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THE ORIGIN AND PURPOSE OF THE SHERMAN ACT

BY CHARLES NAGEL

From the day of its proposal the Sherman Act has been the subject of more or less heated controversy. That much of the discussion had little merit or was wide of the mark, goes without saying. We were hardly broken to the demand for regulation which has since possessed our country. We were still open rebels as we have in a measure become secret defiers of unwelcome laws. Above all, neither our captains of industry nor our statesmen were generally prepared for the consideration of measures so largely economic in their purpose and effect. After the enactment of the statute, the question became one chiefly of practical employment and interpretation. There were those who affected to believe that it would prove to be no more than many other legislative gestures—timely sops for public consumption. There were others who contended that nothing short of a repeal could save industry and commerce from utter disorganization and destruction. There were some who, admitting the impossibility of repeal but insisting that the great promise of our country's development must be fulfilled, took steps to adapt and sometimes to evade the provisions of this new factor in our problem. The struggle has been as protracted as it is fascinating. Large sums have been wasted; some enterprises have been embarrassed, if not wrecked. Great lawyers have made dire prophecies for extravagant fees; economic fallacies have been promulgated; and indifferent statesmen have enjoyed sudden popular acclaim. But withal there has come out of it—at disproportionate loss of investment and time it is true—a rule of reason and wisdom that now gives fair assurance and security to all legitimate enterprise.

It cannot be questioned, however, that of late the discussion has received a new impetus. As is so often the case, the extreme views hold the limelight. The advocates of absolute repeal are as unrestrained in their denunciation as they are discriminating in the selection of their audiences. Their utterances are directed mainly to immediate interested listeners—rarely rising to the dignity of published articles. The impetuous advocates of universal regulation would not rest with the statute as it reads and is interpreted, but would “give it teeth” by prescribing in infinite detail the conduct of industrial and commercial enterprise. Happily, however, the weary and costly analysis to which the act has been subjected during these many years has not been without profit. Those who are seriously concerned to reconcile public welfare and individual success are not quick to surrender this advantage. The clear conviction has resulted from the conflict that wise regulation is an economic and a social necessity and that reasonable private conduct provides the best protection against unreasonable public interference. Those who hold this view are persuaded that between their own efforts to adopt wholesome methods and the disposition of the courts to enforce the reasonable intent of the statute an entirely tolerable condition has been reached. Accordingly, they have as little sympathy for the reactionary advocate of repeal as they have for the heedless promoter of spasmodic amendments. They have as little patience with those who would restore the chaotic conditions of the past as they have with those who would multiply obscurities for future embarrassment. Their position would appear to be strong. The only question is whether they will rest content with the consciousness that they are right, or whether they will enter the public arena as open defenders of their position—true champions of the law.

With a view to provide the material for a liberal and thoughtful consideration of the problem, the National Industrial Conference Board has for some years pursued inquiries, and as a result has now issued four volumes which bear directly upon the several phases of the question. These volumes will be of particular value to a large circle of readers who are interested in the economic and legal problems of trade associations, mergers, price agreements, etc.

Needless to say, there is no attempt to furnish a safe rule of conduct, or even to give an exhaustive or in any sense final treatise of any of the subjects. But it is believed that all these volumes will be of especial value to every one—business man and lawyer—who is faced with the problems of modern economic and social development and who is disposed to shape his course with some advance understanding of their inherent significance and trend. The great body of persons engaged in commerce and industry are unquestionably trying to devise ways and means to promote successful operation within rules and bounds that will stand the test of time and public approval. Regulations and restraints are the inevitable result of abuse of opportunity. They are imposed for the protection of both the general public and the particular dealer who seeks to live within the rule of reason. What is or should be controlled or inhibited; how the rules of economic success may advantageously be reconciled with the safeguarding of public welfare; where the distinction is to be drawn between a good trust and a bad combination, or between an understanding about normal trade relations and improper price agreements; how an exchange of trade information may serve to advance business conditions in general, or may be used to suppress wholesome competition; these are all questions discussed in these reports in a manner to facilitate ready grasp of the fundamental principles that must be kept in mind. This much is true. There will always be enough uncertainty in the interpretation of any statute to render possible technical infraction of its provisions. But it is also possible for those who wish to avoid such infraction to obtain information sufficiently clear and definite to escape the charge of wrongful intention. To such an understanding it is believed these volumes will provide a valuable contribution.

