The Proceedings in the Northern Securities Case.

Many men—perhaps we should say almost all men except lawyers—fix their eyes on the decision rendered by a tribunal, and pay but little heed to the opinions on which the decision is based. Yet it should be obvious that the direct effect of a given decision on the case at bar may be one thing, while the indirect, ultimate effect produced by the opinion filed on the fate of similar but not identical cases may be widely different. There is no doubt that the judgment rendered on March 14 by five out of the nine justices constituting the United States supreme court affirmed the decree by which the four judges composing the United States circuit court for the district of Minnesota pronounced invalid the merger of the Great Northern and Northern Pacific railways in the Northern Securities company. It is equally certain that hereafter every case identical with that presented by the Northern Securities company will be decided in the same way, provided, of course, the five justices who concurred in the decision rendered on March 14 shall adhere to the opinions then filed by them. It should, at the same time, be recognized that the opinion which was read by Justice Harlan, and in which three of his colleagues concurred, differs materially from that signed by Justice Brewer, though he also concurred in the decision. It is, therefore, indispensable that those who would forecast the bearing of the proceedings of March 14 in the United States supreme court on other existing or future aggregations of capital should fasten their gaze on the principles asserted or deductions drawn by the fifth, or pivotal, judge, for thus they may be enabled to divine the fate of corporations or combinations which differ in a given important particular from the Northern Securities company. The outcome of such a scrutiny is that, while the decision is undoubtedly fatal to the Northern Securities merger in the present form thereof, the opinions, viewed collectively, are actually reassuring to the so-called "trusts"—by which we mean combinations of capital undertaken with a view to efficiency and economy—in the sense that they indicate a marked recession of opinion on the part of Justice Brewer and also on the part of Chief Justice Fuller and Justices Peckham and White—with whom their new colleague, Justice Holmes, concurs—from the position previously taken by a majority of the court in the trans-Missouri Freight association and Joint Traffic association cases. We may, indeed, take for granted that Justice Harlan and his three colleagues who concurred in the opinion read by him—Justices Brown, McKenna and Day—will adhere to the position now taken by them, which is a sweeping one, and would be fatal to the trusts because it pronounces all combinations of capital that do or may exercise any restraint, whether reasonable or unreasonable, upon interstate trade to be violations of the anti-trust act, which act is also declared to be a constitutional exercise of the powers delegated to congress. It is clear, however, that this position is no longer that of a majority of the court, though it unquestionably coincides with that previously taken by a majority in the two leading cases to which we have referred.

Before indicating the main points of the opinion filed by Justice Brewer, the fifth, or pivotal, member of the court, let us mark the two principal grounds on which four justices—Fuller, Peckham, and White, democrats, and Holmes, republican—declined to assent to the decision rendered by the majority. These grounds were, first, that congress was without power to regulate the acquisition and ownership of stock in the Great Northern and Northern Pacific railways by the Northern Securities company; and, secondly, that, even if such power were vested in congress by the constitution, it had not been exercised in the anti-trust act. The first ground is set forth with lucidity and cogency in the opinion which was read by Justice White, and in which Chief Justice Fuller and Justices Peckham and Holmes concurred; while the second ground is considered at length in a separate opinion of Justice Holmes, which explains what the jurist believes to be the true interpretation of the federal statute. Justice Holmes said that while the merger of the Great Northern and Northern Pacific lines had undoubtedly been entered upon with the intent of ending competition between the two railways, yet he did not think that the anti-trust act was meant to be applicable to transactions of that sort, because the statute presupposed that a contract in restraint of trade would be made with an outsider. If, however, his interpretation of the statute be overruled, he should concur with his colleagues, Chief Justice Fuller and Justices Peckham and White, in holding that the constitution never authorized congress to regulate the acquisition and ownership of the railway stocks in question by the Northern Securities company. Nor did he refrain from expressing his profound gratification that at least four of the nine judges constituting the court had refused to adopt an interpretation of the anti-trust act which, in his judgment, would tend to inaugurate an eternal social war, and to disintegrate society into its individual atoms. To call such a law, as the anti-trust act is when interpreted by Justice Harlan, a regulation of commerce is, Justice Holmes thinks, a mere pretense. It is rather an attempt to reconstruct society. With the wisdom of such an attempt Justice Holmes does not deem himself to be now directly concerned, but he believes that congress was not entrusted by the constitution with the power to make it, and he is also deeply persuaded that congress has not tried to make it. We add that Justice White, in the opinion which he read, and in which Justices Fuller, Peckham, and Holmes concurred, denounced the construction of the anti-trust act embodied in the decision rendered by the majority of the court, as the assertion, by implication, of a power repugnant to all the fundamental rights of life, liberty, and property upon which all just government must rest.

