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THE SPIRIT BEHIND THE SHERMAN ANTI-TRUST LAW

By Charles A. Boston.

The *New York Times* of November 23, 1911, contained an editorial under the title "Punishing Monopoly," which by implication criticised the Supreme Court of Missouri for condemning the so-called Harvester Trust, because of its possession of monopolistic power, though not used for the oppression or injury of its customers.

The following, quoted in the editorial, is from the opinion of the court:

"When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition, nor, when the legality of their act of acquisition is in question, is it any use for them to say, We have not used the power to oppress any one, * * *. The law regards such power acquired by such a combination as dangerous to the rights of the people, and forbids its acquisition."

The editorial says: "The foundation question is whether bigness itself is bad."

I accept the challenge of this inquiry and shall proceed to answer it.

In the same paper appears a report of the dinner of the Economic Club of New York on the preceding night, at which Senator Cummins, Samuel Untermyer, Chancellor Day, of

Syracuse University, and Congressman Littleton were among the speakers. The article is headed thus:

"ASSAIL SHERMAN LAW AS A USELESS THING

Behold the Tobacco Fiasco, Cries

Untermeyer to a Throng at Economic Club Dinner.

ABOLISH IT, SAYS JAS. R. DAY.

Competition's Absurd, Declares the Chancellor—

We Need a Surer Guide, Asserts Cummins of Iowa."

In order to illustrate the necessity for the following discussion, I shall first indicate the existing confusion of thought or diversity of views of prominent men on this subject of supreme importance by quoting at some length from the article above referred to.

I recognize that in the unavoidable haste of the report in a morning paper, of a speech delivered late the night before, full justice may not be done to the speaker by the quotations from his speech, and my citations are made, not for the purpose of criticising the speaker, who may not have been adequately quoted, but for the purpose of illustrating the views to which the readers were introduced.

The pertinent extracts are as follows:

"CUMMINS ON SHEEP AND GOATS."

"Senator Cummins said that if some combinations were reasonable and lawful and others unreasonable and unlawful 'we must at least describe sheep and goats so clearly that an honest man of average intelligence will know from the beginning of his venture whether he is a sheep or a goat.' "

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"I cannot escape the conclusion that the men of this country who are making its name famous throughout the world through their genius, enterprise, and capacity, are entitled to a surer guide than is found in the existing law.

"I am equally certain that in the end the statute, as it will be administered, will not maintain the competition which its framers had in mind. The people who deal with and depend upon our colossal business institutions have a right to protection from their tremendous power. I believe that there are but two ways in which that protection can be insured: First, for the government to undertake, either directly or indirectly, to fix prices; second, that there shall be such reasonable competition among producers,

consumers, and buyers that their natural rivalry will maintain prices at a point not above a fair and just profit."

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"There are a great many men, and they not only comprise those who are financially interested in what has come to be known as big business, but men who have examined the matter from a purely abstract and altruistic standpoint, who believe that the law should be so modified as to permit trade agreements and combinations which have for their purpose the fixing and maintenance of prices upon the condition that they shall be approved by some governmental board before they become lawful, and that the standard which will determine whether they are to be approved or disapproved be that they must be fair—that is to say, not oppressive or opposed to the public interest. Or, to put it more concretely still, that the prices which they establish, directly or indirectly, shall not be unduly high, and that the liberty of trade upon the part of others shall not be impaired.

"The proposition has been put in a great many forms and a vast variety of procedure has been suggested, but in the last analysis the object to be accomplished is the suppression of competition as between those who enter into the agreement or form the combination. I do not concur with these distinguished advocates of change. My judgment is in favor of some plan that will preserve a healthful, enduring competition in all the affairs of life."

"UNTERMYER ON THE TOBACCO FIASCO."

Mr. Untermyer declared that the administration of the Sherman law had broken down at its most vital point, and "unless something is done immediately by way of legislation the uselessness and absurdity of judgments of dissolution will be exposed, to our utter humiliation."

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"To some of us it" (what to do with the trusts) "seems the most difficult and important economic question that ever confronted a progressive nation and one that while clamoring for immediate settlement cannot be solved without further legislation."

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"The people are not satisfied that the methods now being adopted for the enforcement of the law will be effective or that they will accomplish anything beyond mere changes in the form of organization and new devices for evading the spirit of the law. The disposition recently made by our Circuit Court of Appeals of the Tobacco case demonstrates that these years of litigation are to be barren of practical results."

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"The country will never be content with such an answer. It is not right that it should be."

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"While the law should be rigidly enforced so as to bring about the actual and not mere formal disintegration, the law is inadequate and the machinery of the courts ill-adapted to the genuine enforcement of dissolutions, and there can be no genuine enforcement of any law that compels competition to the point of ruin."

Mr. Untermyer contended that the Sherman law should be enforced, and every corporation operating in violation of it effectively disbanded, but that there should be Federal regulation giving to persons in an industry the right by agreement to limit production and fix prices within a prescribed maximum. Such an agreement would be subject to the approval of an industrial commission, which must be satisfied that the industry has become generally unprofitable, and that the prices fixed will not permit more than a reasonable profit. He would also require every interstate corporation to take out a Federal license.

"Much has been gained," he said in conclusion, "by having at last found out that we have lost our way and are barking up the wrong tree. It is but a step to put ourselves upon the right track and then we shall soon be in sight of home."

To Chancellor Day is credited the following:

"A few days ago the President of the United States is reported to have said in a public speech that our great business men were guilty of lawlessness. Lawlessness can by no justice or truthfulness be applied to men who find themselves in violation of a statute that for twenty-one years no one had defined, and which finally the Supreme Court of the United States, unable to interpret it beyond a guess, brushed aside as a troublesome thing by saying men must use their reason in interpreting it, leaving to one man with power of prosecution to say whether they reasoned reasonably."

In commanding the continuance of competition, he said, the Sherman law made no distinction whatever among various combinations.

"Now, competition is simply a fetich and it is time it came off its throne. Competition wore itself out because it could not do its business. It is an absurdity. We don't want competition, we want trade. Efforts to manage trade by paternal or eternal laws must be futile. Trade makes its own laws. It is not for the law to take out of the hands of one trader merely to put it into the hands of another trader.

"It is trade we want rather than traders. The Sherman law aims simply to create traders—little traders."

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"Chancellor Day concluded by pleading for at least more discretion in the administration of the Sherman law. Under Presidents Cleveland and McKinley, he said, the law was not administered and business prospered, while since the Roosevelt administration took the bit in its teeth, business is almost as stable and safe and firm to-day as is aviation."

"LITTLETON WOULD AID THE INDIVIDUAL."

Congressman Littleton declared that he could not agree with the Chancellor that competition has had its day and run its course.

"I conceive the problem confronting this country," he said, "as how to preserve centralized industry and at the same time keep open the field of industry for the ambition and individuality of an enterprising race. You cannot say that the business of interstate commerce must be governed by a board as are the railroads of the United States, for the business of the railroads is of a public character as opposed to interstate commerce, which is of private character."

