

Recollections of Senators Sherman and Hoar of
the origins of the Sherman Anti-Trust Act.

PART 1

JOHN SHERMAN'S
RECOLLECTIONS

OF

FORTY YEARS
IN

THE HOUSE, SENATE AND CABINET

AN AUTOBIOGRAPHY.

VOLUME II.

ILLUSTRATED

WITH PORTRAITS, FAG-SIMILE LETTERS, SCENES, ETC.

1895.

THE WERNER COMPANY,
CHICAGO. NEW YORK.
LONDON. BERLIN.

In the previous Congress I had introduced a bill “to declare unlawful, trusts and combinations in restraint of trade and production,” but no action was taken upon it. On the 4th of December [1889] I again introduced this bill, it being the first Senate bill introduced in that Congress. It was referred to the committee on finance, and, having been reported back with amendments, I called it up on the 27th of February, and said that I did not intend to make any extended remarks upon it unless it could become necessary to do so. Senator George made a long and carefully prepared speech, from which it appeared that while he favored the general purpose of the bill he objected to it on the ground that it was not constitutional. This objection was shared by several Senators. I subsequently reported from the committee on finance a substitute for the bill, [1071] and on the 21st of March made a long speech in support of it in which I said:

“I did not originally intend to make any extended argument on this trust bill, because I supposed that the public facts upon which it is founded and the general necessity of some legislation were so manifest that no debate was necessary to bring those facts to the attention of the Senate.

“But the different views taken by Senators in regard to the legal questions involved in the bill, and the very able speech made by the Senator from Mississippi [Mr. George] relative to the details of the bill, led me to the conclusion that it was my duty, having reported the bill from the committee on finance, to present, in as clear and logical a way as I can, the legal and practical questions involved in the bill.

“The object of this bill, as shown by the title, is ‘to declare unlawful, trusts and combinations in restraint of trade and production.’ It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our state and federal government. Similar contracts in any state

in the Union are now, by common or statute law, null and void. Each state can and does prevent and control combinations within the limit of the state. This we do not propose to interfere with. The power of the state courts has been repeatedly exercised to set aside such combinations as I shall hereafter show, but these courts are limited in their jurisdiction to the state, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.

“Unlawful combinations, unlawful at common law, now extend to all the states and interfere with our foreign and domestic commerce and with the importation and sale of goods subject to duty under the laws of the United States, against which only the general government can secure relief. They not only affect our commerce with foreign nations, but trade and transportation among the several states. The purpose of this bill is to enable the, courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several states to protect local interests.

* * * * *

“This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section, when they affect injuriously our foreign and interstate commerce and our revenue laws, and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states. It is to arm the federal courts within the limits of their constitutional power, that they may cooperate with the state courts in checking, curbing, and controlling the more [1073] dangerous combinations that now threaten the business, property, and trade of the people of the United

States. And for one I do not intend to be turned from this course by finespun constitutional quibbles or by the plausible pretexts of associated or corporate wealth and power.

“It is said that this bill will interfere with lawful trade, with the customary business of life. I deny it. It aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition. It is the right of every man to work, labor, and produce in any lawful vocation, and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of the equality of all rights and privileges.”

I then recited the history of such legislation in England, from the period of Coke and Littleton to the present times. I also quoted numerous decisions in the courts of the several states, and explained the necessity of conferring upon the courts of the United States jurisdiction of trusts and combinations extending over many states.

