

STRONG DECISION IN MERGER CASE

The Document by Judge Thayer in the Northern Securities Case Will Serve to Clear the Atmosphere in Many Respects—Carriers and the Trust Law, New Jersey Corporations and Status of State Charters Under Federal Law Are Important Points Discussed—Full Text of the Decision.

In the case of the United States against the Northern Securities company and its component corporations and capitalists, Judge Thayer's decision for the plaintiff, filed yesterday at St. Paul, is as follows: In the Circuit Court of the United States for the District of Minnesota—Third Division.

United States of America, complainant, vs. The Northern Securities Company, The Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John E. Kennedy, J. Elmont Morgan, Robert Bacon, George F. Baker and Daniel Lamont, defendants.

Mr. Philander C. Knox, attorney general; D. T. Watson, special counsel; Mr. James M. Beck and Mr. W. A. Day, assistant attorneys general, and Mr. John M. Freeman, for the United States.

Mr. George E. Young and Hon. John W. Griggs for the Northern Securities company.

Mr. M. D. Grover for the Great Northern Railway Company.

Mr. W. Burn for the Northern Pacific Railway Company.

Mr. Francis Lynde Stetson and Mr. David Wilcox for defendants, Morgan, Bacon and Lamont.

Mr. Charles H. Smith, Sanborn, Thayer and Van Devanter, circuit judges.

Thayer, circuit judge, stated the conclusions of the court:

This is a bill, exhibited by the United States, to restrain the violation of an act of congress, approved July 2, 1890 (26 Stat. 209, c. 647), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly called the Sherman anti-trust act. The case was heard before a circuit court composed of the four circuit judges of the eighth circuit, pursuant to the provisions of an act of congress, approved Feb. 11, 1903, which requires such cases to be heard "before not less than three of the circuit judges" of the circuit where the suit is brought, when the attorney general files with the clerk of the court wherein the case is pending a certificate that it is one of "general public importance." Such a certificate has been filed in accordance with the mandate of the statute, the case "has been given precedence over others, and in every way expedited."

From admissions made by the pleadings as well as from much oral testimony, we reach the following conclusions as respects matters of fact.

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul and Minneapolis in the state of Minnesota, thence across the continent to Puget sound.

Competing, Parallel Lines.

These roads are, and in public estimation have ever been, regarded as parallel and competing lines. For some years past they have been built by each other actively for transcontinental and interstate traffic. In the spring of the year 1901 they united in purchasing about 98 per cent of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and became joint sureties for the payment of the bonds of the last named company, whereby they were to run twenty years and bear 4 per cent interest per annum. The amount of stock so acquired was of a par value of about \$200,000,000. The rate of \$200 per share, the bonded indebtedness of the two companies was thus increased to the extent of \$200,000,000.

Subsequent to the acquisition of the stock of the Burlington company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last named companies in the hands of a single owner.

The Holding Corporation.

To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the state of New Jersey, which latter company, when organized, should buy all, or at least, the greater part of the stock of the Northern Pacific and Great Northern companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole or at least a major portion of the stock of both railroad companies.

In accordance with this plan the defendant, the Northern Securities company (hereafter termed the securities company) was organized under the laws of the state of New Jersey on Nov. 18, 1901, with a capital stock of \$400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor.

When the securities company was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity. Very shortly after its organization the securities company acquired, by a large majority of all the stock of the Northern Pacific company at the rate of \$115 per share, paying therefor in its own checks at par.

Exchange of Stock.

At the same time it acquired about 300,000 shares of the stock of the Great Northern company from those stockholders of that company who had been instrumental in organizing the securities company, paying therefor the rate of \$180 per share and using its own stock at par to make the purchase. The securities company subsequently made further purchases of every one of the Northern companies, at the same rate, and in about three months had acquired stock of the latter company amounting, at par, to about \$900,000,000, for that purpose its own stock to the amount of about \$171,000,000.

The securities company was enabled to make the subsequent purchases of stock from stockholders of the Great Northern company not immediately concerned in the organization of the securities company by the advice, procurement and persuasion of those stockholders of the Great Northern company who had been instrumental in organizing the securities company and had exchanged their own stock for stock in that company shortly after its organization.

Merger Stifles Competition.