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"But at present I am unwilling to move from the position that the government shall not do anything which an individual can do better so long as that individual can be kept under the law. The function of government is not to tell business what it may do, but what it may not do. You cannot make competition compulsory. Nor is it the function of government to insist that there shall be competition or coöperation—men bring these things about, not governments. The government should see to it, however, that one man in the field of commerce shall not enjoy an advantage over another nor practice wrong against his competitor. What we desire is not competition but the unhindered right to compete.

"I would make it necessary for any concern crossing into interstate commerce first to rise to a certain standard. Once in that field, I would have Congress enact rules for the government of concerns engaged in interstate commerce—not for dissolution, but to lay down prohibitions against rebates and other unfair practices, specifying each device that is prohibited under separate instance and by number.

"I would strike out Section 4 of the present law, thus taking from the Department of Justice the exclusive power to bring action for the violation of law. I would make it law for any man whose business is damaged by unfair practices of another to bring an action in a court of competent jurisdiction for an injunction, instead of leaving it solely to the inert Department of Justice.

"I assume that the President and the Attorney General are acting with the same earnestness as are all of us for the welfare of the country. I would simply challenge them and ask: 'Do you believe the Sherman law is the last word of statesmanship on American industrialism?' "

These various matters, all appearing in a single issue of a daily paper, serve to emphasize the very great public interest which is everywhere manifested over the specific law which is the subject of the controversy.

Since the meeting of the Economic Club referred to, the President has sent his message to Congress, in which he says:

"The test of reasonableness was never applied by the court at common law to contracts or combinations or conspiracies in restraint of trade whose purpose was, or whose necessary effect would be to stifle competition, to control prices or establish monopolies. The courts never assumed power to say that such contracts or combinations or conspiracies might be lawful if the parties to them were only moderate in the use of the power thus secured and did not exact from the public too great and exorbitant prices. It is true that many theorists, and other engaged in business violating the statute, have hoped that some such line could be drawn by the courts; but no court of authority has ever attempted it."

In speaking of the Tobacco decree, which I shall consider later, he says:

"Objection was made by certain independent tobacco companies that this settlement was unjust because it left companies with very large capital in active business, and that the settlement that would be effective to put all on an equality would be a division of the capital and plant of the trust into small fractions in amount more nearly equal to that of each of the independent companies. This contention results from a misunderstanding of the anti-trust laws and its purpose. It is not intended thereby to prevent the accumulation of large capital in business enterprises in which such a combination can secure reduced cost of production, sale and distribution. It is directed against such an aggregation of capital only when its purpose is that of stifling competition, enhancing or controlling prices, and establishing a monopoly. If we shall have by the decree defeated these purposes and restored competition between the large units into which the capital and plant have been divided, we shall have accomplished the useful purpose of the statute."

I venture to suggest that if the sole effect of the decree is to divide the tobacco business of the country among three companies, all largely owned and controlled by the same individuals, the pur-

pose of the statute has *not* been effected, even though these three companies may compete with each other. If the three companies, or any of them, availing themselves of the judicial approval of contracts, every one of which is by the law declared to be illegal, shall thereby be able to restrain the trade of other companies or individuals, then I say the purpose of the statute has not been accomplished, but defeated, the President to the contrary notwithstanding.

In a public address delivered about the same time, Andrew Carnegie is credited with saying:

MONOPOLY'S EVILS.

"The second imperative duty before the American people is to agree upon a measure which will prevent the evils flowing from monopoly. The sole object in view is the protection of the consumer from extortion through monopoly. That achieved, all other subsidiary results can be met as they arise. Unless we can protect the consumer from extortion there is no use in disturbing present conditions.

"In my opinion there is only one way of protecting the consumer, and that is through an industrial court, with power to investigate and fix a maximum price from time to time beyond which no concern, large or small, is permitted to go. We have successfully done this in the whole railway system, and we can do it just as easily in the industrial system."

It seems to me that all of these representative men have failed to point out an essential fact which should aid in the disposition of the very important question which they all discussed.

I would emphasize the spirit, which prompted the passage of the law and which prompts the demand for its enforcement.

Of course in the enforcement of any penal legislation by litigation, the lawyers are taken up with narrow disputes about the verbal construction of the particular law, but economists and other public men, who advocate or abuse its enforcement, talk, or think they talk about its principles and purpose and not its verbiage, and they advocate or abuse it, according as they have preconceived notions of the justice of its object.

Albert H. Walker in his *History of the Sherman Law,* in commenting upon the speech of Senator Sherman in the Senate, March 21, 1890, upon his proposed bill, which was subsequently substituted by the so-called Sherman Anti-Trust Law (page 14), states that, referring to trusts as they had then been devised (page 13), Senator Sherman said:

"The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices as will best promote its selfish interests, reduce prices in a particular locality and break down competition, and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness uncontrolled by competition, compels it to disregard the interest of the consumer. * * * Such a combination is far more dangerous than any heretofore invented, and when it embraces the great body of all the corporations engaged in a particular industry in all the states of the Union, it tends to advance the price to the consumer of any article produced. It is a substantial monopoly injurious to the public, and by the rule of both the common law and the civil law is null and void and the just subject of restraint by the courts; of forfeiture of corporate rights and privileges; and, in some cases, should be denounced as a crime and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now.

"If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities. If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life.

"If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity. * * * They aggregate to themselves great enormous wealth by extortion, which makes the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are in fact producing that condition of our people in which the great mass of them are servitors of those which have this aggregated wealth at their command."

And Senator Vest of Missouri said (ib. page 16):

"Mr. President, no one can exaggerate the importance of the question before the Senate, or the intensity of feeling which exists in the country in regard to it. I take it there will be no controversy with the Senator from Ohio, as to the enormity of the abuses that have grown up under the system of trusts and combinations which now prevail in every portion of the Union."

Senator Reagan of Texas said (ib. page 17):

"I think the country is debtor to that distinguished Senator for his efforts to furnish a remedy for a great and dangerous evil."

Senator George of Mississippi said, at a later date, in a debate on the same subject, March 25, 1890 (ib. page 22):

"It is a sad thought to philanthropists that the present system of production and exchange is having that tendency, which is sure at some not very distant day to crush our all small men, all small capitalists, all small enterprises. So now the American Congress and the American people are brought face to face with this sad, this great problem. Is production—is trade—to be taken away from the great mass of the people and concentrated in the hands of a few men who, I am obliged to add, by the policies pursued by our government, have been enabled to aggregate to themselves large, enormous fortunes?"

Senator Edmonds on March 27, 1890, said (ib. page 25), referring to the sugar trust and the oil trust:

"I am in favor, most earnestly in favor, of doing anything that the Constitution of the United States has given Congress power to do to repress and break up and destroy forever the monopolies of that character, because in the long run, however seductive they may appear in lowering prices to the consumer for the time being, all human experience and all human philosophy has proved that they are destructive of the public welfare and come to be tyrannies, grinding tyrannies."