Various amendments were offered and a long debate followed, until, on the 25th of March, Mr. George moved to refer the whole subject to the committee on the judiciary. I opposed this motion on the ground that such a reference would cause delay and perhaps defeat all action upon the bill. I stated that I desired a vote upon it, corrected and changed as the Senate deemed proper. The motion was defeated by the vote of yeas 18, nays 28. Subsequently, however, the bill was referred to the committee on the judiciary, with instructions to report within twenty days. On the 2nd of April Mr. Edmunds, chairman of that committee, reported a substitute for the bill, and stated that, while it did not entirely meet his views, he was willing to support it. Mr. Vest, Mr. George and Mr. Coke, members of the committee, also made statements to the same effect. When the bill was taken up on the 8th of April I said I did not intend to open any debate on the subject, but would state that after having fairly and fully considered the substitute

proposed by the committee on the judiciary, I would vote for it, not as being precisely what I wanted, but as the best thing, under all the circumstances, that the Senate was prepared to give in that direction. The bill [1074] passed by the vote of 52 yeas and 1 nay, Senator Blodgett, of New Jersey, alone voting in the negative. It was passed by the House and after being twice referred to committees of conference was finally agreed to, the title having been changed to "An act to protect trade and commerce against unlawful restraints and monopolies," and was approved by the President June 26, 1890.

The law as finally agreed to is as follows:

"SEC. 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.

"SEC. 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.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any 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, is hereby declared 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.

“SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of [1075] the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

“SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

“SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like

proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

“SEC. 7. Any person who shall be injured in his business or property by any other or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney’s fee.

“SEC. 8. That the word ‘person,’ or ‘persons,’ wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.”

Since the passage of this act I have carefully studied and observed the effect, upon legitimate trade and production, of the combination of firms and corporations to monopolize a particular industry. If this association is made merely to promote production or to create guilds for friendly intercourse between persons engaged in a common pursuit, it is beneficial, but such is not the object of the great combinations in the United States. They are organized to prevent competition and to advance prices and profits. Usually the capital of several corporations, often of different states, is combined into a single corporation, and sometimes this is placed under the control of one man. The power of this combination is used to prevent and destroy all competition, and in many cases this has been successful, which has resulted in enormous fortunes and sometimes a large [1076] advance in prices to the consumer. This law may not be sufficient to control and prevent such combinations, but, if not, the evil produced by them will lead to effective legislation. I know of no object of greater importance to the people. I hope the courts of the United States and of the several states, will deal with these combinations so as to prevent and destroy them.

Part 2

AUTOBIOGRAPHY
OF SEVENTY YEARS

BY

GEORGE F. HOAR

WITH PORTRAITS

VOLUME TWO

NEW YORK

CHARLES SCRIBNER'S SONS
1903

CHAPTER XXXVI TRUSTS

I HAVE given the best study I could to the grave evil of the accumulation in this country of vast fortunes in single hands, or of vast properties in the hands of great corporations-- popularly spoken of as trusts--whose powers are wielded by one, or a few persons. This is the most important question before the American people demanding solution in the immediate future. A great many remedies have been proposed, some with sincerity and some, I am afraid, merely for partisan ends. The difficulty is increased by the fact that many of the evils caused by trusts, or apprehended from them, can only be cured by the action of the States, but cannot be reached by Congress, which can only deal with international or interstate commerce. As long ago as 1890 the people were becoming alarmed about this matter. But the evil has increased rapidly during the last twelve years. It is said that one man in this country has acquired a fortune of more than a thousand million dollars by getting an advantage over other producers or dealers in a great necessary of life in the rates at which the railroads transport his goods to market.

In 1890 a bill was passed which was called the Sherman Act, for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatever. He introduced a bill and reported it from the Finance Committee providing that whenever a trust, as it was called, dealt with an article protected by the tariff, the article should be put on the free list. This was a crude, imperfect, and unjust provision. It let in goods made abroad by a foreign trust to compete with the honest domestic manufacturer. If there happened to be an industry employing thousands or [363] hundreds of thousands of workmen, in which thousands of millions of American capital was invested, and a few persons got up a trust--perhaps importers, for the very purpose of breaking down the American manufacturer--and made the article to a very small extent, all honest manufacturers would be deprived of their protection.

