that claims for damages be paid by the railroad within sixty days under penalty of sixty dollars forfeit and interest.[20]

In 1907 the passion for arbitrary fixing of railroad rates became almost national. Recommendations for the regulation of railroad rates by state legislation were made by the Governors of Alabama, California, Missouri, Arkansas, Colorado, Kansas, Massachusetts, Minnesota, Nebraska, North Dakota, West Vir-

[19] See *Index of Legislation*, 1905, and *Review of Legislation*, 1905, New York State Library.

[20] See *Index of Legislation*, 1906, and *Review of Legislation*, 1906, New York State Library.

ginia, and Wisconsin. Maximum rates for passenger traffic—generally two cents a mile—were urged by the Governors of Indiana, Iowa, Kansas, Michigan, Minnesota, North Carolina, Pennsylvania and Texas. Statutes in accordance with the latter recommendations were passed by Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, Pennsylvania, South Dakota, West Virginia and Wisconsin. Maximum rates for particular articles of freight were also enacted in Alabama, Kansas, Minnesota, Missouri, Nebraska, North Carolina and North Dakota. Meanwhile, Alabama took a leaf from the experience of North Carolina, Florida, Arkansas and Georgia, and passed statutes similar to those of the latter States, requiring substantially immediate payment by the railroads of all claims for damages under very heavy penalties.[21]

In the midst of this widespread crusade against large corporations the administration which had roused the country to the fray sounded the first warning note.

In his annual message to Congress in 1905, President Roosevelt said: "It is generally useless to try to prohibit all restraint on competition, whether this restraint be reasonable or unreasonable; and where it is not useless it is generally hurtful."

In his speech at Bath, Maine, in September, 1906, Judge Taft described the Sherman Anti-Trust Act as follows: "It would seem as if Congress itself knew that the evil existed but had a most indefinite idea of how it was to be described. * * * Construed literally, this statute could be used to punish combinations of the most useful character, like partnerships and other business arrangements conceded by all to be legitimate and proper; and the difficulty in its construction has been to draw a law effective to suppress the real evil aimed at by the Legislature and to furnish a proper and clear rule for the guidance of business men while not interfering with legitimate combinations which Congress had no purpose to prevent."

In his annual message to Congress in 1906, President Roosevelt discussed the working of the Sherman Anti-Trust Act as follows:

"The actual working of our laws has shown that the effort to prohibit all combination, good or bad, is noxious where it is not ineffective. Combination of capital, like combination of labor,

[21] See *Digest of Governor's Messages, 1907; Index of Legislation, 1907,* New York State Library.

is a necessary element in our present industrial system. It is not possible completely to preyent it; and if it were possible, such complete prevention would do damage to the body politic. * * * It is unfortunate that our present laws should forbid all combinations instead of sharply discriminating between those combinations which do good and those combinations which do evil. * * *

"It is a public evil to have on the statute books a law incapable of full enforcement, because both judges and juries realize that its full enforcement would destroy the business of the country; for the result is to make decent men violators of the law against their will, and to put a premium on the behavior of the wilful wrongdoers. Such a result in turn tends to throw the decent man and the wilful wrongdoer into close association, and in the end to drag down the former to the latter's level; for the man who becomes a lawbreaker in one way unhappily tends to lose all respect for law and to be willing to break it in many ways. No more scathing condemnation could be visited upon a law than is contained in the words of the Interstate Commerce Commission when, in commenting upon the fact that the numerous joint traffic associations do technically violate the law, they say: 'The decision of the United States Supreme Court in the Trans-Missouri case and the Joint Traffic Association case has produced no practical effect upon the railway operations of the country. Such associations, in fact, exist now as they did before these decisions, and with the same general effect. In justice to all parties we ought probably to add that it is difficult to see how our interstate railways could be operated with due regard to the interest of the shipper and the railway without concerted action of the kind afforded through these associations.' This means that the law as construed by the Supreme Court is such that the business of the country cannot be conducted without breaking it."

Again, in his annual message to Congress in 1907, and in his special message submitted January 31, 1908, President Roosevelt repeated the same criticism with renewed emphasis.

