The NORTHERN SECURITIES DECISION

By a vote of five to four, the United States supreme court, on March 14, decided that the Northern Securities merger is in violation of the anti-trust law.

Justice Harlan delivered the opinion for the majority of the court, which majority comprised Justices Harlan, Brown, Brewer, McKenna and Day.

While Justice Brewer was one of the majority, he took occasion to say that he did not entirely agree with every point upon which the majority reached its conclusion.

The minority was composed of Chief Justice Fuller and Justices White, Peckham and Holmes.

The opinion delivered by Justice Harlan completely affirms the lower court and directs it to make such orders as the circumstances may require. The result is that Messrs. Hill and Morgan must find some other method than the Northern Securities company to avoid the law.

The several opinions delivered in this case are briefed by the Chicago Record-Herald as follows:

After reviewing the allegations of the government in the merger case and the defense of the Northern Securities company, Justice Harlan practically indicated the decision of the supreme court in the first sentence of the opinion. He said:

"In our judgment the evidence fully sustains the material allegations of the bill, and shows a violation of the act of congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce."

He again recurred to the facts in the case and said that, laying aside any minor things, it was indisputable that upon the principal facts of the record under the leadership of Hill and Morgan, the stockholders of the two railroad companies, having practically parallel lines of road, had combined under the laws of New Jersey by organizing a corporation for the holding of the shares of the two companies upon an agreed basis of value. Proceeding, he said:

"The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage or cause to be managed, both lines of railroad as if held in one ownership. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation, by the name of a holding corporation, the principal, if not sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease."

He said that the stockholders of the two old companies are now united in their interest in preventing all competition between the two. He added:

"They would take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies, the result being that all the earnings of the constituent companies make a common fund in the hands of the securities company upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act 'combination in the form of a trust or otherwise in restraint of commerce among the states or with foreign nations,' or could more effectively and certainly suppress free competition between the constituent companies. This combination is within the meaning of the act a 'trust,' but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as trustee for the combination constitute a menace to and a restraint upon that freedom of commerce which congress intended to recognize and protect, and which the public is entitled to have protected. If not destroyed all the advantages that would naturally come to the public under the operation of the general law of competition as between the Great Northern and Northern Pacific Railway companies will be lost, and the entire commerce of the immense territory in the northern part of the United States between the great lakes and the Pacific at Puget Sound would be at the mercy of a single holding corporation, organized in a state distant from the people of that territory."

He agreed with the summing up by the circuit court of the results of the combination, which was that it places the control of the two roads in the hands of a single person, and, second, that it destroyed every motive for competition between the two lines by pooling their earnings, notwithstanding both were engaged in interstate traffic.

Justice Harlan took up the contention of the counsel for the Securities company, that as the Northern Securities company is a corporation, and as its acquisition of the stock of the railroad companies is not consistent with the powers conferred by its charter, the enforcement of the act of congress as against these corporations will be in its operation an interference by the national government with the internal commerce of the state creating those corporations. He said:

"This view does not impress us. There is no reason to suppose that congress had any purpose to interfere with the internal affairs of the state, nor is there any ground whatever for the contention that the anti-trust act regulates their domestic commerce. By its very terms, the act regulates only commerce among the states and in the foreign states. Viewed in that light, the act must be respected. By the explicit words of the constitution that instrument and the laws enacted by congress in pursuance of its provisions, are the supreme law of the land, 'anything in the constitution or the laws of any state to the contrary notwithstanding'—supreme over the states, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the constitution was ordained. . . . Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority."

He brushed aside as scarcely worth mentioning the contention on the part of the securities company that the question involved is the right of an individual to dispose of his stock in a state corporation, and that in such transactions the individuals whose interests are involved are subject only to the restraint of state laws.

Justice Harlan also referred to the argument that the position of the government amounts to declaring that the ownership of stock in a railroad corporation is in itself interstate commerce and to other similar declarations, and he said:

"We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that congress may control the mere ownership of stock in a state corporation, engaged in interstate commerce. It does not contend that congress can control the organization or mere ownership of state corporations, authorized by their charters to engage in interstate and international commerce."

The opinion then takes up the right of congress to enact such legislation as the anti-trust law, and says:

"We say that congress has prescribed such a rule, because in all the prior cases in this court the anti-trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce—in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Nor can this court, in reason, say that such a rule is prohibited by the constitution or is not one that congress could appropriately prescribe when exerting its power under the commerce clause of the constitution. Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Many persons, we may judicially know, of wisdom, experience and learning, believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history; indeed, that the time has come when the public needs to be protected against the exactions of corporations wielding the power which attends the possession of unlimited capital. Be this as it may, congress has, in effect, recognized the rule of free competition, when declaring illegal every combination or conspiracy in restraint of interstate and international commerce. If in the judgment of congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that must be for all the end of the matter if this is to remain a government of laws and not of men."

Justice Harlan announced the inability of the court to concur in the view that the anti-trust act is repugnant to the constitution of the United States. "The contention of the defendants," he said, "could not be sustained without in effect overruling the prior decisions of this court as to the scope and validity of the anti-trust act."

Discussing the question as to the effect of the anti-trust law on financial interests Justice Harlan said the prediction had been made that disaster to business and widespread financial ruin would follow the execution of its provisions, and he added that such predictions had been made in connection with all preceding cases under that act, "but," he said, "they have not been verified."

Justice Harlan set aside as fallacious the argument that the acquisition of stock by the Northern Securities company was in the nature of an investment, saying that there had been no actual investment in any substantial sense.

In conclusion he said:

"The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the circuit court to proceed in the execution of its decree as the circumstances may require."

Justice Brewer expressed the opinion that some of the recent decisions of the court in anti-trust cases had gone too far, and said:

"Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were in themselves unreasonable restraints of interstate trade, and therefore within the scope of the act."

Justice Holmes in his dissenting opinion contended that the anti-trust statute is of a criminal nature, and said:

"It is in vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. I am no friend of artificial interpretations because the statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail."

Referring to the popular impression concerning the intention of the anti-trust law, Justice Holmes said:

"There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow, breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly, merely by virtue of its size, than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part."

Justice White, in considering the question of power, held that the point at issue really was whether congressional supervision extends to the regulation of the ownership of stock in railroads, which is, he said, not commerce at all. He dwelt on the necessity for observing this distinction. He announced his opinion to be that stock ownership in a state corporation cannot be said to be in any sense traffic between the states or intercourse between them. Power to control the ownership of interstate railroads he contended necessarily would embrace their organization. "Hence it would result," said the justice, "that it would be in the power of congress to abrogate every such railroad charter granted by the state from the beginning if congress deemed that the rights conferred by such state charters tended to restrain commerce between the states or to create a monopoly concerning the same."

He held that by the majority opinion congress could forbid the organization of all labor associations, and that the doctrine must in reason lead to a concession of the right in congress to regulate concerning the aptitude, the character and capacity of persons.