Supplementary Legislation Only Need to Che.k Trusts Says President Taft

MESSAGE OF THE PRESIDENT

Mr. Taft Champions the Anti-trust Statute.

NEW REMEDIES SUGGESTED.

Not Repeal or Amendment, but Supplemental Legislation Needed—The Tobacco Trust Decision an Effective One—Federal Incorporation Recommended and a Federal Corporation Commission Proposed—The Test of "Reasonableness."

To the Senate and House of Representatives:

This message is the first of several which I shall send to congress during the interval between the opening of its regular session and its adjournment for the Christmas holidays. The amount of information to be communicated as to the operations of the government, the number of important subjects calling for comment by the executive and the transmission to congress of exhaustive reports of special commissions make it impossible to include in one message of a reasonable length a discussion of the topics that ought to be brought to the attention of the national legislature at its first regular session.

The Anti-trust Law—The Supreme Court Decisions.

In May last the supreme court handed down decisions in the suits in equity brought by the United States to enjoin the further maintenance of the Standard Oil trust and of the American Tobacco trust and to secure their dissolution. The decisions are epoch making and serve to advise the business world authoritatively of the scope and operation of the anti-trust act of 1890. The decisions do not depart in any substantial way from the previous decisions of the court in construing and applying this important statute, but they clarify those decisions by further defining the already admitted exceptions to the literal construction of the act. By the decrees they furnish a useful precedent as to the proper method of dealing with the capital and property of illegal trusts. These decisions suggest the need and wisdom of additional or supplemental legislation to make it easier for the entire business community to square with the rule of action and legality thus finally established and to preserve the benefit, freedom and spur of reasonable competition without loss of real efficiency or progress.

No Change in the Rule of Decision, Merely in Its Form of Expression.

The statute in its first section declares to be illegal "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" and in the second declares guilty of a misdemeanor "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce of the several states or with foreign nations."

In two early cases, where the statute was invoked to enjoin a transportation rate agreement between interstate railroad companies, it was held that it was no defense to show that the agreement as to rates complained of was reasonable at common law, because it was said that the statute was directed against all contracts and combinations in restraint of trade, whether reasonable at common law or not. It was plain from the record, however, that the contracts complained of in those cases would not have been deemed reasonable at common law. In subsequent cases the court said that the statute should be given a reasonable construction and refused to include within its inhibition certain contractual restraints of trade which it denominated as incidental or as indirect.

These cases of restraint of trade that the court excepted from the operation of the statute were instances which at common law would have been called reasonable. In the Standard Oil and tobacco cases, therefore, the court merely adopted the tests of the common law and in defining exceptions to the literal application of the statute only substituted for the test of being incidental or indirect that of being reasonable, and this without varying in the slightest the actual scope and effect of the statute. In other words, all the cases under the statute which have now been decided would have been decided the same way if the court had originally accepted in its construction the rule at common law.

It has been said that the court by introducing into the construction of the statute common law distinctions has emasculated it. This is obviously unjust. By its judgment every contract and combination in restraint of interstate trade made with the purpose or necessary effect of controlling prices by stifling competition or of establishing in whole or in part a monopoly of such trade is condemned by the statute. The most extreme critics cannot instance a case that ought to be condemned under the statute which is not brought within its terms as thus construed.

The suggestion is also made that the supreme court by its decision in the last two cases has committed to the court the undefined and unlimited discretion to determine whether a case of restraint of trade is within the terms of the statute. This is wholly untrue. A reasonable restraint of trade at common law is well understood and is clearly defined. It does not rest in the discretion of the court. It must be limited to accomplish the purpose of a lawful main contract to which in order that it shall be enforceable at all it must be incidental. If it exceed the needs of that contract it is void.

The test of reasonableness was never applied by the court at comman 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 others engaged in business violating the statute have hoped that some such line could be drawn by courts, but no court of authority has ever attempted it. Certainly there is nothing in the decisions of the latest two cases from which such a dangerous theory of judicial discretion in enforcing this statute can derive the slightest sanction.