At the present time the securities company is the owner of about 96 per cent of the stock of the Northern Pacific company and the owner of about 78 per cent of all the stock of the Great Northern company.

The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to-wit, the securities company, a combination of interests of a large majority of the stock of both companies; second, it destroyed every motive for competition between the two roads engaged in interstate traffic, which were natural competitors for business, by putting the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule of the law, the purpose of the merger was to prevent the fulfillment of the intent and what is the necessary consequence of his own acts when done willfully and deliberately we must conclude that those who conceived and executed the plan aforesaid intended, for other things, to accomplish these objects.

The general question of law arising upon this state of facts is whether such a combination of interests as that above described, falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as the form of every contract, conspiracy or conspiracy in restraint of trade or commerce among the several states or with foreign nations.

Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraint on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

Trust Act Hits Carriers.

What is commonly termed a "trust" by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles, and commonly understood when the anti-trust act was approved.

Combinations in that form were accordingly prohibited; but congress, evidently anticipating that a combination might be formed in any other form, if in restraint of interstate trade or commerce, that is, if it directly or indirectly restrained interstate commerce, should likewise be deemed illegal. Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial, that the words "restraint of trade or commerce" do not mean in unreasonable or partial restraint of trade or commerce, but any direct restraint on interstate trade or commerce, whether the restraint be effected by a contract between competing railroads which require them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one state to another, and which, by that means, restricts temporarily the right of any one of such carriers to name such rates for the carriage of such freight or passengers over its road, as it pleases, is a contract in direct restraint of interstate commerce, the intent of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such contract or combination being that it confers the power to establish unreasonable rates and directly restrains interstate commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage, and finally that congress has the power, under the grant of authority contained in the federal constitution to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the law of competition. United States vs. Trans-Missouri Freight Association, 169 U. S. 290; United States vs. Joint Traffic Association, 177 U. S. 505; Ardystone Pipe and Steel company vs. United States, 17 U. S. 211.

Convenient "Artificial Person."

Taking the foregoing proportions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done so, had the agency of natural persons, what they have accomplished thru an artificial person of their own creation.

That is to say, if the same individual who promoted the securities company, in pursuance to a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in an individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and have the right to place in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers whose lines are practically parallel, it will not do to say that so long as each railroad company has its own board of directors they operate independently, and are not controlled by the owner, or the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated, and that their policy is controlled by those who own the majority of their stock.

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obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern companies to control the Chicago, Burlington & Quincy railroad, and so long as directors are chosen by stockholders, the latter will necessarily dominate the former, and control of the corporation will remain in the hands of a majority of the capital stock of a corporation gives one the mastery and control of the corporation.

What has been done thru the organization of the securities company accomplishes the object which congress has denounced as illegal, more effectively perhaps than such a combination as is last supposed.

That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad.

Competition, we think, would not be more effectively restrained than it now is under and by force of the existing arrangement. If the two railroad companies were considered under a single charter. It is manifest, therefore, that the New Jersey charter is not the only one to which the defendants can interpose between themselves and the law.

The reasoning which led to the acquisition of that charter would seem to have been that while individuals the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person, or a few persons, giving him or them the power to operate the roads in harmony and stifle competition, yet that some persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed; and by placing the same stock in the name of such artificial being, accomplish the same purpose.

The manifest unreasonableness of such a proposition and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law as administered by courts of equity, looks always at the substance of things, and not at the legal form, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

State Charters and Federal Law.

So far as the New Jersey charter is concerned the question, broadly stated, which the court has to determine, is whether a charter granted by a state can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which congress has absolute control.

Presumptively, at least, no charter granted by a state is intended by the state to have that effect or to be used for such a purpose; and in the present instance it is clear that the state of New Jersey did not intend to grant a charter under cover of which an object denounced by congress as unlawful, namely, a combination conferring the power to restrain interstate commerce, might be formed and maintained because the end to be acted under which the securities company was organized, expressly declares that three or more persons may avail themselves of