This intolerable condition of affairs, in which a highly penal statute was daily violated by the normal transactions of business, and business men enjoyed liberty only as the executive power indulged them in the open breach of law, was never better illustrated than in the midst of the panic of 1907. Judge Elbert H. Gary and Mr. Henry C. Frick, representing the United States Steel Corporation, desired to take over the holdings of a group of speculators in the securities of the Tennessee Coal & Iron Company, and accordingly hastened to Washington to obtain a dispensation of the Sherman Anti-Trust Act for that purpose. The administration, acting under the belief that it was saving the stability of a great financial institution, promptly promised

amnesty without further inquiry and thereby sealed with its approval the combination of the United States Steel Corporation and its great competitor.

In a special message to Congress, submitted March 25th, 1908, President Roosevelt suggested the following changes in the Sherman Anti-Trust Act:

"The substantive part of the anti-trust law should remain as at present; that is, every contract in restraint of trade or commerce among the several States or with foreign nations should continue to be declared illegal; provided, however, that some popular governmental authority (such as the Commissioner of Corporations acting under the Secretary of Commerce and Labor) be allowed to pass on any such contracts.

"Probably the best method of providing for this would be to enact that any contract, subject to the prohibition contained in the anti-trust law, into which it was desired to enter might be filed with the Bureau of Corporations or other appropriate executive body. This would provide publicity. Within, say, sixty days of the filing, which period could be extended by order of the department whenever, for any reason, it did not give the department sufficient time for a thorough examination, the executive department having power might forbid the contract, which would then become subject to the provisions of the anti-trust law, if at all in restraint of trade.

"If no such prohibition was issued, the contract would then only be liable to attack on the ground that it constituted an unreasonable restraint of trade. Whenever the period of filing had passed without any such prohibition, the contracts or combinations could be disapproved or forbidden only after notice and hearing with a reasonable provision for summary review on appeal by the courts."

Judge Gary, Mr. Francis Lynde Stetson, chief counsel for the United States Steel Corporation, and Mr. Victor Morawetz prepared for the National Civic Federation a bill embodying substantially the suggestions of the President,[22] which was introduced into Congress by Representative Hepburn.

Like their predecessors of eighteen years before, President Roosevelt and the National Civic Federation "knew that the evil existed but had a most indefinite idea of how it was to be described." The only difference was that the sponsors of the Act of 1890 left it to the courts to define what combinations were guilty of crime, while the sponsors for the bill proposed in 1908 left it to the "Bureau of Corporations or other appropriate executive body"

[22] *House Bill No.* 19745, Sixtieth Congress, First Session.

to define what combinations were guilty of crime. The original mischief of the Act in outlawing organized capital and organized labor was sought to be tempered by a system of special immunity. The dispensation of this immunity, it was suggested, should not be trusted to the courts nor even to that branch of the government concerned in the administration of justice, but rather to a bureau in the Department of Commerce and Labor. Under such a statute every business man making contracts relating to interstate commerce—and such contracts are made by scores and hundreds every day in every large business—and desiring to make sure of escaping the penalties of law, would have to file each contract with a Government bureau and thereafter wait patiently for sixty days before completing or executing the contract.

A kindly Providence overcame this bill. In the House the bill died in committee. In the Senate the Judiciary Committee returned a ringing adverse report, in which a grant of "a dispensing power of granting immunity * * * conferred on a mere bureau head * * * without notice or hearing and wholly *ex parte*" was denounced as "a course of procedure that would not be tolerated in any court of our country," a resurrection of the hated "dispensing power" which led to the fall of the House of Stuart and the English Revolution of 1688, and a violation of the Bill of Rights and the fundamental principles of free government.[23]

In 1908 the United States Circuit Court of Appeals declared the American Tobacco Company and its allied concerns a combination in violation of the Sherman Anti-Trust Act. In his opinion in that case, Judge Lacombe set forth the dire consequences of the Act in vigorous language:[24]

"The Act of July 2, 1890, in its first section declares to be illegal 'every contract, combination, or agreement in the form of trust restraining commerce among the several States or with foreign nations.' That declaration, ambiguous when enacted, is as the writer believes, no longer open to construction in the inferior Federal courts. Disregarding the various *dicta* and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus

[23] *Report of Senate Committee on Judiciary,* January 26, 1909, Sixtieth Congress, Second Session.