There seems to be now an obvious failure on almost all sides to appreciate the great fundamental cause, which manifested itself in this debate upon the passage of the law and which now advocates its enforcement. And this, to play upon words, is the *cause* of humanity. This statute should be perceived by the average public man, in the light of a historic spirit, which I shall endeavor to illustrate at greater length by examples. Viewed in this light, as part and a very substantial part, of the "light of reason," it seems to me that the *New York Times* is wrong, when it implies that mere possession of a monopolistic power is not a violation of the spirit of the law, which the Missouri court was enforcing; that Chancellor Day is fundamentally wrong when he regards the Sherman law as an act to foster competition, and when he says it is trade that we want rather than traders; that Mr. Untermyer is fundamentally right, when he criticises the ineffectiveness of the final decree in the American Tobacco suit; and that the talk of good and bad *trusts,* and sheep and goats, belittles a great and momentous question in the current history of this country, if not in the economic history of humanity; and that any requirement of a minimum standard of bigness to be attained before engaging in interstate commerce is worst of all.

The spirit of which I speak, if I interpret it correctly, would condemn much that is speciously advanced as not to be condemned, under a misconception of the purpose, if not of the letter, of the anti-trust legislation. This spirit would extinguish the apparent difference between good and bad trusts (using the word trusts in its colloquial significance, of a great corporation or other organization formed to gather into one control, the business of several previously distinct corporations, or individuals, so as to amass within the new corporation, the substantial control of a great part of the particular branch of the industry in the country). And this spirit would answer in the affirmative, in all cases where bigness means a dangerous aggregation of power, the question ironically asked by the *Times,* whether bigness itself is bad.

The spirit of which I speak is the spirit, not of a law, but of a people. That people may not have adequately expressed itself in a particular statute, which may therefore not be efficient to carry out the will incident to that spirit. The critics of the Sherman law do not, however, appear to me to criticise it for its inadequacy, but only to the extent that it accomplishes the demand which it was intended to embody. And so they, or some of them, contemptuously refer to it as ineffectually designed to accomplish an economic impossibility, and discouraging trade which it was, in their opinion, passed to foster. But the spirit, which I mean, does not design to foster anything save independence, security, justice and stability of the government. A law passed in that spirit and aimed at particular practices, is not designed to accomplish an indirect, but a direct result. It is designed to prevent, not to foster, and what it aims to prevent is acts which it deems inimical to the highest well being of society. The Sherman Act, unlike many other Federal statutes, was not passed for the encouragement of business, but for the prevention of wrong-doing, and by wrong I mean something which, at the time it was passed, was considered, and still is considered to threaten, not a volume of business, and not the profits of A and B, but the well-being of society.

The spirit of which I speak is the spirit of self-preservation and self respect. Its particular manifestation in such laws as are now under consideration, is prompted by a prudent apprehension and fear. It is not the spirit of aggression and plunder as certain circles in my neighborhood honestly believe and loudly proclaim, but the spirit of self-defense.

The author of Proverbs said:

"A prudent man foreseeth the evil, and *hideth* himself, but the simple pass on and are punished." (Proverbs xxii, 3; xxvii, 12.)

It has long, however, been characteristic of the English nation, and of our native born population in this country, when it foreseeth the evil, to prepare to throttle it; and when recognized, though not foreseen, to try to throttle it anyway.

This spirit is the one, which, to my mind, without any doubt, dictated the Sherman law. It recognized an existing evil, it feared a greater. Through the supineness of administrations, and through a failure to appreciate the true underlying spirit and its earnestness, strength and purpose, and therefore through the failure to act promptly, and perhaps from other causes satisfactory to the officers charged with the administration of the law, the fear was in some measure realized through an inordinate growth which might have been prevented by a prompt and aggressive enforcement of the law.

The people who have violated it, have not been in any great measure deceived as to its meaning; they have merely been deceived as to whether it would be enforced. Nor has *business* suffered as much as is represented; the things which the law was designed to prevent, have been somewhat retarded by uncertainty whether they could or could not still be done with profit and impunity; and by a euphemism this is an assault on *business.*

I once heard of a man, who had a savage bull dog, to which his wife seriously objected; he promised to get rid of the dog, and did so, but to the horror of his wife, traded it for three pups of the same breed. There are those who sympathize with Mr. Untermyer, and believe that in the case cited by him, a dog has been traded for three pups. But, if this has happened, it seems to me, it is because of a failure of those charged with its administration and enforcement to appreciate that the law should be interpreted in the light of its purpose as the embodiment of the fundamental spirit of which I speak. And even now, *business* is merely staggered as to how it may become a pup without too nearly approximating the size of an objectionable dog, though it wants to acquire all of the advantages which it may legitimately claim as a pup.

Once on a time, a man advertised for a coachman, and tested the applicants, by seeing how near they could drive to a precipice

on his property; there were many expert drivers who showed their skill by going very close to the edge, but he chose the old fellow, who said that when he had to drive by a precipice he stuck as close to the wall on the other side as he could get. If *"business"* would observe these principles, there would not be much trouble or uncertainty about the application of the Sherman law; it is only when it drives close to the edge that there is danger.

The historic spirit, of which I still wish to speak, is an inborn determination that the acquisition of too much power by a single individual or group of individuals is a danger to the balance of the community and will not be *tolerated.* Sometimes it has manifested itself in opposition to the exercise of power, at other times it has prudently refused to permit the power to be acquired. Occasionally, through not foreseeing the trend of a speciously advocated apparent good, it has tamely waited until it was too late, but not often.

Instances of the latter fault or misfortune are afforded first by the submission in England, to the feudal system of land tenures, brought in with and possibly made necessary by war and conquest, but destructive of the ancient and greater liberty of the Saxons; second, by that land policy of Henry VII, which displaced a large part of the agricultural population, and forced them into vagrancy.

One result of the feudal system, was that one man became another man's man, pledged to him with an oath of fealty; and oppressive charges of all sorts and degrees of vexation ultimately grew up between lord and vassal.

The spirit which dictated the anti-trust law, foresaw a trend toward a new, but oppressive commercial feudalism, in which there was a rapidly approaching necessity, that any man who hoped for advancement or success, must be some corporation's man. The spirit of independence was menaced, and the spirit of co-operation was not fostered in its place, because the large corporation does not beget generosity among men, but they are always tempted to climb higher by means of those whom they subordinate.

Lessons may properly be drawn from history; and one who has traced the influence of feudalism, and the land policy of Henry VII, on the development of hopeless poverty in England, has said several things which I deem pertinent and enlightening in

the present situation. Of feudalism, he says:

"Many of those who have written on the subject seem to me to have failed to grasp either the *object* or *genius* of *feudalism.* It was the device of conquerors to maintain their possessions, and is not to be found among nations, the original occupiers of the land, nor in the conquests of states which maintained standing armies." (Joseph Fisher, *The History of Landholding in England—Humboldt Library of Popular Science Literature,* Vol. II, No. 27, p. [119] 11.)