The foreword to the first of the National Industrial Conference Board's volumes¹ among other things, says:

It is obvious that the industrial and commercial development of a nation is vitally influenced not only by the organization and methods of production and trade, in which the initiative and enterprise of industrial and business leader-

¹ TRADE ASSOCIATIONS: THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS (1925).

ship are reflected, but by the environment of public attitudes and governmental policies in which industry and commerce live and develop. Those two factors—individual enterprise and public control—are the two sides of the shield of economic progress. They must be properly related and proportioned; they must mutually sustain each other; and they must develop together in accordance with the changing needs of the times.

As the foreword says, the volume deals with the lesser forms of organization and cooperation among separate business interests, of which the trade association is the type. It relates to the question of the legitimate limits of cooperation among independent business enterprises in the form of voluntary associations among trade competitors.

In the foreword to the second volume² the following appears:

This volume . . . is an outcome of a comprehensive investigation of the problems raised by governmental regulation of industrial and business enterprise in the United States. Such problems are ever-present in a society in which manufacture and trade have undergone and are undergoing such rapid development and change as is witnessed in this country. Both this development of industry and trade and some form of government policy toward them are inevitable, and the flexible adjustment of the one to the other is necessary for economic security and progress.

The third volume³ gives an interesting account of the outcome of different kinds of consolidations and amalgamations. Perhaps the most illuminating result of the inquiry is the showing that consolidation itself, regardless of size or financial power, does not guarantee success. In other words, the advantage of consolidation is proved to depend practically upon the economic wisdom and reason of the plan which is employed.

In the preface of the fourth volume⁴ it is said:

Public policy in the regulation and control of business organizations and methods is a continuing factor in the economic environment of modern life which must always be reckoned with. Such policy establishes certain standards of conduct for business in its relation to other business and

² PUBLIC REGULATION OF COMPETITIVE PRACTICES (1925).

³ ECONOMIC ASPECTS OF INDUSTRIAL CONSOLIDATIONS (1929).

⁴ MERGERS AND THE LAW (1929).

to the public. Like any general standards, for some they mean restraint or compulsion, while for others they assure a measure of freedom and individual initiative. The attention of the business community and the public at any time is naturally most directed to the degree of compulsion or freedom which results from the prevailing public policy.

In the present volume the Conference Board carries its inquiry to the question of . . . corporate consolidation or merger.

It is in this field that our anti-trust laws may be said to have had their beginning, and although the character and the extent of the merger movement in industry and trade have greatly changed since the Sherman Act was adopted, the status of the type of business organization under the anti-trust laws remains a problem and presents many difficult questions both to business men and to public officials.

The primary purpose of this study is to trace the development of public policy toward corporate consolidations and to set forth, in broad outline, the modifications which this policy has undergone in recent years, and its status at the present time.

This last volume, *Mergers and the Law*, perhaps merits a more extended reference. To many readers it will unquestionably come as a surprise. Not only does it contain a thoughtful consideration of the present advanced state of the law, but it gives an account of the gradual development of all anti-trust legislation and its interpretation by the courts that must prove most gratifying to both representatives of industry and the legal profession.

The description of the growth and changes of commerce and industry, the development of judicial interpretation, and the common result of these two contributions, presents an account which is, to say the least, illuminating. Again it must be said that this little volume does not furnish a chart of safety. It does, however, provide a compass to point the course with sufficient certainty to avoid essential danger.