[24] *U. S. v. American Tobacco Co.,* 164 Fed., 700, 701.

tend to deprive the country of the services of any number of independent dealers, however small.

"As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the Act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free, and unrestrained competition which was assumed, rightly or wrongly, to be the wish of a large part, if not all, of the community, and that it intended to secure such competition against the operation of the natural laws.

"The Act may be termed revolutionary because before its passage the courts had recognized a 'restraint of trade' which was held to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing, and trading alike has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combination of individual enterprise. It is contended that under existing conditions in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations formerly independent, immediately upon its formation terminates an existing competition; whether or not some other competition may subsequently arise, the Act, as above construed, prohibits every contract or combination in restraint of competition. Size is not made the test. Two individuals, who have been driving rival express wagons between villages in contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition, and it would seem to make little difference whether they make such a combination more effective by partnership or not."

Both of the great parties entered upon the last presidential campaign on platforms calling for amendments to the Sherman Anti-Trust Act. In opening his campaign Judge Taft declared:[25]

"I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law defining in great detail the evils against which it is aimed and making clearer the distinction between lawful agreements reasonably restraining trade and those which are pernicious in their effect and particularly denouncing the various devices for monopolizing trade which prosecutions and investigations have shown to be used in actual practice. The decisions of the courts and the experience of executive and prosecuting officers make the framing of such a statute possible. It will have the good effect of making much clearer to those business men who would obey the laws the methods to be avoided."

[25] Speech at Columbus, Ohio, August 19, 1908.

In his inaugural address President Taft declared that any plan for the stability of American business "must include the right of the people to avail themselves of those methods of combining capital and effort deemed necessary to reach the highest degree of economic efficiency, at the same time differentiating between combinations based upon legitimate economic reasons and those formed with the intent of creating monopolies and artificially controlling prices."

The attitude of the new administration has been well expressed by Attorney General Wickersham:[26]

"The last administration set to work with vigor, with energy, which was accompanied at times with newspaper clamor, to enforce these laws. * * * It may be—it probably is—true that in the movement to impress upon the whole business world the meaning and force of certain laws and the necessity of attention and obedience to them, some suits were instituted and some prosecutions commenced without sufficient consideration and without adequate cause * * *. I am perfectly well aware that there is uncertainty as to the precise scope and meaning of that law which most closely touches all business activities of the country, namely, the Sherman Anti-Trust Law, and I should be the last to authorize the institution of a criminal proceeding against men who, without intent to violate the law, have, nevertheless, acted in technical contravention of an extreme and most drastic construction of that enactment. It is to be hoped that the Supreme Court will at an early date authoritatively define the full scope and effect of the Anti-Trust Law, and that if a construction should be given to it by that court as far-reaching as some of the judges of the Court of Appeals in this circuit gave in the tobacco case, Congress may so amend the Act as to except from its provisions the ordinary agreements which are the necessary result of healthy business conditions, while still effectively prohibiting the creation of those far-reaching monopolies which are believed to be incompatible with the wholesome growth and progress of the Republic. This matter is under consideration by the present administration with a view to submitting to the next Congress proposed amendments to the law."

The purpose of the Sherman Anti-Trust Act was to further free competition. The defect in the Act consists in its sweeping prohibitions which stultify this purpose by preventing certain of the most normal agencies of competition.

Competition, the law says, increases trade; and for the purpose of acquiring a portion of trade every one may use competition. The word itself means strife—struggles with others—warfare for

[26] Speech in New York City, April 30, 1909.

the same thing—"endeavoring to gain what another is striving to gain at the same time." The strife is always to own exclusively the thing sought, and to own it to the exclusion of everybody else. If it is the intangible thing called trade, each competitor strives for the whole, and the law does not limit the reward of any. The reason is that trade is not stationary but absolutely changing, shifting with the numbers and movements and wants of customers. So changeful, indeed, is trade that it is axiomatic that monopoly is not dangerous so long as competition is free. Freedom of competition presumes the freest possible choice of competitive methods, short of the use of force, fraud or similar unlawful means. Such conceptions as *undue* competition or *unreasonable* competition, or any other limitation upon free competition short of *unlawful means* have no place in the business economy. They raise artificial barriers in the strife "to gain what another is striving to gain at the same time" behind which lurk every form of monopoly. Who can determine what is *undue* competition or *unreasonable* competition? Would not each judge and each juryman have his own standard? No trader could regulate his own competition or anticipate the competition of his competitor under such imaginary standards.