The same author gives the form of the oath of fealty as prescribed by the law of Edward and Guthrum (ib. p. [117] 9)—to "love all that he loves, and shun all that he shuns * * * and never by will nor by force, by word, nor by work, do aught of what is loathful to him, on condition that he me keep, as I am willing to deserve, and all that fulfil, that our agreement was, when I to him submitted, and chose his will."

Another form of oath was: "I become your man from this day forward, of life and limb, and of earthly worship * * *." (ib. p. [124] 16).

The author adds,

"But it is repugnant to our ideas to think that any man can, on any ground, or for any consideration, part with his manhood, and become by homage, the *man* of another." (ib. p. [127] 19.)

Yet, what in the middle ages the conquest of land exacted as the price of keep, was an end, which bade fair in 1890 to come as the result also of the unrestricted conquest of business. Those whose aggressions were marked by abuses which prompted the anti-trust law, were none too good to exact the same allegiance as the price of keep, which their forerunners in English history had exacted as the price of keep and protection. They may never have had the effrontery to require an actual oath of allegiance from their *man,* but they would and did have the effrontery to require a manifestation of the same devotion. Comparing the conditions in the two ages, and allowing for differences of time and manner, there was in 1890, upon the horizon the possibility of a new feudalism, commercial in its nature, and more hazardous to its dependents, because under the feudal oath of allegiance, the lord was bound to the man, as well as the man to the master; whereas, under the new feudalism all power was assumed by the master.

In A. D. 1175 Prince Henry refused to trust himself with his father till his homage had been renewed and accepted, for it bound the superior to protect the inferior (ib. p. [127] 19).

The spirit which dictated the landmarks of English and American constitutional history, of which the Sherman anti-trust law is one, was illustrated, even under feudalism in the behavior of the Earls of Hereford and Norfolk, when required by Edward I to go over with his army to Guienne,

"and they replied: 'The tenure of our lands does not require us to do so, unless the the King went in person.' The King insisted; the Earls were firm. 'By God, Sir Earl,' said Edward to Hereford, 'you shall go or hang.' 'By God, Sir King,' replied the Earl, 'I will neither go nor hang.' " (ib. p. [128] 20.)

And the Earl of Surrey, in reply to a *quo warranto,* said

"It was by their swords that his ancestors had obtained their lands, and that by his he would maintain his rights." (ib.)

This spirit was not dead in 1890, nor is it now. In 1890, joined with intelligence, it saw a growing tendency, the inevitable result of which, would have been to establish a new feudalism and some of its wise advisers and exponents sought to curb that growing tendency by the passage of the law under discussion. But a law does not completely enforce itself; this law did, to my knowledge, discourage the tendency, in some respects; it dissuaded some of the more law-abiding from doing what it condemned; but as it was not enforced to any appreciable degree, by an alert administration, it did not accomplish much toward preventing the dangerous evil at which it was aimed.

Reverting now, to illustrations chosen from English history, I shall elaborate somewhat, the disastrous effects of the mistaken land policy of Henry VII. And this bears particularly upon Chancellor Day's declaration (if he was properly reported), that what we want is trade and not traders. If I were to answer him in his own terms, I should say that we want and need traders and many of them, with trade; and not trade monopolized, with a necessary increase of disheartened, discouraged and dangerous vagrants or near-vagrants.

After the Wars of the Roses, the nobility and remnant of the former *liberi homines* of Saxon times were both alike depleted; the power of the barons, and their ability under the feudal system to muster retainers to fight their battles, had made those wars and their disasters possible.

"The nobles had absorbed the lands of the *freemen,* and had thus broken the backbone of society. They had then entered upon a contest with the Crown to increase their own power; and to effect their selfish objects, set up puppets, and ranged under conflicting banners, but the Nemesis followed." (Fisher, *History of Landholding in England,* p. [133] 26.)

Even here we have a warning example, because, forsooth, are not those who as individuals, seek the control of whole industries, but the "nobles" of another day? And are not Wars of the Roses, though conducted perhaps without bloodshed, the inevitable outcome of such ambitions?

But it was not of this that I purposed to speak, when I referred to the land policy of Henry VII.

"The Wars of the Roses showed that the power of the nobles was too great for the comfort of the monarch." (ib. p. [134] 26.)

By the enforcement of penal legislation against retainers, which had not in former reigns been enforced, the power of the nobles was reduced, their estates relieved of an onerous charge and their lands freed from the burden of supporting the army of the state (ib). By reason of the enforcement of the laws, a large part of the rent of land granted in Knight's service belonged to the state; an opportunity to convert the holdings of the men-at-arms into small estates held direct of the Crown, presented itself, but was neglected. Of the solution of this question by Henry VII, Fisher says:

"Vagrancy, with its great evils, would have been prevented, and the passing of the poor laws would have been unnecessary, Unfortunately, Henry and his counsellors did not appreciate the consequence of the suppression of retainers and liveries. By the course he adopted to secure the influence of the Crown, he compensated the nobles, but *destroyed the agricultural* middle class.

"This change had an important, and in some respects, a most injurious effect upon the condition of the nation, and led to enactments of a very extraordinary character. * * * (ib.)"

Fisher shows how with the occupation of the retainers gone, and they unfit for the routine of husbandry, and unprovided with farms, that the policy of the nobles changed.

"Then commenced a struggle of the most fearful character. The nobles cleared their lands, pulled down the houses, and displaced the people. Vagrancy, on most unparalleled scale, took place. Henry VII, to check this cruel, unexpected, and harsh

outcome of his own policy, resorted to legislation, which proved nearly ineffectual." (ib. p. [135] 27.)

It is not necessary for us to follow all of the attempts, as given by Mr. Fisher, to remedy the fundamental error by patchwork legislation. He says:

"The simple fact was, that those who had formerly paid the rent of their land by service as soldiers were without the capital or means of paying rent in money; they were evicted and became vagrants. Henry VIII took a short course with these vagrants and it is asserted upon apparently good authority that in the course of his reign, thirty-six years, he hanged no less than 72,000 persons for vagrancy, or at the rate of 2,000 per annum." (ib. p. [137] 29.)

Indeed, have we not seen in recent years an awakening in England, in regard to a similar mistaken policy in Ireland, and even now, is England not trying to undo the mistakes of the past in Ireland by carrying out the provisions of the Irish land laws, to aid in the reëstablishment of individual ownership of land in Ireland?

I fear that there is no substantial difference in effect upon the welfare of the people, between the accumulation of all the land in a few hands, and of all of the business in a few hands. In each case, the overlord requires assistance to make his property profitable, but in the one case, history has demonstrated that from a democratic standpoint, it is a dire mistake. Shall we wait for history to demonstrate that it is likewise a mistake in the other case? In "big business," it is welfare as measured by profit, which is the standard of achievement. It is true that in some, a voluntary effort to consider the welfare of the employee has been made, but this is wholly optional, and is not a necessary concomitant of bigness. I am not speaking of big business, however, but of big power. If big business consists only of gathering into a few hands, what was formerly distributed among many, that, in itself, may be simply a detriment to the many; and may only seem an advantage because we can get the statistics of the few, but not of the many.

