

ALUMNI DEPARTMENT

Memorandum on the Sherman Law
What It Is and What It Is Not.

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A.

Congress has sole and plenary power to regulate—to prescribe rules for governing—interstate commerce.

This power has been little used. Congress has passed laws which do regulate—

The business of interstate common carriers.

The care of livestock transported in interstate commerce.

The interstate transportation of explosives, etc.;

And laws which prohibit—

The interstate transportation of—

Lottery tickets,

Obscene articles,

“White slaves,”

Stolen motor vehicles,

Game killed in violation of State law, etc.

When States undertake by law to encroach upon this power of Congress, their laws are nullified by the Federal courts in cases coming before them.

When individuals or corporations undertake to usurp this power of Congress *in certain ways*, they violate the Sherman law.

The Sherman law, then, is not a law to *regulate* interstate commerce but is a law to *prevent* certain private regulations of or interferences with interstate commerce which anticipate the action of Congress, leaving all others untouched.

B.

The title of the Sherman law is “An Act to protect trade and com-

merce against unlawful restraints and monopolies.’

The word “unlawful” in the title implies that there are lawful restraints and monopolies, and that these are not within the purview of the Act. For example—

The incidental elimination of competition arising from the formation *in a normal way* or partnerships or corporations out of competitive units or from purchases *under normal conditions* of the businesses of competitors, they going out of business under the terms of the sale, are lawful *restraints*; and patents give lawful *monopolies* to patentees, their lessees and assigns, though not any right to form unlawful combinations with other patentees or others to secure benefits over and above the benefits granted by the patents. Note that a patentee has an *exclusive* right to make, use and vend the article he invents. Copyrights are in the same class. *Exclusion* is the main feature of all monopolies.

C.

The two important sections of the Sherman law are as follows:

“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, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one

year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

D.

The Sherman law is a law to prevent—

1. Carrying on interstate trade by *unlawful methods*, looking (a) merely to the benefit of the actor or actors through the exclusion of competitors from the trade (monopoly provisions of Sec. 2 and conspiracy provisions of Sec. 1), or (b) to the benefit to the actors arising from the use of "unified tactics" on their part, with injury (conspiracy-monopoly provision of Sec. 2 and conspiracy provision of Sec. 1) or without injury (contract and combination provisions of Sec. 1) to competitors;

2. Persons not carrying on the trade in question from interfering, by unlawful or tortious means, either gratuitously or to obtain a collateral benefit, gratify spite, or coerce action in some extraneous matter, with the carrying on of that trade by another, or with the course of trade between others (conspiracy provision of Sec. 1).

E.

The Sherman law touches the common law only in the phrase "restraint of trade," the meaning of which was fixed at common law in numerous decisions upon contracts the enforcement of which was sought in civil

suits, and in a few decisions in criminal cases of conspiracy to restrain trade, principally growing out of concerted but peaceable efforts of workmen to secure better wages.

Carrying on trade under tacit understandings, or "unification tactics," not in the contractual form (the Sherman-law *combination*), was unnoticed in common-law times, is not unlawful in England today, and is lawful in the United States only as it is made so by such specific provisions as that in Section 1 of the Sherman law. Just here is the reason for the difference between the English and American decisions. It is not a difference in reasoning, but is one arising out of the positive provisions of the American law. The courts of both countries are bound by the common law until it is changed by statute. It has been changed in this country but not in England, as to the matter here under consideration.

In England, because of recent legislation against it, a charge of conspiracy cannot now be predicated upon mere concerted efforts of workmen peaceably to secure better wages; nor can such a charge be here based upon the Sherman law. A recent statutory provision by Congress forbids considering labor organizations unlawful combinations so long as their purposes are legitimate. Producers of farm products, moreover, are exempted by law from being charged with violating the Sherman law merely because they fix reasonable prices for their products by agreement.

Contracts in restraint of trade are in terms made illegal by Section 1 of the Sherman law. They were not *unlawful* at common law. They were merely *unenforcible* in the courts be-

cause against public policy, with one exception: A contract in restraint of trade in which the vendor of a business and its good will agreed to keep out of the business for such a reasonable time or within such a reasonable distance as to insure the purchaser's obtaining the benefit of his purchase *was* enforceable. As a result of modern conditions, such time and distance are now, in England, treated with greater liberality than they formerly were. The same exception and like liberality of treatment are accorded contracts in restraint of trade in the United States, the one by force of the common law and the other by reason of modern considerations in its application. Just here lies the only opportunity there is to consider *reasonableness* in connection with restraints of trade. The idea that reasonableness has any bearing upon combinations or conspiracies of some traders to injure others, or upon gratuitous and tortious interferences with the business of traders by non-traders, is as absurd as the idea of reasonable burg-law.