Force and Effectiveness of Statute a Matter of Growth.

We have been twenty-one years making this statute effective for the purposes for which it was enacted. The Knight case was discouraging and seemed to remit to the states the whole available power to attack and suppress the evils of the trusts. Slowly, however, the error of that judgment was corrected, and only in the last three or four years has the heavy hand of the law been laid upon the great illegal combinations that have exercised such an absolute dominion over many of our industries. Criminal prosecutions have been brought, and a number are pending, but juries have felt averse to convicting for jail sentences and judges have been most reluctant to impose such sentences on men of respectable standing in society whose offense has been regarded as merely statutory. Still, as the offense becomes better understood and the committing of it partakes more of studied and deliberate defiance of the law we can be confident that juries will convict individuals and that jail sentences will be imposed.

The Remedy in Equity by Dissolution.

In the Standard Oil case the supreme and circuit courts found the combination to be a monopoly of the interstate business of refining, transporting and marketing petroleum and its products, effected and maintained through thirty-seven different corporations, the stock of which was held by a New Jersey company. It in effect commanded the dissolution of this combination, directed the transfer and pro rata distribution by the New Jersey company of the stock held by it in the thirty-seven corporations to and among its stockholders, and the corporations and individual defendants were enjoined from conspiring or combining to restore such monopoly, and all agreements between the subsidiary corporations tending to produce or bring about further violations of the act were enjoined.

In the tobacco case the court found that the individual defendants, twenty-nine in number, had been engaged in a successful effort to acquire complete dominion over the manufacture, sale and distribution of tobacco in this country and abroad and that this had been done by combinations made with a purpose and effect to stifle competition, control prices and establish a monopoly, not only in the manufacture of tobacco, but also of tin foil and licorice used in its manufacture and of its products of cigars, cigarettes and snuffs. The tobacco suit presented a far more complicated and difficult case than the Standard Oil suit for a decree which would effectuate the will of the court and end the violation of the statute. There was here no single holding company, as in the case of the Standard Oil trust. The main company was the American Tobacco company, a manufacturing, selling and holding company. The plan adopted to destroy the combination and restore competition involved the redivision of the capital and plants of the whole trust between some of the companies constituting the trust and new companies organized for the purposes of the decree and made parties to it and numbering, new and old, fourteen.

Situation After Readjustment.

The American Tobacco company (old), readjusted capital $92,000,000; the Liggett & Meyers Tobacco company (new), capital $67,000,000; the P. Lorillard company (new), capital $47,000,000, and the R. J. Reynolds Tobacco company (old), capital $7,525,000, are chiefly engaged in the manufacture and sale of chewing and smoking tobacco and cigars. The former one tin foil company is divided into two, one of $825,000 capital and the other of $400,000. The one snuff company is divided into three companies, one with a capital of $15,000,000, another with a capital of $8,000,000 and a third with a capital of $8,000,000. The licorice companies are two, one with a capital of $5,758,300 and another with a capital of $2,000,000. There is also the British-American Tobacco company, a British corporation, doing business abroad with a capital of $26,000,000, the Porto Rican Tobacco company, with a capital of $1,800,000, and the corporation of United Cigar Stores with a capital of $9,000,000.

Under this arrangement each of the different kinds of business will be distributed between two or more companies with a division of the prominent brands in the same tobacco products, so as to make competition not only possible, but necessary. Thus the smoking tobacco business of the country is divided so that the present independent companies have 21.39 per cent, while the American Tobacco company will have 33.08 per cent, the Liggett & Meyers 20.05 per cent, the Lorillard company 22.82 per cent and the Reynolds company 2.66 per cent. The stock of the other thirteen companies, both preferred and common, has been taken from the defendant American Tobacco company and has been distributed among its stockholders. All covenants restricting competition have been declared null and further performance of them has been enjoined. The preferred stock of the different companies has now been given voting power which was denied it under the old organization. The ratio of the preferred stock to the common was as 78 to 40. This constitutes a very decided change in the character of the ownership and control of each company.