This general result dispassionately judged must arouse some sense of surprise at the enormous cost and delay which were involved in the achievement. Not without chagrin, but no doubt with some measure of satisfaction, the substantial vindication of the intention of the framers of the Sherman Act may now be accepted. Years of uncertainty and turmoil must be attributed to the fallacy that the act was supposed to embody entirely new

and largely experimental regulations. So loath are our people to profit by the experience of others that little or no thought was given to the historic origin and wisdom of the fundamental principles of the Sherman Act. We protested and struggled, oblivious to the simple truth, in spite of the efforts of the original framers and champions of the act to set us right. The fact is that the avowed purpose of the act was neither more nor less than to adapt well recognized and tried principles to our institutions. These principles were in no sense alien—borrowed from some unrelated country—but were the outcome of the ripe experience of the people of Great Britain from whom the fundamental principles of our system of law had been derived. This much was confirmed at the time by the most distinguished sponsors of the act.

Senator Hoar said :

We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions.

Senator Sherman said :

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.

That was the intention ; and there was no one among those engaged in this piece of legislation to challenge the correctness of these statements.

It must be remembered, however, that simple as the principles of the act appear to be, the conditions to which they were to be applied were very far from simple. In Great Britain a single authority had the power to speak for the entire nation. One common rule governed in every situation. With us quite the contrary was true. Ours is a dual system. Industrial and commercial relations do not coincide with political boundaries. Intra-state and interstate commerce presented the objects of legislative regulation. True, the Sherman Act concerned only the latter ; but the agitation of the subject and the varied legislative policies adopted in more than forty states necessarily added to the confusion, reflected the popular conception of the Sherman Act, and without question served to inspire a strained interpretation. The Sherman Act was not the mere abstract conception

of philosophic minds. It represented the practical effort of highly trained statesmen to provide a reasonable curb to the confessed industrial and commercial abuses of the day. Greed for profit had run wild. Liberty had been turned into license; and even meritorious enterprises under the pressure of false competition had come to adopt methods that ran counter to accredited standards of conduct. True, the states were free to deal with local conditions; but as commerce assumed more and more national proportions, the very inability of the states to cope with this larger problem led them to enact more and more drastic laws. By the time the Sherman Act was put upon the statute book, the atmosphere was charged with a political agitation that was little calculated to further a rational interpretation.

There is little wonder that the judicial pendulum swung from one extreme to the other. Political candidates, eager for promotion, vied with each other in the extravagance of promised relief. Prosecuting officers gloried in the chance to lay a foundation for future careers. Even courts groped for the construction of statutes that might satisfy popular impatience. An era for regulation of conduct by governmental force was inaugurated, which in some phases has extended into the present time. All these manifestations were present chiefly in the jurisdiction of the states, and resulted in a conflict of theories, as well as practices, that was nothing short of chaotic. There were no leaders out of the wilderness. There was an abundance of advocates to profit by litigation. There was a dearth of counselors to warn against hazardous enterprise, or to point the way out of desperate commitments. The wise counsel of Senators Hoar and Sherman was unheeded or forgotten. Even the Sherman Act—rational, restrained, brief and terse as it was—could not escape the consequences of such popular agitation. Decisions of the lower Federal courts, representing many districts or circuits, were not in accord. They ranged all the way from conservative conclusions reached by reluctant judges, to extravagant edicts uttered by judges who were eager to employ “the teeth” of a new statute. The Supreme Court itself rendered decisions that at one time seemed to be inspired by a desire to restrict the operation of a dangerous act, and at another time applied the act with a freedom that suggested a purpose to demonstrate its futility and absurdity. Throughout, every step from the institution of

a public suit to the announcement of the final decree was had to the refrain of political thunder in speech and platform and message. Throughout, ill-advised or rebellious promoters of enterprise were providing new material in the form of evasive measures or pretended conformity to law, for ambitious demagogues to feed upon.

Unwilling to be judged by the experience of others, we were paying the price for our own. Some installments may still be due. But as is demonstrated in the volumes referred to, a fairly normal condition has been reached. This in itself is a great satisfaction. The chief cause for congratulation, however, is the fact that this situation is the outcome of patient, thoughtful—yes, patriotic—cooperation in the conduct of industry and the attitude of the courts.