The people of the United States fear, and justly fear, that "big business" means big power, dangerously exercised; many of them believe and fear that it means a death struggle with democracy. Plutocracy has been blatant, it has been impudent and inconsiderate of its conspicuous condition; it has been cruel; it has been

selfish; and it has at times manifested a dangerous desire for the possession and exercise of power improperly and corruptly acquired. It has failed to recognize the reciprocal duty which was implied in the feudal oath. When the anti-trust law was passed, the most conspicuous example cited in argument was widely reported and commonly believed to be guilty of many most reprehensible practices, and it was continually growing more dangerously powerful. It has since been judicially declared to have violated the law, even upon the construction of the law by the most moderate rule of construction which has been devised.

Are we not to profit by the experience and mistakes of the past in shaping our course in the present and future? Are we to assume that the potentates of the present, whose money has demonstrated their power in the absorption of some industries and the destruction of their competitors, are dominated by any greater consideration for the prospective "vagrant" than the nobles of the past? And if not, can we safely leave to their own good motives, the determination whether they shall exercise their power dangerously, or even accumulate dangerous power?

Those who sympathize with the purposes of the law are accused of trying an economic impossibility; of trying to stop the accomplishment of a natural law. I have the temerity to assert that it is not a natural, but positive law, which has been perverted to the uses of those who have violated the anti-trust law. The question for the wise and well informed heads among the people of the United States to consider and determine, is whether their laws, passed for other ends, shall be utilized to overwhelm the spirit, which has stood them and their ancestors in such good stead for many centuries, in stopping threatened evils, which were done under the guise or protection of law.

Chancellor Day apparently despises the era of the small trader, and openly advocates displacing him, not, as he thinks, because of his inability to compete under fair conditions, but because of his inability to withstand unfair conditions, which the American people have declared to be illegal. Lloyd, in *Wealth Against Commonwealth,* (Ch. XXII), pictures at least one of these unfair conditions, when he shows how in Columbia, Mississippi, a commodity was sold below cost by one of the huge aggregations in order to smother competitors, while the price was raised in other localities to guard the aggregation against loss. In this particular community, to its credit, be it said, Lloyd states that the plan

did not succeed because the community, imbued with another supposedly Anglo-Saxon characteristic of demanding fair play, refused its patronage to the price cutter. In the Anti-trust Law, the American people do *not* demand competition, but condemn contracts, combinations and conspiracies which in its opinion are not economically necessary, and which exist, not for the benefit of the community, but as a menace to its present and future peace and happiness. Whatever may be the economic truth underlying the demand for competition, it must be true, that the American people as a whole will not tolerate the suppression of independence and the disappearance of opportunity, through the operation of statute laws, by which other single individuals or small coteries acquire for themselves the power to dominate whole industries, or whole states. If, as Chancellor Day says, we do not want competition, we want trade; it is equally true that we want fair trade, and that we do not want and will not have, if the laws of nature do not require it, a trade under the dictation of a single individual or a single corporation or coterie; and that rather than a single corporation conducting all trade for its own profit, a thousand times rather the small traders whom he characterizes with contempt. I am now speaking from the standpoint of what I conceive to be political wisdom. When the time comes for all small traders to be suppressed, and trade, the thing, to take the place, of traders, the men, then, unless I am mistaken, civilization will have advanced to the point that trade, the thing, will not be organized for the benefit and profit of the single trader, be he individual or corporation, but for the benefit of the whole community, with the individual profit of the single trader, cutting very little figure in the purpose of the organization, and with complete safeguards that the people do not become the trader's *men* in the feudal sense, nor have to submit to his caprice, fancy or dictation.

In our own country, there are those who think the high protective tariff should have been warded off, as a piece of political foresight, rather than for the people to have suffered the conditions which it has fostered, and whose end is not yet.

It was not foreseen by enough people to prevent it, that slavery, if suffered to live on in the United States would cause a civil war, but it did.

So much for the places, or a few of them in the history of England and America, where sufficient political wisdom was lacking to prevent great public calamities, by warding off unhappy

aggressions, fostered or permitted by law. These are merely illustrations of lapses in the spirit of which I have spoken.

Let me now advert to several of the manifestations of that spirit, which have served to direct the course of our civilization as well as to strengthen the heritable quality of the will which it bespeaks.

But first, a few words concerning bigness. Mere bigness, which consists of collecting the industry of many into the hands of a few, despoiling the many for the benefit of a few, is in itself a positive disadvantage to those who are despoiled, and a menace to the whole people, even though it may give cheaper prices, and prevent so-called ruinous competition. Ruinous competition may be successfully prevented, otherwise than by making all competition impossible for the immediate profit of a few. Bigness which consists in growth without depredation, which is not a mere transfer from many hands to one, is not a menace to any one. Bigness which consists merely of a transfer from many to one, may be harmless on account of its comparative insignificance when "in the light of reason," it is within the principle *de minimis non curat lex*. Or it may be harmful or pregnant with harm. It is pregnant with harm when it menaces the government, or puts into the hands of individuals the power of many to such an extent that the power may be used as a weapon to prevent the realization of the fundamental principles of the government and the fundamental hopes of its people and electorate, which are: the establishment of *justice,* domestic tranquility, the common defense, the general welfare, and the blessings of *liberty* for this generation and posterity.

To the extent that bigness disestablishes or threatens to disestablish justice, threatens domestic tranquility, prevents the *common* defense, disturbs the *general* welfare, and deprives or bids fair to deprive this generation and *posterity* of the blessings of liberty, just so far is it a menace, and just so far should it be forcibly interrupted by law. Seldom is it possible to define precisely any dangerous line. In building, a margin of safety is always provided; in banking, a reserve. It is not unreasonable to provide by law a safe margin, within the danger line, which bigness can not pass. In the anti-trust law, this was provided by the condemnation of the acts having the dangerous tendency which it was designed to prevent.

In many historical exigencies, a danger point has been set on the side of safety. In Magna Charta, and subsequent charters of liberties, the monarch's power and its exercise were defined by limits: in the mortmain statutes, the transfer of land was prohibited to dangerous transferees; in the acts of settlement of the British Crown, the succession to the throne was so limited as to exclude those who were deemed a possible danger to the common good; in the Declaration of Independence and by the American Revolution, an allegiance which had proved a constant source of danger to liberty was severed; in laws against perpetuities and accumulations, and in the abolition of primogeniture, and of entails, and the prohibition of long leases, limits were found for the correction of abuses actually experienced; in the attitude of Andrew Jackson toward nullification, and in the refusal to re-charter the United States Bank, menaces were stopped short, when it was believed that they were menaces, and by the Civil War, a demonstrated menace to the general peace was wiped out after violence. A greater degree of general foresight and a greater amount of firmness in dealing earlier with the "institution" would have avoided the violent method of suppression.