In the original suit there were twenty-nine defendants, who were charged with being the conspirators through whom the illegal combination acquired and exercised its unlawful dominion. Under the decree these defendants will hold amounts of stock in the various distributee companies ranging from 41 per cent as a maximum to 28½ per cent as a minimum, except in the case of one small company, the Porto Rican Tobacco company, in which they will hold 45 per cent. The twenty-nine individual defendants are enjoined for three years from buying any stock except from each other, and the group is thus prevented from extending its control during that period. All parties to the suit and the new companies who are made parties are enjoined perpetually from in any way effecting any combination between any of the companies in violation of the statute by way of resumption of the old trust. Each of the fourteen companies is enjoined from acquiring stock in any of the others. All these companies are enjoined from having common directors or officers, or common buying or selling agents, or common offices, or lending money to each other.

Size of New Companies.

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 law 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.

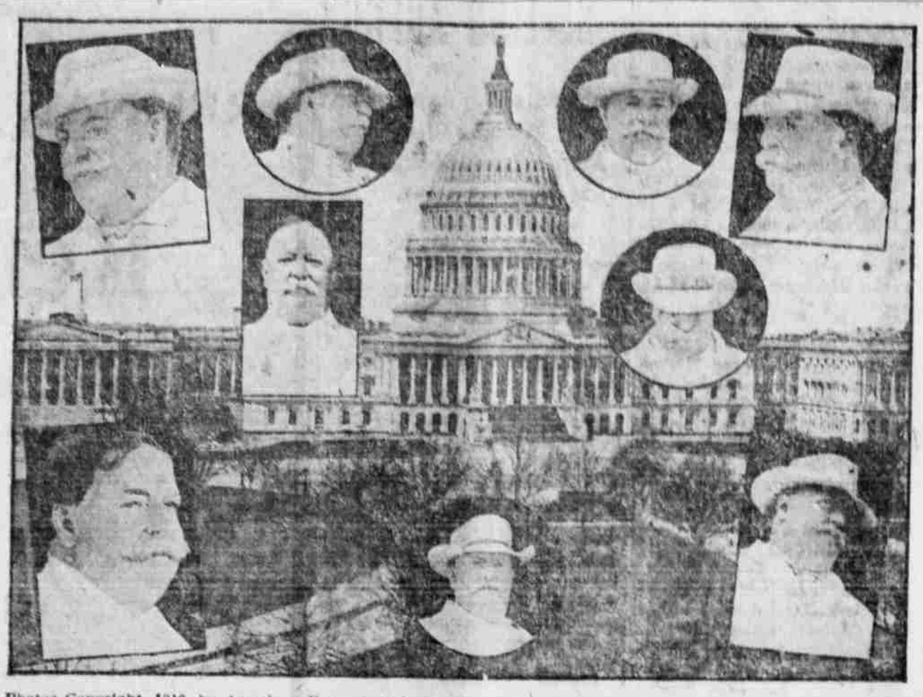
Confiscation Not the Purpose of the Statute.

It is not the purpose of the statute to confiscate the property and capital of the offending trusts. Methods of punishment by fine or imprisonment of the individual offenders, by fine of the corporation or by forfeiture of its goods in transportation are provided, but the proceeding in equity is a specific remedy to stop the operation of the trust by injunction and prevent the future use of the plant and capital in violation of the statute.

Effectiveness of Decree.

I venture to say that not in the history of American law has a decree more effective for such a purpose been entered by a court than that against the tobacco trust. As Circuit Judge Noyes said in his judgment approving the decree:

"The extent to which it has been necessary to tear apart this combination and force it into new forms with the attendant burdens ought to demonstrate that the federal anti-trust statute is a drastic statute which accomplishes effective results, which so long as it stands on the statute books must be obeyed and which cannot be disobeyed without incurring farreaching pen-



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alties. And, on the other hand, the successful reconstruction of this organization should teach that the effect of enforcing this statute is not to destroy, but to reconstruct; not to demolish, but to recreate in accordance with the conditions which the congress has declared shall exist among the people of the United States."