Cloak Department Specials

- Stylish Covert Coats,** Made in newest box styles, good satin lining, worth \$15.00, for **\$9.75**
- Children's New Spring Coats** Made in the latest styles, and all wool material, worth \$4.25, special at **\$2.50**
- Dress Skirts** New Viole and Twine Cloth, made in flare style and trimmed with silk taffeta; \$8.75 value, for **\$5.48**
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Easter Millinery
Wonderful Values in trimmed hats—the best new spring styles, worth \$5.00; Saturday... **\$3.75**
Superb styles, choice trimmings and the best of work on these hats. Special... **\$4.98**
Swell, Shapes, an immense assortment of new models, rich materials, and right here the milliner's art is seen to advantage; worth \$10.00 to \$12.00; choice... **\$7.50**

Silks
Special Silk Prices for Saturday:
Crepe de Chine in a full line of colors. Regular \$1.00 and 85c qualities. Special Saturday... **69c**
Japanese white hand made Habutai regular 75c quality. Special for Saturday... **50c**
Black Taffeta, 24-inch, regular 89c quality. Special for Saturday... **69c**

Dress Goods
75c black Mohair Brilliantine, 46-inch. Special for Saturday... **49c**
68c and 70c black Voile for Saturday, 59c and... **39c**
All our heavy Wool Suiting, worth \$1.50 and \$1.00. Special Saturday, 98c and... **59c**

Wash Goods
35c and 50c new Mercerized Cotton Suitings in the latest canvas and etamine weaves, special Saturday... **19c**

Ribbons
Easter Ribbons, beautiful embroidered lace, and plaid ribbon from 4 1/2 to 6 inches wide; regular price 68c and 50c yard; Saturday special, per yard, 45c and... **33c**
Nos. 5 and 7 plaid and plain wash Taffeta, ribbon fit all the colors imaginable; Saturday, per yard... **7c**

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Silk Waists just received in newest spring models, all colors and black. \$6.50 values Saturday... **\$4.98**
New lawn Wash Waists trimmed with Embroidery, seven different styles. \$1.48 kind Saturday... **98c**

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Finest linen embroidered Handkerchiefs, regular price 25c and 35c, Saturday special, each... **19c**

Dress Trimmings
Drop Ornaments and Pearl Buttons, the scarce articles. We have them at the right price.

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2 dozen different styles in straight front Corsets, in short, medium or dip hip with supporters attached; sizes 18 to 32. Saturday (fitted if desired)... **98c**
Women's long or short komonas, made of fine lawn, in all colors and trimmed with fancy borders. Special for one day, 98c, 65c and... **65c**
Women's Percalé Wrappers; special for one day... **65c**

Drugs
Celery Compound, the spring medicine \$1 kind; Easter price... **29c**
Moth Balls, druggists' price 10c pound, our Easter price... **4c**
Perfume, fancy bottle, a full ounce; regular price 19c, Easter price... **12c**

Jewelry
Hair Pins, complete line of the new heavy loop Hair Pins in shell and amber, 25c, 15c, 12c and 5c. Hat Pins for the Easter Hat in Pearl and Turquoise, 25c kind at... **12c**
Shawl Pins in Pearls and Turquoise. Easter price... **5c**

Belts
Great assortment of ladies, Satin and Silk Easter Belts in tab effects; worth up to 98c. Easter price... **49c**
New styles in Silk and Satin Belts with fringe and tab effects; worth up to 49c, Easter price... **25c**

Easter Gloves
Fine Kid Gloves, two-clasp, all colors and sizes. We fit and warrant every pair, only... **98c**
French Kid Gloves; two of our most popular brands; regular selling price, \$1.50 and \$1.75. Saturday... **\$1.39**
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Ladies' full seamless fast black stockings, actual value 12c, 20c, a pair... **12c**

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Ladies' Ribbed Combination Suit, Umbrella Drawers, lace trimmed, worth 50c; extra special, Saturday... **25c**

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New Easter Vellings, in plain chiffon and fancy meshes, worth up to 65c and 75c a yard, Saturday special, yard... **39c**

Leather Goods
Oriental Wrist Bags, made of best quality tapestry, inside pocket silk lined; with heavy gilt frames and long chain; worth 95c, Easter price... **59c**

shall not exercise them so as to set at defiance any statute lawfully enacted by the congress of the United States or any statute lawfully enacted by any state wherein you see fit to exercise your powers.

But, aside from this view of the subject, if the state of New Jersey had undertaken to invest the incorporators of the securities company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals—then we have no doubt that such a



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