In the light of this experience *pre*vision is a safeguard to liberty. And this *pre*vision requires that we should not stick in the bark of the question by descanting upon the anti-trust law as an enemy to business, or as an ill-conceived effort to foster competition, nor yet say that its object is accomplished when "big business" is fair in its dealings, when it lowers prices, and when it enters into no combinations to restrict output. Competition is a means, not an end. The end is the preservation of *liberty* and its transmission to posterity, and the establishment of justice, domestic tranquility, and the general welfare.

The anti-trust law is likewise a means to an end; the matters condemned are: (1) "*Every* contract, combination in the form of trust or otherwise, or conspiracy, *in restraint* of *trade or commerce among* the several states, or with foreign nations;" or "in any territory of the United States, or the District of Columbia, or between any such territory and another, or between such territory or territories, and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations."

(2) *Monopolizing* or *attempting* to monopolize, or combining or conspiring to monopolize any part of the trade or commerce among the several states or with foreign nations.

The significant words are *every, restraint of trade or commerce, monopolizing, attempting* to monopolize, *any part* of trade or commerce.

This is not intended to be an exposition of the law, nor an attempt to interpret or construe its language, but merely to show that the language was an expression of this spirit, which was deemed adequate at the time; the power was put into the hands of the government, through its judiciary department to institute proceedings in equity to prevent and restrain violations; and through ordinary criminal prosecutions to punish every person violating its provisions; and through seizure and condemnation of property in transit, owned under any such contract or by any combination or pursuant to any conspiracy and being the subject thereof. The right was also conferred upon persons injured in their business or property, by reason of anything forbidden or declared unlawful, in the act, to recover threefold damages, costs and an attorney's fee.

Any one acquainted with the history of the enforcement of the law will know that, possibly by reason of the decision of the Supreme Court of the United States in the *Knight case,* or possibly by a failure on the part of officials of the judiciary department to appreciate or sympathize with the spirit of the law, no substantial steps were ever taken to prevent by injunction the formation of any of the combinations which have since been declared to be in violation of the law, although their formation and its purpose were publicly known and usually announced in advance; nor were these combinations prevented from realizing vast profits from the violations which have since been condemned—as witness the enormous surplus which the American Tobacco Company still has after distribution of great profits. Although *every* violation of the Act is declared to be a misdemeanor, the criminal prosecutions have been few. Likewise private litigations were few and inconsiderable.

Walker, in his *History of the Sherman Law* (p. 86), shows that during the Harrison administration, it "was never used to any considerable extent as an instrument for the promotion of justice or for the prevention of injustice;" that during the Cleveland administration, ten cases were prosecuted by the government and eight by private parties, of which seven were labor strike cases in which the law was successfully applied in six, and that ten of the other eleven failed to accomplish any results during

that administration, the eleventh producing a decision from the Supreme Court of the United States, condemning a combination after its voluntary dissolution (ib. p. 122); that during McKinley's administration, of eleven suits between private parties, in eight the law was invoked in vain, in two it was successfully invoked as a defense, and in only one did it remedy a wrong (ib. p. 161); that during the same administration six cases were prosecuted by the United States (including one brought over from Cleveland's administration and one which extended into the Roosevelt administration); and that of these, two failed in the United States Supreme Court, and two succeeded in the lower court and were not appealed and two succeeded on appeal to the Supreme Court of the United States (ib. p. 147).

Walker summarizes these cases as follows: eighteen prosecutions by the United States, eighteen by private parties and four in which the defendants invoked the law as a defense; in three of these latter this defense succeeded, and in the fourth, a combination collected a promissory note from one who had purchased goods from it. Of the eighteen cases prosecuted by private parties, two succeeded and sixteen failed; the two successful ones being the prosecution of a railroad striker for contempt of court, and the other resulting in the recovery of $500 damages and an attorney's fee of $750; of the eighteen cases prosecuted by the government, ten succeeded and eight failed. Of the ten successful ones four related to labor strikes, three to combinations of coal miners and coal dealers, two to railroad associations and one to the cast-iron pipe combination. Walker characterizes the practical effect of the labor cases as important; of the coal cases, the suppression of the particular combinations; of the railroad cases as unimportant to the public; and of the cast-iron pipe case as not deterring other similar combinations from adopting still more efficient methods of suppressing competition between them.

This record, in the light of the history of industrial combinations, which is a part of the public history of the same period, seems to show very slight regard to the age-old spirit of which I have spoken.

In answer to a resolution of inquiry of the House of Representatives, Attorney General Harmon responded February 8, 1896, "two actions are now pending, based partly or wholly on alleged violations of what is known as the Sherman Act. They both relate to agreements among interstate carriers" (ib. p. 167). He

made four recommendations for changes in the law, designed, I suppose, to meet some of the difficulties which his department had experienced in its administration. One of these was:

"The purchase or combination, in any form, of enterprises in different states, which were competitive before such purchase or combination, should be *prima facie* evidence of an attempt to monopolize." (ib. p. 18.)

Walker says: (p. 173.)

"It was during the last part of McKinley's administration that hundreds of *holding* companies were organized as state corporations, the purpose of each of which organization was to place the property and power of a number of theretofore competing corporations under the control of a few men, or of one man, in order to suppress all mutual, future or extraneous competition by other parties with any of the combined corporations."

He points out (p. 176) that all of the *"trusts"* which existed and flourished in 1890 were dissolved and their places taken by *holding companies* before 1900; and that they have the same purpose and substantially the same mode of operation as the typical "trust."

During the Roosevelt administration the United States was successful in six important cases, it failed in a seventh because of the illegal presence of unauthorized persons in the grand jury room during the receipt of evidence upon which in their absence an indictment was found (ib. p. 216). During this administration there was a considerable increase in the private litigation (ib. p. 216).

The important results during the Taft administration, which is not yet ended, are still fresh in the public mind.

It seems to me, from these recitals, that the infusion of the historical spirit into the appreciation of the law and its importance, and into the people themselves, including those who obscure the issues by misinterpreting the purpose as an attack instead of a conservative measure, will go a long way toward the essential protection of the people without any change except in the administration of the law.

In view of these considerations, it may be well to consider the final decree in the American Tobacco Case. This decree approves and gives the sanction of a judgment to a plan having the following substantial features:

1. Dissolution and distribution of the assets of the Amsterdam Supply Company, having a capital stock of $235,000 and a surplus of $127,058.74.

2. Abrogation of restrictive covenants with the foreign companies, and between the parties to the combination (except covenants relating to foreign countries).