Justice Peckham expressed this view in the Trans-Missouri Freight Association case as follows:[27]

"Competition, free and *unrestricted,* is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world."

As Mr. Justice Holmes, now of the United States Supreme Court, and formerly of the Massachusetts Supreme Court, once said:[28] "the doctrine generally has been accepted that free competition is worth more to society than it costs."

Lord Chief Justice Bowen in the House of Lords laid down the same principle:[29]

"But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm

[27] *U. S. v. Trans-Missouri Freight Association,* 166 U. S., 290, 337.
[28] *Vegelahn v. Guntner,* 167 Mass., 92, 106.
[29] *Mogul Steamship Co. v. McGregor,* L. R. 23, Q. B. 598, 615.

another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case, is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation or obstruction, of some other personal right *in rem* or *in personam,* there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and, I think, with submission, that there is no sufficient reason for such a proposition."

The Massachusetts Supreme Court has recently stated the same doctrine:[30]

"The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J., in the Mogul Steamship case, *ubi supra,* may adopt the 'expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future.' In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete."

The Rhode Island Supreme Court has announced a similar rule:[31]

"Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractural relations, are instances."

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[31] *Macauley Bros. v. Tierney,* 19 R. I., 255, 258-259.

[30] *Martell v. White,* 185 Mass., 255, 260-261.

These principles have repeatedly been approved by the highest courts of England and America and have never been seriously questioned.[32]

The law protects the winner in the ownership of the prize which he gains by competition. Unless this be so, competition must fail; for no one will endure the strife of competition without the assurance that he may have the prize which he wins. No matter how great the prize, the winner owns it subject only to the chance of losing it through the same rigor of competition by which he won it. If the subject of the competition be trade, the legitimate growth and lawful extension of the business of the successful trader is protected by law.

Large business—the reward of success in competition which the law eagerly protects in the successful competitor—presumes the disappointment of unsuccessful competitors. Essentially it is the subjugation of competition and victorious appropriation of the prize, the removal of it from the arena of competition, and the exclusive enjoyment of it under the protection of law. "According to popular speech," said Justice Holmes in the Northern Securities case, "every concern monopolizes whatever business it does, and if that business is trade between two States, it monopolizes a part of the trade among the States. Of course, the statute does not forbid that. It does not mean that all business must cease."[33] As one of the judges forcibly expressed it in his opinion in the Tobacco Trust case: "it has never been held that the mere fact that a business is large and is extended

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[32] See *U. S. v. E. C. Knight Co.*, 156 U. S., 1, 16-17; *U. S. v. Trans-Missouri Freight Association*, 166 U. S., 290, 334, 337; *Hopkins v. U. S.*, 171 U. S., 70; *Anderson v. U. S.*, 171 U. S., 578, 592, 604, 617; *Bement v. Natl. Harrow Co.*, 186 U. S., 70, 94; *Thomas v. Cincinnati Ry. Co.*, 62 Fed., 803, 819 (Opinion by Taft, J.); *Whitwell v. Continental Tobacco Co.*, 125 Fed., 454, 457; *Phillips v. Iola Portland Cement Co.*, 125 Fed., 593, 594; 192 U. S., 606; *U. S. v. Atchison, Topeka & Sante Fe Ry. Co.*, 142 Fed., 176, 184; *Montgomery, Ward & Co. v. South Dakota Retail Association*, 150 Fed., 413, 417; *Commonwealth v. Hunt*, 4 Metc., 111, 134; *Bohn Mfg. Co. v. Hollis*, 54 Minn., 223, 231; *Lough v. Outerbridge*, 143 N. Y., 271, 283; *Transportation Co. v. Standard Oil Co.*, 50 West Va., 611; *Mogul Steamship Co. v. McGregor*, 1892, App. Cas. 25; *Allen v. Flood*, 1898, App. Cas. 1, 166; *Huntley v. Simmons*, 1898, 1 Q. B., 181; *Ajello v. Worsley*, 1898, 1 Ch., 274, 280; Pollock, *Law of Torts*, 8th Ed., 152.