Better acquaintance with the development of commerce and industry in other countries—particularly in Great Britain—might have protected us from many a prejudice against the Sherman Act. It was avowedly a restatement in the form of a Federal statute of well recognized principles—the outgrowth of centuries of experience of a great commercial nation. An approach with that understanding might have saved years of costly and needless litigation. The failure to accept the spirit of that statute, and the endless wrangle over its literal requirements were natural and perhaps inevitable during a period when statutory regulation of personal conduct had become the order of the day. The more interesting is the fact that the first reaction from the extremely literal conception of law in our time was had with respect to this great statute, which by degrees has been redeemed to vindicate the wisdom of its framers. No less interesting is the fact that this beneficent outcome has resulted from the efforts of both industry and the courts. The first still insisting upon the employment and development of rules of economy that are calculated to meet the demands of ever changing and growing conditions, has sought and found ways to reconcile them with the restraints wisely imposed by statute. The courts, still upholding and enforcing those restraints have, however, saved the statute from needless and harmful technicalities, and have thus revived the spirit of the law to guide and control wholesome enterprise. In the exercise of time-honored judicial discretion, the courts, by announcing the rule of reason, have given real pur-

pose and life to a statute which was in danger of being obscured and distorted by the addition of endless and sometimes harmful amendments.

The question will be asked whether the Sherman Act may not be perfected by amendment. Perhaps so. But is there not much more immediate prospect to have it weakened by exceptions or distorted by uneconomic extravagances? The demand for amendments, either to tone down or to accentuate, necessarily invites two risks. It is almost sure to disturb the normal interpretation which the courts have by degrees developed. It is practically certain to encumber the statute with crude and ill-advised provisions, and thus embark upon another period of doubt and uncertainty. At best there would be no promise of a balanced, consistent, thoroughly digested economic policy. Before encouragement is given to further modifications, two things must be kept in mind. The Sherman Act is perhaps as good an example of the actual purpose and limitation of law making as our history of legislation can show. It accepted as a basis the teachings of ripest economic and social experience. It contented itself with the statement of general fundamental principles for the encouragement of legitimate competition, and for the protection of the public against illegitimate combination. Finally, it preserved in the courts the discretionary power to interpret both freedom and restraint in the light of actual conditions presented in each particular situation. The act did not undertake to anticipate or to dictate a decision in every specific case, but left it to the courts to judge of the purpose and reason of every transaction, and in doing so to formulate rational rules of conduct within the statute.

If it is proposed to gauge the prospect of further amendments, there is no better method than to take careful measure of what has already been done in that respect. Without entering upon a consideration of the intrinsic merits of the numerous amendments or modifications that have been made, one fact stands out as a signal of warning. Every act that operates to modify or amplify the original Sherman Act is marked by the evil of verbosity. Practically without exception, they lack evidence of the simplicity of language and the restrained statement of rules of conduct that characterize the thoughtful, balanced and poised form in which the original Sherman Act is cast. They read like

an effort to supply in volume what is lacking in substance. They are, generally speaking, the creatures of political opportunism.

The bearing of many of these amendatory acts upon the Sherman law is so remote that it is not necessary to dwell upon them at length. In this connection they are interesting, chiefly to show the possibilities of spasmodic legislative ventures. No better illustration can be given than the pretended and avowedly futile attempt to exempt labor unions from the operation of the Sherman Act. These provisions are found in different forms, sometimes as part of appropriation bills, and always couched in language obscure enough to serve the political candidate, without affecting the question at issue. The Packers and Stockyards Act, the Capper-Volstead Act and the Cooperative Marketing Act all have reason and merit. But they are not governed by a controlling policy in method and system. Sometimes a number of secretaries are asked to act in conjunction. At other times one secretary is put in authority. In every instance highly complicated machinery is created, often with governmental power so absolute that the mere starting of a proceeding is apt to spell ruin before the victim has a chance at the proverbial fair hearing without which he should not be condemned. All these acts provide the right to ultimate appeal to the courts. But they make no provision for a reference to the Department of Justice or Commerce to determine whether there is any justification for the institution of a protracted inquisitorial and practically destructive proceeding. The citizen charged is at the mercy of an executive authority which prefers the charge, makes the inquiry, and renders the decision. The important hearing is vouchsafed after the mischief is done. It is perfectly true that these tremendous powers have as a rule been used with moderation and wisdom. But in considering the possibilities of future amendments, the immediate question is, what powers have been permanently granted by the legislative body, and not with how much restraint they may have been temporarily employed. It should be added that all the above acts deal with particular classes which confessedly constitute subjects for exception. They are referred to merely to show how important it is to have governmental policy defined and democratic guaranties observed, and legislative acts cast in clear language and in consistent form.