Common Stock Ownership.

It has been assumed that the present pro rata and common ownership in all these companies by former stockholders of the trust would insure a continuance of the same old single control of all the companies into which the trust has by decree been disintegrated. This is erroneous and is based upon the assumed inefficacy and innocuousness of judicial injunctions. The companies are enjoined from co-operation or combination; they have different managers, directors, purchasing and sales agents. If all or many of the numerous stockholders, reaching into the thousands, attempt to secure concerted action of the companies with a view to the control of the market their number is so large that such an attempt could not well be concealed, and its prime movers and all its participants would be at once subject to contempt proceedings and imprisonment of a summary character. The immediate result of the present situation will necessarily be activity by all the companies under different managers, and then competition must follow or there will be activity by one company and stagnation by another. Only a short time will inevitably lead to a change in ownership of the stock, as all opportunity for continued co-operation must disappear. Those critics who speak of this disintegration in the trust as a mere change of garments have not given consideration to the inevitable working of the decree and understand little the personal danger of attempting to evade or set at naught the solemn injunction of a court whose object is made plain by the decree and whose inhibitions are set forth with a detail and comprehensiveness unexampled in the history of equity jurisprudence.

Voluntary Reorganizations of Other Trusts at Hand.

The effect of these two decisions has led to decrees dissolving the combination of manufacturers of electric lamps, a southern wholesale grocers' association, an interlocutory decree against the powder trust, with directions by the circuit court compelling dissolution, and other combinations of a similar history are now negotiating with the department of justice looking to a disintegration by decree and reorganization in accordance with law. It seems possible to bring about these reorganizations without general business disturbance.

Movement For Repeal of the Anti-trust Law.

But now that the anti-trust act is seen to be effective for the accomplishment of the purpose of its enactment we are met by a cry from many different quarters for its repeal. It is said to be obstructive of business progress, to be an attempt to restore old fashioned methods of destructive competition between small units and to make impossible those useful combinations of capital and the reduction of the cost of production that are essential to continued prosperity and normal growth.

In the recent decisions the supreme court makes clear that there is nothing in the statute which condemns combinations of capital or mere bigness of plant organized to secure economy in production and a reduction of its cost. It is only when the purpose or necessary effect of the organization and maintenance of the combination or the aggregation of immense size are the stifling of competition, actual and potential, and the enhancing of prices and establishing a monopoly that the statute is violated. Mere size is no sin against the law. The merging of two or more business plants necessarily eliminates competition between the units thus combined, but this elimination is in contravention of the statute only when the combination is made for purpose of ending this particular competition in order to secure control of and enhance prices and create a monopoly.

Lack of Definitsness In the Statute.

The complaint is made of the statute that it is not sufficiently definite in its description of that which is forbidden to enable business men to avoid its violation. The suggestion is that we may have a combination of two corporations which may run on for years and that subsequently the attorney general may conclude that it was a violation of the statute and that which was supposed by the combiners to be innocent then turns out to be a combination in violation of the statute. The answer to this hypothetical case is that when men attempt to amass such stupendous capital as will enable them to suppress competition, control prices and establish a monopoly they know the purpose of their acts. Men do not do such a thing without having it clearly in mind. If what they do is merely for the purpose of reducing the cost of production, without the thought of suppressing competition by use of the bigness of the plant they are creating, then they cannot be convicted at the time the union is made, nor can they be convicted later unless it happen that later on they conclude to suppress competition and take the usual methods for doing so and thus establish for themselves a monopoly. They can in such a case hardly complain if the motive which subsequently is disclosed is attributed by the court to the original combination.

New Remedies Suggested.

Much is said of the repeal of this statute and of constructive legislation intended to accomplish the purpose and blaze a clear path for honest merchants and business men to follow. It may be that such a plan will be evolved, but I submit that the discussions which have been brought out in recent days by the fear of the continued execution of the anti-trust law have produced nothing but glittering generalities and have offered no line of distinction or rule of action as definite and as clear as that which the supreme court itself lays down in enforcing the statute.