The word *monopolize* is used in the Sherman law in a sense unknown to the common law. Monopolies of trade at common law were granted by the crown. An *exclusive right* was given by the crown. The monopoly of the Sherman law arises from a grasping by traders of the trade from their competitors by *unlawful methods* of carrying on business, resulting in, or tending towards, the exclusion of competitors from the trade. The excuse for the word's being used in the Sherman law lies in the fact that the exclusion feature is common to both the common-law and the Sherman-law monopoly—the *result* is the same in both cases, altho

the *methods* of obtaining the two kinds of monopoly differ, in that the one proceeded from the act of the Crown while the other proceeds from the acts of individuals.

Again, a monopolist at common law usually had an exclusive right in the whole of a given line of trade, while under the Sherman law one begins to monopolize a line of trade as soon as he begins to use unlawful methods in carrying on his business.

The size of the business, absolutely or relatively, is not the criterion of monopoly under the Sherman law at all. We may be sure that when Congress gets ready to limit the volume of business one may do honestly, it will provide some means of keeping track of all business done and of furnishing all concerns engaged in each line of business with the information that will prevent the ones doing a dangerously large percentage of the business from passing the limit fixed by law. It will be a long time before Congress does any such thing as *this*.

Indeed, if monopoly under the Sherman law *has* any reference to the comparative size of the business, a small concern using unlawful methods of carrying on its business cannot be touched until it has secured by such methods say over half of the business. This consideration alone reduces the proposition that a big business, as is popularly supposed, is a monopoly to an absurdity, because a single concern is amenable to the Sherman law only for monopolizing under the second section of law and not at all under the first section, which requires the co-operation of two or more.

F.

Expanding the foregoing, and drawing permissible inferences

therefrom, we may say, that—

The first section of the Sherman law addresses itself only to *restraints* of trade through contracts, combinations or conspiracies.

Contracts and combinations in restraint of trade seek to benefit the parties thereto at the expense of the public.

Conspiracies in restraint of trade seek to benefit the conspirators at the expense of traders outside of the conspiracy. The conspirators may or may not be traders themselves.

If a group of traders seek to injure its competitors outside of the group by grasping the trade through methods so unlawful as to exclude such competitors from the trade, or to tend to that result, they not only conspire in restraint of trade but they conspire to monopolize the trade.

If conspirators not in the trade seek to injure concerns in trade, by unlawful interferences, they conspire to restrain trade but they do not monopolize or grasp the trade to themselves. There is, however, a distinction between a direct object to injure and a direct object to benefit the parties "conspiring" in a legitimate way with only incidental injury to others.

The second section of the law addresses itself only to *methods of doing business* not normal or usual; i.e. to unlawful methods within the meaning of those terms as defined by the courts; and so it addresses itself to *monopolization*, in the sense of vexing, disturbing or distorting, the whole of the trade in any line, it being a *part* of the whole trade of the country. It is to be noted that the second section covers the case of a *single concern* grasping business

from its competitors by unlawful methods.

The Sherman law is *not* a law to condemn transactions which have always been normal in business even if incidental effects, having the appearances of restraints of trade or of competition, flow therefrom. We may instance a transaction involving the outright purchase of a competitor's business and property when it is *bona fide* and does not come at the end of a campaign of unfair and tortious trade methods used by the purchaser to put the seller in a position where he *must* sell. The fact that the competition formerly existing between the parties is eliminated by the sale does not make the transaction a "combination in restraint of trade." Only separate and presently-existing concerns can *engage in* a combination within the meaning of the first section. A concern that goes out of existence cannot engage in a continuing combination. A defunct thing cannot function in any way. Of course anything lawful in itself *may* be a step in an unlawful plan.