The Webb-Pomerene Act is a direct attempt to modify or perfect the Sherman Act. It is at least doubtful whether its professed purpose was not amply covered by the terms of the Sherman Act. It is hardly conceivable that a combination of industries to engage in and promote export trade would be held to jeopardize the development of domestic industry or the interests of our consuming public. On the other hand, this act restricts combinations to associations that are engaged solely in export trade; and it can hardly be doubted that in effect this act has embarrassed rather than encouraged export trade.

No doubt the Clayton Act is the outstanding attempt to give additional force to the Sherman Act. In what measure it has really succeeded may be doubted. Broadly speaking, its purpose would seem to be met by the denunciation of combinations under the Sherman Act. The acquisition of one concern by another, resulting in the substantial suppression of necessary competition, would undoubtedly fall within the condemnation of that act. If such acquisition were had by the purchase of share stocks instead of assets, the case would probably be aggravated, because the chance for manipulation and abuse would be increased by the stock control.

The Clayton Act, however, goes farther. It denounces the acquisition of capital stock in a competing corporation where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition. Manifestly, there is some conflict between this provision and the interpretation by the courts of the Sherman Act. By the terms of the Sherman Act as construed, either assets or share stocks may be acquired, provided a safe margin of competition is left in the market. The Clayton Act does not denounce the acquisition of assets, and therefore makes no change in this respect. It does, however, denounce the acquisition of share stocks, and in that event is not content with substantial suppression of general competition but accepts as the test the substantial lessening of competition between the purchasing and the selling corporations. This is not only a new ground for complaint, but it constitutes some departure from the accepted interpretation of the original Sherman Act. It adds a ground for complaint, the unreasonable embarrassments of which the courts have, however, softened, first,

by refusing to sustain the complaint where the acquisition of the share stocks has been followed by an acquisition of the assets before the Federal Trade Commission has entered a proceeding, and second, by applying the reason of the rule to the term "substantial competition," thus bringing the original and the amendatory acts into substantial harmony. Other provisions of the Clayton Act are numerous, and not always clear. Chief among these is the creation of the Federal Trade Commission itself, which is armed with absolute power to summon, to investigate, to enter complaint, to take testimony, to hear argument, and to enter judgment which is conclusive if there is any testimony to sustain it. Again, the challenged citizen is left the consolation of an appeal to the courts after he has been stigmatized as an offender, or has perhaps suffered irreparable financial loss.

We have, therefore, an amendment in the Clayton Act which provides a distinct and in some respects a conflicting ground for complaint against combinations or purchases. We have also two jurisdictions to deal with complaints—the Department of Justice and the Federal Trade Commission. They may but do not always lap. They have established little or no system of cooperation for the fair protection of bewildered citizens, and the fate of the supposed offender will often depend upon which branch of the Government strikes first. Criticism does not go to the use which representatives of the Government have made of the powers lodged in them. Indeed, the fact that there has been so little arbitrary employment is one of the great causes for confidence in our institutions. But the question today is what prospect is there to have further legislative amendments fairly say what we may wisely mean.

With entire frankness we must recognize that the proposed anti-trust legislative schemes do not present an inspiring picture. They lack consistency and harmony and, above all, centralizing thought and purpose. Those who contemplate ready amendments to soften or to enforce what we have, may well pause to contemplate our experiences in that field. They should first determine whether we are prepared for well considered codification of existing statutes, for modification that will mould them in a consistent, purposeful form, and whether we are willing to take our chance with the outcome of inevitable, political and partisan deliberation.