ator Sherman, but to Ida Tarbell, Teddy Roosevelt, Woodrow Wilson, Louis Brandeis, Wright Patman, and Thurman Arnold, not to mention Edward Bellamy and Thorstein Veblen. And many of *their* purposes were confused, conflicting, and confusing.

Today, the man-in-the-street may still think that "the Sherman Act" consisted of marching through Georgia, but not the businessman. The law, as interpreted, now touches almost every nerve of American business. It is a thicket, an obstacle race, a slalom, a mined field through which a corporation's lawyers must guide it. It is hard to tell what business transaction next may be found illicit.

One reason for this is the vagueness of the law today, as interpreted. Here is an example, as the Supreme Court sees it:

> A merger which produces a firm controlling an *undue* percentage share of the *relevant* market, and results in a *significant* increase in the concentration of firms in that market, is so inherently *likely* to lessen competition *substantially* that it must be enjoined. . . . (italics added)
>
> *U. S.* v. *Philadelphia National Bank*, 374 U. S. 321 (1963)

The underlined words have no precise meaning; nor can anyone define them legally except the Supreme Court.

The "Relevant Market"

The definition of the *relevant market* is a particular teaser. Whether one is charged with conspiring, monopolizing, excluding, foreclosing, or illegally merging, the question automatically comes up, "in relation to what market?"

In the important Cellophane case (*U. S.* v. *du Pont,* 351 U. S. 377, [1956]) the du Pont lawyers, rebutting a charge of monopolizing, argued that the relevant market was not cellophane, of which du Pont sold 75 per cent, but "flexible packaging materials" in general, of which du Pont sold less than 20 per cent. And the Supreme Court majority agreed.

But three Justices (Warren, Black, and Douglas) dissented, saying that cellophane was the relevant market and condemning the formulas both of "reasonable interchangeability" and of "interindustry competition." Had they been a majority, this would have made du Pont guilty of monopolizing.

However, eight years later they *were* part of a Court majority which said that "we must recognise meaningful competition where it is found to exist. . . . Where the area of effective competition c[illegible] across industry lines, so must the relevant line of commerce. . . ." (*U. S.* v. *Continental Can Co. et al.*, 378 U. S. 441, [1964]) This decision broke up the merger of a large metal container maker and a large *glass* container maker.

The "Incipiency" Doctrine

Perhaps the broadest hunting license the antitrust laws give the enforcement agencies is the so-called "incipiency" doctrine. It consists in the two little words "may be," well known in courtship and politics. The Clayton Act of 1914 was written to "nip monopolies in the bud," that is, in their *incipiency.* So it banned quantity discounts, tying clauses, and the buying of competitors' stock "where the effect *may be* to substantially lessen competition." The legal meaning of "substantially" has in the last 30 years been whittled to almost nothing, but the "may be" has proved a little giant. It has even been compounded, in the current antimerger drives, to "incipient incipiency," proscribing acts the effect of which "may be" to produce results the effects of which "may be . . . ," and so on.

To "incipiency" the antitrust enforcers imaginatively have added a "potential competition" concept. The idea is that if, for instance, two firms join in a new venture, they substantially lessen competition because one might have gone in and the other have stayed out and so constituted *potential* competition. Thus said the Supreme Court in 1964:

> . . . a finding should have been made (by the trial court) as to the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant *potential* competitor. . . . (italics added)
>
> *U. S.* v. *Penn-Olin Chemical Co.,* 378 U. S. 158 (1964)

Promotion of Competition?

With all this weaponry available, what are the purposes of the antitrust laws?

The first sentence of the Report of the Attorney General's National Committee to Study the Antitrust Laws had an answer:

> The general objective of the antitrust laws is promotion of competition in open markets.

This Report, dated March 31, 1955, is the last word in an ambitious effort to appraise, review, and make recommendations on the antitrust laws. There has been nothing since of the sort. Sixty members, chosen from the leaders of the antitrust bar and aided by the heads of Antitrust and the