3. Abrogation of restrictive covenants made by vendors.

4. Disintegration of the Conley Foil Company by cancellation of bonds of the Johnston Tin Foil and Metal Company, $100,000, and the distribution of 3,000 shares of stock of the latter company among the stockholders of the former company, including the American Tobacco Company, which is to distribute this dividend and the stock of the Conley Company ($825,000) among its own common stockholders.

5. Sale of the Baltimore plant of the MacAndrews and Forbes Company to a new company (J. S. Young Co.) and distribution of the price to the stockholders of the MacAndrews Company, including the American Tobacco Company.

6. Sale of some of the property of the American Snuff Company to two new companies and distribution of the purchase price to its stockholders, including the American Tobacco Company.

7. Dissolution or reorganization of the American Stogie Company—the assets or new securities to be distributed to the American Cigar Company—which is to distribute them to its stockholders.

8. Disintegration of the business of the American Cigar Company by sales to the American Tobacco Company; by distribution to its stockholders of receipts from dissolution or reorganization of the American Stogie Company.

9. Purchase of property consisting of stocks, by the American Tobacco Company and distribution of stocks of twelve companies among its stockholders as dividends to be charged to surplus; a deferred distribution before January 1, 1915, out of surplus, to its stockholders, of the securities of four companies.

10. The sale by the American Tobacco Company of assets and business to two new companies, viz: to the Liggett & Myers Tobacco Company, the stock and business of eleven companies or branches, existing at St. Louis, Chicago, Richmond, Louisville, San Francisco, Toledo, New Orleans, Durham, Philadelphia and Baltimore—dealing respectively in plug, fine cut and smoking tobacco, cigarettes, scrap tobacco and cigars.

To P. Lorillard Company the assets of the present P. Lorillard Company consisting of four companies, manufacturing cigarettes, scrap tobacco, little cigars, and cigars, and operating, so far as disclosed in the decree, at Wilmington, Danville and Baltimore.

11. The decree states the present stock of the American Tobacco Company,

Preferred	$78,689,100.00
Common	$40,242,400.00
Its surplus December 31, 1910	$61,119,991.63

with added surplus for the year.

The decree provides for distributing from this surplus	$35,011,865.03
The tangible property to be acquired by Liggett & Myers Tobacco Company is of the value of	30,607,261.96
Exclusive of the value of brands, etc., which are to be taken over by Liggett & Myers Company at	36,840,237.04
Totals	$67,447,499.00
Tangible property to be taken over by P. Lorillard & Co.	$28,091,748.86
And value of brands, etc., to be taken by P. Lorillard & Co. at	19,460,752.14
Total	$47,552,501.00
The American Tobacco Company is permitted to retain—of tangible value	$53,408,498.94
Of brands, etc.	45,023,974.89
Total	$98,432,473.83

The two new companies, Liggett & Myers and P. Lorillard & Co., are to pay the American Tobacco Company $115,000,000, of which that part which consists of stock is to be offered to its stockholders at par, and sold, so that the defendants do not increase their present proportional holdings; the balance, consisting of bonds and preferred stock is to be used in acquiring outstanding bonds and stocks. Pending the distribution of the common stocks (prior to March 1, 1912) and bonds and preferred stock (within three years) they are sequestered in the hands of a trustee, but the income goes to the American Tobacco Company, which remains in existence.

Subject to these and other subordinate provisions the defendants are enjoined from carrying into effect the combination adjudged illegal, or forming a new one to restrain interstate or foreign commerce, or to prolong the unlawful monopoly by doing any of a long catalogue of acts; the decree provides that the new companies shall not for five years have any director or officer, or purchasing agent in common. The defendants are not allowed to increase their holdings for three years, except in the British American Company; and certain of the defendant companies are enjoined from exercising control over the others during their temporary ownership of stocks necessary in carrying out the decree.

There can be no doubt that this decree curbs the particular large combination, the principal defendant, and it also limits to a certain extent the activities of the individuals who have been adjudged guilty of the acts charged. Whether and how far it limits their pernicious influence by permitting them to remain proportionately interested as before, in the new enterprises, are very grave questions. The decree provides for the creation of, and gives judicial sanction to, two companies having a combined capital of $115,000,000 and enjoying the business formerly enjoyed by fifteen companies operating from many states. It permits the American Tobacco Company to remain in business with assets of a value of $98,432,473.83 and gives it judicial sanction. These assets were acquired by contracts in aid of the combination now declared to be illegal, and so far as assets are retained by the American Tobacco Company full effect is given to them (except in respect to restrictive covenants) though illegal in their inception. Similarly, though the contracts by which they acquired the property which they are ordered to sell were illegal, they are allowed to dispose of their rights thereunder for $115,000,000 and to distribute the proceeds among their stock and bondholders, including those who conceived and formed the illegal combination. A court of equity in its wisdom may be satisfied with a decree which would not conform with the harsh provisions or spirit of a law. But it would be another most unfortunate episode in the history of this law, if the Supreme Court should merely decide the meaning of the law, but never have an opportunity to decide how it is to be given practical effect. Reflection upon the decree also suggests the question whether the Liggett & Myers Company and the P. Lorillard Company would now be permitted to form,

if they were proceeding without the sanction of a judicial decree, and to take into two combinations the eleven and four companies which they respectively now absorb. These questions are of infinitely more importance to the people of the United States and the spirit of which I speak than any mere dispute concerning the meaning of the law independent of its administration. Therefore, I deem it a proper time to insist that the historical spirit of independence is behind the Sherman law; if it is administered with a view to the enforcement of that spirit, it will rank with Magna Charta and the other great epoch making, freedom-conserving acts of which I have spoken; while if the spirit is disregarded and ways be found by which single men or combinations of men are fostered in the accumulation of dangerous power under the sanction of judges, federal commissions, federal licenses or what not, perhaps it may be discovered by future historians that the men of the twentieth century did not have an intelligence or integrity broad enough to transmit to posterity, a liberty which the men of the thirteenth century knew how to wrest from an unscrupulous monarch.

Having followed thus far the exposition of these views, the temptation to see how they apply in the suggestion of remedies is great, though these are a mere corollary to the principal thesis.

It seems to me that some of the present problems which are causing so much discussion and are involved in so much confusion, may be the more readily solved, if we give due weight to the fact that the spirit of which I have spoken is fundamentally responsible for the law, and demands recognition.

Appreciating this fact, it seems to me that any law or collection of laws is adequate which serves to enforce this spirit, by preventing or destroying the accumulation, through the operation of other laws, of dangerous power in the hands of one or a few. And dangerous power in this sense, includes the power to monopolize, or to arrogate such part of an industry, that others are precluded from entering that industry, though they have sufficient capital and brains to conduct it profitably under normal conditions. While the power to charge extortionate prices is an evil, it is not the sole or the principal evil; the truly objectionable power is the power to exclude others, of which the power to charge high prices is merely one objectionable consequence.