[33] *Northern Securities Co. v. U. S.*, 193 U. S., 197, 406.

over a wide territory renders its promoters amenable to the statute. Success is not a crime."[34]

In this apparent antinomy of large business and competition lies most of the misapprehension of the subject.

Large business is not really the bane of competition, any more than the bestowal of the prize at the close of the game is the death of the sport. The trophy must be defended next season or be forfeited to the field. The greater the value of the trophy, the keener will be the rivalry to regain it from the holder. Large business must be defended, not next season, but every moment. Its magnitude merely proves the worth of the prize, and stimulates keener competition. So long as the lists are kept open to the entrants, and the freest play is allowed within the rules of the game, none but good can result from the enhancement of the prize.

Large business, and the temporary triumph over competition which it implies, is the crown of competition. The exclusive enjoyment which the successful competitor seizes for the moment is monopoly only in the sense that the fleeting ownership of the trophy winner is monopoly. Even though the skill of the successful competitor lengthens the span of enjoyment, it is at the cost of defending his prize and not in any true sense through monopoly. One of the ablest of the Federal Circuit Judges has explained the phenomenon:[35] "every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself and to exclude others from a part of that trade, and if he may not do this he may not compete with his rivals."

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[34] *U. S. v. American Tobacco Co.*, 164 Fed., 700, 709 (Opinion by Coxe, J.). See also *Northern Securities Co. v. U. S.*, 193 U. S., 194, 407 (Opinion by Holmes, J.); *In re Corning*, 51 Fed., 205, 211; *In re Greene*, 52 Fed., 104, 115; *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed., 946, 950; *Dueber Watch Case Mfg. Co. v. Howard Watch & Clock Co.*, 66 Fed., 637, 643; *Mogul Steamship Co. v. McGregor*, L. R., 23 Q. B., 598, 618; Eddy, *Combinations*, Sect. 177.

[35] *Whitewell v. Continental Tobacco Co.*, 125 Fed., 454, 462 (Opinion by Sanborn, J.).

The defect of the Anti-Sherman Trust Act has been that it has sought to stimulate competition by punishing the normal forms of large business which naturally develop out of competition. In the fatuous belief that the success of the winner was a discouragement to sport, it has sought to encourage the field by penalizing the winner. The Sherman Anti-Trust Act should prohibit only those combinations which, by unlawful means, repress concerns desirous of entering the market. The Act should not punish combinations which, by adaptations of normal competitive methods, have fairly and justly excelled their rivals in competition. The prohibition should apply, not to the *form* which the combination may assume, nor yet to the *power* which its efficiency may develop; but should only forbid the use of unlawful means to attain such form or to increase such power.

The monopolist seeks to suppress competition, and thereby to control prices. The legitimate competitor seeks to extend his trade, and thereby to enforce his prices throughout the trade. Each seeks ultimately to affect prices. The monopolist, however, seeks to accomplish his purpose through preventing by unlawful means other concerns from entering the trade in competition with him; while the legitimate competitor seeks to accomplish his purpose by excelling his rivals in competition. Coercion, force and fraud are the means by which the monopolist endeavors to accomplish his purpose. "Destroying or restricting free competition," "smothering competition," "extinguishing competition," "stifling competition," "eliminating competition," "preventing competition," "annihilating competition" and "suppression of competition" are a few of the phrases which the courts have used to describe the operation of these unlawful monopolistic methods.[36] None of these are methods evolved out of normal competition. Each of them is as truly anarchistic in the realm of business as "fouling" is in the field of sport. Each of them, unless specifically forbidden and punished, must tend to destroy the funda-

[36] *U. S. v. Trans-Missouri Freight Association,* 166 U. S., 290, 337; *U. S. v. Joint Traffic Association,* 171 U. S., 505, 569-571, 577; *U. S. v. Addyston Pipe Co.,* 175 U. S., 211, 244; *Northern Securities Company v. U. S.,* 193 U. S., 197, 337; *National Cotton Oil Company v. Texas,* 197 U. S., 115, 129; *Waters-Pierce Oil Co. v. Texas,* 212 U. S., 86, 110; *Continental Wall Paper Co. v. Voight & Sons Co.,* 212 U. S. 227, 256; *Whitwell v. Continental Tobacco Co.,* 125 Fed., 454, 458; *Phillips v. Iola Portland Cement Co.,* 125 Fed., 593, 594; *U. S. v. American Tobacco Co.,* 164 Fed., 700, 721.