The Sherman law is *not* to reduce all concerns to one level by compelling large concerns to divide their business with smaller ones; i.e. not a law to maintain the poor, incapable or inefficient at the expense of the rich, capable or efficient, to handicap large concerns for the benefit of small ones, to give the small ones *advantages* in their struggle for existence, or to enforce the golden rule, or any rule but that of lawful competition, which necessarily carries with it the idea that success, it may be at the expense of competitors, is a necessary incident to the working rule of competition, which the law

now favors instead of a policy of governmental regulation.

The Sherman law is *not* a law to prevent a business concern from enjoying all the results of its successful competition lawfully conducted, even a resulting "monopoly" in the popular sense of that word.

The Sherman law is *not* a law to prevent a business concern from "dominating" its own business, or conducting it in any lawful way which suits it, even if its methods differ from those of other concerns and seem calculated to drive such others out of business or to wreck its own business. Neither the courts nor the Trade Commission can *supervise* the business methods of business concerns, or do anything but prevent the use by them of *unlawful* methods.

The Sherman law is *not* a law to compel a business concern to know the extent of its competitors' businesses, individually or collectively, or otherwise to attend to any business but its own.

The Sherman law is *not* a law to limit the amount of property or money to be used or invested in a given business, or to limit the number of different enterprises a given concern may conduct, whether related or not, even if they concern necessities of life. The fact that legislation on this subject is now under consideration in Congress is proof that the Sherman law does not cover it.

The Sherman law is *not* a law to put business concerns on the same footing as inn-keepers and common carriers in their dealings with the public: i.e. not a law to prevent discrimination by a concern between its customers, or the choosing of its customers, upon any theory that suits

it, without having to give a reason for so doing.

The Sherman law is *not* a law to authorize the courts to ignore the rules of logic, or the well-settled principles of the criminal or civil law.

G.

Prevention, so far as the Government is concerned, takes the forms of criminal punishment for past, and injunction against continued violation of the law.

That this law, contrary to usual principles, provides for an injunction against the commission of crime must be taken to indicate that Congress felt an unusual tenderness towards prospective violators of it, or else that Congress foresaw that such difficulties would arise in interpreting the law as fairly to call for their settlement, as to some practices at least, in civil proceedings. The latter seems to have been the view of the Department of Justice in its administration of the law.

H.

The conditions prevailing at the time the Sherman law was enacted have so far changed that the unlawful methods then freely used for grasping trade from competitors have mostly disappeared, and the current practice is for traders to adopt "unified tactics" coming within the combination provision of Section 1. Of course, combinations in restraint of trade being in terms made illegal by Section 1, the use of such tactics constitutes an unlawful method of doing business upon which a charge of conspiracy to monopolize under Section 2 may be based.

Furthermore, the "unified tactics" now in vogue assume the form of the oldy plan of **so-called open competition**, which seems to be a lawyer-

made scheme for inducing business men to fool themselves and believe that they can at the same time fool the courts. This plan has recently been properly characterized as "teamwork to fleece the public." The good old-fashioned method of trading was for each business man to attend strictly to his own business without consulting his competitors or reporting the details of his business to them from day to day. Above everything else the Sherman law is a law to preserve the normal and condemn the abnormal method in business. The Eddy plan is a ridiculously abnormal method of competition which would never have been thought of if the Sherman law had not been on the books. We can easily imagine what a cry of protest would arise from business men if it were proposed to *compel* business men by law to do the things which they now so willingly do in pursuance of the Eddy plan. Let us hope that this Eddy plan is the last ditch of the Sherman law violators among *traders*.

Most of the violations of the Sherman law by *non-traders*—those who interfere, for purposes of their own, with the freedom of action by *traders*, in whose business they have only

a secondary interest, have been perpetrated by laborers working for traders directly or indirectly.

Under a government of law, no sane person can claim a right to impose punishment upon another for not conducting his business according to rules laid down by the person aggrieved, or wantonly to destroy the business or property of one who does not comply with his demands in matters pertaining only indirectly to the trade being carried on. And yet laborers assume to do this, and believe that the law is powerless to interfere. Certain classes of laborers, like the I. W. W., are honest enough to say that their "right" to do such things is above and outside the law. The others, or at least their representatives, seem to think that union organization endows them with a species of sanctity that exempts them from the operation of the laws which society relies for its continued existence. A recent decision of the Supreme Court has disabused the minds of unionists upon this point, so much so that they now talk of securing a repeal of the Sherman law, as though that were the only law standing in the way of their unconscionable claims. A state of society wherein such things would be permissible is unthinkable.