Supplemental Legislation Needed, Not Repeal or Amendment.

I see no objection, and indeed I can see decided advantages, in the enactment of a law which shall describe and denounce methods of competition which are unfair and are badges of the unlawful purpose denounced in the anti-trust law. The attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business or the making of exclusive contracts with customers under which they are required to give up association with other manufacturers and numerous kindred methods for stifling competition and effecting monopoly should be described with sufficient accuracy in a criminal statute on the one hand to enable the government to shorten its task by prosecuting single misdemeanors instead of an entire conspiracy and on the other hand to serve the purpose of pointing out more in detail to the business community what must be avoided.

Federal Incorporation Recommended.

In a special message to congress on Jan. 7, 1910, I ventured to point out the disturbance to business that would probably attend the dissolution of these offending trusts. I said:

"But such an investigation and possible prosecution of corporations whose prosperity or destruction affects the comfort not only of stockholders, but of millions of wage earners, employees and associated tradesmen, must necessarily tend to disturb the confidence of the business community, to dry up the now flowing sources of capital from its places of hoarding and produce a halt in our present prosperity that will cause suffering and strained circumstances among the innocent many for the faults of the guilty few. The question which I wish in this message to bring clearly to the consideration and discussion of congress is whether, in order to avoid such a possible business danger, something cannot be done by which these business combinations may be offered a means, without great financial disturbance, of changing the character, organization and extent of their business into one within the lines of the law under federal control and supervision, securing compliance with the anti-trust statute.

"Generally in the industrial combinations called 'trusts' the principal business is the sale of goods in many states and in foreign markets. In other words, the interstate and foreign business far exceeds the business done in any one state. This fact will justify the federal government in granting a federal charter to such a combination to make and sell in interstate and foreign commerce the products of useful manufacture, under such limitations as will secure a compliance with the anti-trust law. It is possible so to frame a statute that, while it offers protection to a federal company against harmful, vexatious and unnecessary invasion by the states, it shall subject it to reasonable taxation and control by the states with respect to its purely local business. * * *

"Corporations organized under this act should be prohibited from acquiring and holding stock in other corporations (except for special reasons, upon approval by the proper federal authority), thus avoiding the creation under national auspices of the holding company with subordinate corporations in different states, which has been such an effective agency in the creation of the great trusts and monopolies.

"If the prohibition of the anti-trust act against combinations in restraint of trade is to be effectively enforced it is essential that the national government shall provide for the creation of national corporations to carry on a legitimate business throughout the United States. The conflicting laws of the different states of the Union with respect to foreign corporations make it difficult, if not impossible, for one corporation to comply with their requirements so as to carry on business in a number of different states."

I renew the recommendation of the enactment of a general law providing for the voluntary formation of corporations to engage in trade and commerce among the states and with foreign nations. Every argument which was then advanced for such a law and every explanation which was at that time offered to possible objections has been confirmed by our experience since the enforcement of the anti-trust statute has resulted in the actual dissolution of active commercial organizations.

It is even more manifest now than it was then that the denunciation of conspiracies in restraint of trade should not and does not mean the denial of organizations large enough to be intrusted with our interstate and foreign trade. It has been made more clear now than it was then that a purely negative statute like the anti-trust law may well be supplemented by specific provisions for the building up and regulation of legitimate national and foreign commerce.

Government Administrative Experts Needed to Aid Courts In Trust Dissolutions.

The drafting of the decrees in the dissolution of the present trusts, with a view to their reorganization into legitimate corporations, has made it especially apparent that the courts are not provided with the administrative machinery to make the necessary inquiries preparatory to reorganization or to pursue such inquiries, and they should be empowered to invoke the aid of the bureau of corporations in determining the suitable reorganization of the disintegrated parts. The circuit court and the attorney general were greatly aided in framing the decree in the tobacco trust dissolution by an expert from the bureau of corporations.