mental conditions of healthy rivalry. Each of them is sometimes resorted to by the obscure and unsuccessful competitor, as well as by his conspicuous and successful rival. In sport, the harm from the foul play, by which an obscure contestant may seek to overcome his fellows and push himself into prominence, is just as despicable as the foul play by which a prominent contestant may seek to maintain his position. The rules very properly forbid foul play, without regard to the position or attainments of the contestants. In business the same doctrine should obtain. The prohibition should apply specifically to the unlawful practice. Whether the contract, combination or trust exerts any dominance or "restraint," great or little, upon commerce should be entirely immaterial.

"Coercion," "force" and "fraud" are well established terms in law.[37] They are capable of definition and application by courts and juries to varying states of fact. They are sufficiently definite to serve in penal statutes. Together, they include practically every violation of legitimate competition. "Destroying or restricting free competition" and the other phrases above quoted are of more recent usage. In common speech and as used by the courts, they include practically every phase of coercion, force and fraud as applied to competition. In a statute defining a violation of law and providing only the remedy of injunction—the most effective remedy against unlawful combinations, as already has been shown[38]—these phrases would, it is believed, be sufficiently definite and inclusive to define every real offense against competition. 'Indeed, it may well be contended that these phrases are sufficiently definite to serve in a statute providing for a criminal penalty.[39]

Much of the anti-trust legislation of the various States and many of the remedies recently proposed are a misapplication to

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[37] See these various titles in *Bouvier's Law Dictionary* and in *Words and Phrases.*

[38] The comparative efficiency of the criminal penalty and the remedy by injunction is strikingly shown in the cases collected in *Hearings on House Bill No.* 19745, Sixtieth Congress, First Session, p. 389, and in *Report of Senate Committee on Judiciary,* January 26, 1909, Sixtieth Congress, Second Session, p. 7.

[39] See the argument of Commissioner of Corporations in *Hearings on House Bill No.* 19745, Sixtieth Congress, First Session, pp. 422-430, regarding the legal bearings of the word "unreasonable" as applied to restraint of trade.

private businesses of regulations which are properly applicable only to public service businesses. This was the defect of the Hepburn Bill, proposed in 1908, and is the defect of the numerous State anti-trust laws that forbid the sale of goods at prices above or below the ordinary cost of production. The duty to serve everybody, without discrimination, at a reasonable price that may be regulated and determined by the State, is properly enforceable against railroads, lighting and watering companies, and other corporations which perform a public service, and in most cases enjoy exclusive powers from the State. This duty arises from the fact that the business of such companies is naturally and unavoidably a monopoly, in which competition does not exist, and, in fact, should be discouraged. This duty and these purposes are best fulfilled by State regulation. In the great majority of businesses, however, no public service is performed or professed, and no exclusive powers are obtained from the State.[40] In these businesses, competition naturally exists, and should be encouraged in order to maintain a healthy condition. Remedial legislation regarding such businesses should seek to assure freedom of competition. Interference with prices and with the organization of such businesses misses the real evil, and only creates artificial barriers behind which lurk dangerous forms of privilege.

If the Sherman Anti-Trust Act were amended, so as merely to forbid contracts and combinations which are made for the purpose of stifling competition, and to prevent the practices defined in one or more of the simple phrases above quoted, it would well nigh make illegal every improper method of competition, and make lawful every healthy agency of free competition.

Gilbert Holland Montague.

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[40] See *Gibbs v. Baltimore Gas Co.*, 130 U. S., 396, 408; *U. S. v. Trans-Missouri Freight Association*, 166 U. S., 290, 332; *Dueber Watch Co. v. Howard Watch Co.*, 66 Fed. 637, 644; *Whitwell v. Continental Tobacco Co.*, 125 Fed., 460, 461; Beale & Wyman, *Law of Railroad Rate Regulation*, pp. 41-57 and cases there collected.