Mr. Sherman's bill found little favor with the Senate. It was referred to the Judiciary Committee of which I was then a member. I drew as an amendment the present bill which I presented to the Committee. There was a good deal of opposition to it in the Committee. Nearly every member had a plan of his own. But at last the Committee came to my view and reported the law of 1890. The House disagreed to our bill and the matter went to a Conference Committee, of which Mr. Edmunds, the Chairman of the Committee, and I, as the member of the Committee who was the author of the bill, were members. The House finally came to our view.

It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words "agreements in restraint of trade" as having a technical meaning, such as they are supposed to have in England.

The Supreme Court of the United States went in this particular _____ farther than was expected. In one case it held that "the bill comprehended every scheme that might be devised to restrain trade or commerce among the several States or with foreign nations." From this opinion several of the Court, including Mr. Justice Gray, dissented. It has not been carried to its full extent since, and I think will never be held to prohibit the lawful and harmless combinations which have been permitted in this country and in England without complaint, like contracts of partnership which are usually considered harmless. We thought it was best to use this general phrase which, as we thought, had an accepted and well-known meaning in the English law, and then after it had been construed by the Court, and a body of decisions had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary. [364]

The statute has worked very well indeed, although the Court by one majority and against the very earnest and emphatic dissent of some of its greatest lawyers, declined to give a technical meaning

to the phrase "in restraint of trade." But the operation of the statute has been healthy. The Attorney-General has recently given an account of suits in equity by which he has destroyed a good many vast combinations, including a combination of the six largest meat-packing concerns in the country; a combination of railroads which had been restrained from making any rebate or granting any reference whatever to any shipper; and a pooling arrangement between the Southern railroads which denied the right of the shippers interested in the cotton product in the South to prescribe the route over which their goods should pass. He has also brought a suit in equity to prevent the operation of a proposed merger of sundry transcontinental railroads, thereby breaking up a monopoly which affected the whole freight and passenger traffic of the Northwest.

The public uneasiness, however, still continued. The matter was very much discussed in the campaign for electing members of the House of Representatives in the autumn of 1902. I made two or three careful speeches on the subject in Massachusetts, in which I pointed out that the existing law, in general, was likely to be sufficient. I claimed, however, further, that Congress had, in my opinion, the power of controlling the whole matter, by reason of its right to prescribe terms on which any corporation, created by State authority or its own, should engage in interstate or international commerce. It might provide as a condition for such traffic by a corporation, that its officers or members should put on file an obligation to be personally liable for the debts of the concern in case the conditions prescribed by Congress were not complied with.

The House of Representatives passed a very stringent bill known as the Littlefield Bill, which was amended by the Judiciary Committee, of which I was the Chairman, by adding the provisions of a bill which I had, myself, previously introduced, based on the suggestions above stated. [365]

But there was a general feeling that the amendments to the existing law proposed by the Administration were all that should be made at present. These consisted in providing severe penalties for granting rebates by railroads to favored shippers; for having suits under the existing law brought forward for prompt decision, and for giving the new Department of Commerce large powers for the examination of the conduct of the business of such corporations, and to compel them to make such returns as should be thought desirable.

I should have preferred to have the bill I reported brought forward and discussed in the Senate, although there was obviously no time, with the pressure of other business, to get it through. But it was thought best by a majority of the Republicans not to take it up. Some of them thought it was likely, if passed, to have a very serious and perhaps disastrous effect on the country. So far as I know, nobody in either House of Congress or in the press has pointed out why such a result would be likely to follow.

On the whole I was very well satisfied. The interests concerned are vast. A rash or unskillful remedy might bring infinite trouble or ruin to lawful business. The work of restraining the trusts is going on very well under the law of 1890. It is a matter which must be discussed and considered by the American people for a great many years to come, and the evils from the trusts at present are rather in anticipation than in reality. So I am very well content for the present, with what has been accomplished. □

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Balthasar Henry Meyer, *A History of the Northern Securities Case* (1906) (also posted on MLHP).

Albert H. Walker, *History of the Sherman Act of the United States of America* (1910) (posted on MLHP).

Posted MLHP: January 31, 2022