Federal Corporation Commission Proposed.

I do not set forth in detail the terms and sections of a statute which might supply the constructive legislation permitting and aiding the formation of combinations of capital into federal corporations. They should be subject to rigid rules as to their organization and procedure, including effective publicity, and to the closest supervision as to the issue of stock and bonds by an executive bureau or commission in the department of commerce and labor, to which in times of doubt they might well submit their proposed plans for future business. It must be distinctly understood that incorporation under a federal law could not exempt the company thus formed and its incorporators and managers from prosecution under the anti-trust law for subsequent illegal conduct, but the publicity of its procedure and the opportunity for frequent consultation with the bureau or commission in charge of the incorporation as to the legitimate purpose of its transactions would offer it as great security against successful prosecutions for violations of the law as would be practical or wise.

Such a bureau or commission might well be invested also with the duty already referred to of aiding courts in the dissolution and recreation of trusts within the law. It should be an executive tribunal of the dignity and power of the comptroller of the currency or the interstate commerce commission, which now exercises supervisory power over important classes of corporations under federal regulation.

The drafting of such a federal incorporation law would offer ample opportunity to prevent many manifest evils in corporate management today, including irresponsibility of control in the hands of the few who are not the real owners.

Incorporation Voluntary.

I recommend that the federal charters thus to be granted shall be voluntary, at least until experience justifies mandatory provisions. The benefit to be derived from the operation of great businesses under the protection of such a charter would attract all who are anxious to keep within the lines of the law. Other large combinations that fail to take advantage of the federal incorporation will not have a right to complain if their failure is ascribed to unwillingness to submit their transactions to the careful official scrutiny, competent supervision and publicity attendant upon the enjoyment of such a charter.

Only Supplemental Legislation Needed.

The opportunity thus suggested for federal incorporation it seems to me, is suitable constructive legislation needed to facilitate the squaring of great industrial enterprises to the rule of action laid down by the anti-trust law. This statute as construed by the supreme court must continue to be the line of distinction for legitimate business. It must be enforced unless we are to banish individualism from all business and reduce it to one common system of regulation or control of prices like that which now prevails with respect to public utilities and which when applied to all business would be a long step toward state socialism.

Importance of the Anti-trust Act.

The anti-trust act is the expression of the effort of a freedom loving people to preserve equality of opportunity. It is the result of the confident determination of such a people to maintain their future growth by preserving uncontrolled and unrestricted the enterprise of the individual, his industry, his ingenuity, his intelligence and his independent courage.

For twenty years or more this statute has been upon the statute book. All knew its general purpose and approved. Many of its violators were cynical over its assumed impotence. It seemed impossible of enforcement. Slowly the mills of the courts ground, and only gradually did the majesty of the law assert itself. Many of its statesmen-authors died before it became a living force, and they and others saw the evil grow which they had hoped to destroy. Now its efficacy is seen; now its power is heavy; now its object is near achievement. Now we hear the call for its repeal on the plea that it interferes with business prosperity, and we are advised in most general terms how by some other statute and in some other way the evil we are just stamping out can be cured. If we only abandon this work of twenty years and try another experiment for another term of years.

It is said that the act has not done good. Can this be said in the face of the effect of the Northern Securities decree? That decree was in no way so drastic or inhibitive in detail as either the Standard Oil decree or the tobacco decree. But did it not stop for all time the then powerful movement toward the control of all the railroads of the country in a single hand? Such a one man power could not have been a healthful influence in the republic, even though exercised under the general supervision of an interstate commission.

Do we desire to make such ruthless combinations and monopolies lawful? When all energies are directed, not toward the reduction of the cost of production for the public benefit by a healthful competition, but toward new ways and means for making permanent in a few hands the absolute control of the conditions and prices prevailing in the whole field of industry, then individual enterprise and effort will be paralyzed and the spirit of commercial freedom will be dead.

WM. H. TAFT.

The White House, Dec. 5, 1911.

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