With these thoughts in mind, I should say that the present Sherman anti-trust law should not be weakened by exceptions,

nor by amendment; that its remedy should be rendered more efficient by prompt efforts in the future on the part of the Department of Justice to prevent the formation, rather than merely to dissolve after their successful operation, the combinations which it condemns; that to this end, all proposed trade combinations should be subject to governmental scrutiny at their inception; that it is not necessary that *all* persons or corporations engaging in interstate commerce should be subject to inspection or license by the federal government, but that it might properly be provided that a federal bureau should issue a license to all corporations, associations or trusts engaging in interstate or foreign commerce, or commerce over which Congress has jurisdiction, when such corporations, associations or trusts, or the trustees or owners thereof as such, propose to succeed or have succeeded to the business of other corporations or persons, or when they consist of combinations of other corporations or associations, or of persons previously engaged in the same or a similar business; that such license should be granted only after a summary hearing, and adequate public notice, and that any person should be entitled to appear in opposition; that such license should be *prima facie* evidence in any litigation (so far as Congress can so prescribe) that its holder was not in its inception an unlawful combination. Such a course would limit Federal interference with small and non-dangerous enterprises; it would relieve the Federal bureau of unnecessary work and would confine its attention to enterprises of the kind which have hitherto proved a menace to the general welfare; it would tend to prevent the formation of combinations which would not stand the test of Federal scrutiny; it would prevent resort to the President for his private sanction of doubtful combinations; it would tend to prevent investors from being the sufferers by subsequent governmental prosecution of combinations unlawful in their inception. Such licenses should not protect the holders in the commission of unlawful acts, and the licensing bureau should not be empowered to confirm or approve an unlawful act, nor to prevent resort to a court to enforce the law, in case of its violation. The probability is, that in respect to intra-state commerce, or transactions beyond the power of the Federal government, the states would follow a model Federal system, as Virginia, for example, did in respect to the interstate commerce law. The remedies now afforded by the anti-trust law should be continued, and the remedy by permanent injunction should be extended to

individuals injured. The enactment of any Federal law for national incorporation, or a national incontrovertible license to engage in interstate commerce, free from judicial control or examination, would not necessarily conserve the ancient spirit, which I have endeavored to make plain. I regard the suggestion that a minimum size should be prescribed, below which no corporation should be permitted to engage in interstate commerce, as peculiarly vicious and the most obnoxious of all the solutions presented. The permission of the national government is all that the offenders wish; if they could secure it, the states and their people would or might be powerless to exclude any Federal licensee or corporation. At present they have, or are assumed to have, the power to exclude all corporations of other states, even though they engage in interstate commerce, and consequently to prescribe, within limits, the conditions upon which they may be admitted to do business within the state. But with a national license, having a wider scope than *prima facie* evidence, or under a national incorporation act, it is at least doubtful if the people of any state would not be powerless against any combination permitted by the national government. An abuse once entrenched by authority of the national government is almost impossible to eradicate; and unless the national law should be conceived in the sublimity of wisdom, it is not unlikely that it would achieve more harm than good, and if it afforded means of defying the spirit of which I have spoken, it might even cause the overthrow of the form or substance of the government which has hitherto not only proved its efficiency to accomplish the objects expressed in the preamble of the Constitution, but has also done a great deal to accomplish the same objects for a large part of the balance of the human race.

So long as the United States confines its attention to preventing an evil, little harm will be done to itself or its people; but when it times its efforts to achieving a positive result through fostering some questionable practice to accomplish a fancied good, there is the gravest danger that the factors in the problem may not all receive their due weight in its solution, and that an unforeseen damage may be done. Under the guise of needful tariff legislation, favors have been distributed in such a way that they have proven a constant source of ill-feeling and irritation; in the effort to compromise with the demands of slave owners conditions were created which could only be settled by civil war; even in the

raising of an actual and necessary internal revenue, the moonshiners, who are indulging a natural impulse, are made violators of law; and with a Federal incorporation, and a Federal license made necessary before engaging in interstate commerce; and Federal favoritism distributed in the future as heretofore, there is the gravest danger that those who cherish the spirit of liberty and who oppose the dangerous acquisition of large power by single individuals, may themselves become the moonshiners and the vagrants of the future, and that the mass of the population will become the retainers and the feudatories of the man of business power. If this is an economic necessity it will come despite laws, but hitherto the progress in this direction has been through laws and not in spite of them, except only the defiance of the Sherman law, which it was believed was substantially a dead letter. Can it be doubted, in view of the way that the possibilities of the Sherman law were neglected in the past by those charged with its administration, that those corporations which have recently been held to have violated it would have received from a complacent licensing bureau permission and a godspeed, which would have been, like letters of marque, if not of reprisal, against helpless citizens of the United States entitled to its protection?

Let us remember that it is the "nobles" of the present who are suggesting industrial courts, legalized agreements to "prevent destructive competition," Federal licenses, Federal incorporation, price-fixing commissions, and other nostrums if only "big business" is not restrained in getting bigger, not through increasing its field of operation, for there is no restraint on that now, but through forming combinations through which they increase their power, by acquiring for their own what now belongs to others.

It has been observed as a fact in natural history that the disappearance of races of animals has been accounted for by their struggle for existence with those immediately stronger races with which they came into direct contact, while other and weaker races survived unmolested. In the Island of Madagascar particularly it is said that the advent of early races of rude men put an end to the struggle for existence of a now extinct form of higher monkeys, though the arboreal lemurs still survive. Perhaps it is in the inevitable course of nature that "big business" must have what it demands and that liberty-loving and independence-loving men are doomed to extinction by nature's irresistible decrees wrought through those whom she favors. If so, no human law will pre-

vent it. But it may be timely to suggest that it should be left in that event to a law of nature to accomplish the result, and that laws to assist nature are unnecessary. Up to the present, however, it seems that "big business" has availed itself of friendly corporation laws, and the friendly principles of the laws of trusts, rather than of any laws of nature or of mere social relations.

In its administration the Sherman law has proved cumbrous; many inherently wrongful acts are evidence of the things which it condemns, which by themselves could well and properly be condemned as offenses against the United States. These could be denounced by separate penal legislation. The President has in his message called attention to these possibilities. It might be possible and advisable to define and penalize unfair and destructive competition, in order to rob of its efficiency the taunt so frequently repeated, that we can not return to "ruinous competition," though in fact those who utter the taunt have in some instances been the most persistent offenders. The common man understands the meaning of "ruinous competition"—it is illustrated by the devices of selling goods below cost, and of giving away prizes or property as inducements; of conducting business at an obvious loss in order to injure the business of another; of giving and taking rebates from apparently real prices, and of refusing to sell to those who deal with others.

These suggestions upon the problem of remedies are only tentative; they seemed appropriate corollaries to the main proposition that the spirit behind the anti-trust law is ancient and lasting, and that it can not safely be lost to view in any discussion of the subject. But whatever remedies may be adopted,

> Let us remember that it is the duty of the Twentieth Century to preserve from destruction by private greed the spirit which the men of the prior centuries have known how to preserve, and which is their greatest political contribution to us.

Charles A. Boston.