Now Justice Brewer concurs with Justices Harlan, Brown, McKenna, and Day in upholding the decree issued by the United States circuit court against the Northern Securities company. He shows, however, in his separate opinion that he concurs in the decision on grounds of his own. He agrees, indeed, with the rest of the majority in holding that congress was constitutionally authorized to enact the anti-trust law, provided the statute is to bear the construction which he, Justice Brewer, would give it. His own interpretation differs materially from that which is now announced by the rest of the majority, and which, moreover, was embodied in the opinions filed by the justices concurring in the decisions rendered in the trans-Missouri and Joint Traffic cases. Justice Brewer holds that the two last-named decisions were right, but that the opinions filed in defense thereof went too far. He now thinks that, instead of holding, as a majority of the justices did in the two cases last named, that the anti-trust act prohibited all contracts, reasonable or unreasonable, in actual or possible restraint of interstate trade, the ruling should have been that the contracts presented in the trans-Missouri and Joint Traffic cases were, in themselves, unreasonable restraints of interstate trade, and, therefore, within the scope of the act. Congress, he thinks, did not intend by that act to reach and destroy such contracts in partial restraint of trade as had been pronounced reasonable by a long series of decisions at common law. He thinks, moreover, that the general language of the anti-trust act is necessarily limited by the power which an individual unquestionably has under our federal and state constitutions to manage his own property, and to determine the place and manner of its investment. Justice Brewer does not hesitate to describe freedom of action in these respects as among the inalienable rights of every citizen. Applying this principle to the Northern Securities case, he goes on to say that, had it appeared that Mr. James J. Hill was the owner of a majority of the stock in the Great Northern Railway company, he could not, by any act of congress, be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway company, although such purchase might tend to vest in him, through that ownership, a control over both companies. In other words, the right which all other citizens had of purchasing Northern Pacific stock could not be denied to Mr. James J. Hill by congress, because of his ownership of stock in the Great Northern company.

Justice Brewer holds, however, that no such investment by a single individual in the stock of two competitive companies is presented in the Northern Securities case. What was here exhibited was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. That corporation—the Securities company—was a mere instrumentality, by which separate railroad properties were to be combined under one control. Justice Brewer regards such a combination as a no less direct restraint of trade, by destroying competition, than would be the appointment of a committee to regulate rates. He adds that if the parties interested in the Great Northern and Northern Pacific railroads could, through the instrumentality of a holding corporation, place both lines under one control, then, in like manner, could the control of all the railroad companies in the country be eventually placed in a single corporation. That is why Justice Brewer upheld the adverse decree of the United States circuit court. He upheld it because he looked upon the Northern Securities company as against public policy—i. e., as an unreasonable combination in restraint of interstate commerce. He deemed it his duty, however, to explain in his separate opinion that he would not deny the validity of a combination exercising restraint upon interstate trade, provided that restraint can fairly be described as reasonable; much less would he deny the right of an individual to acquire controlling interests in two or more competitive companies. He felt it his duty to draw these sharp and deep distinctions, lest the broad and sweeping language of the opinion read by Justice Harlan should tend to unsettle legitimate business enterprises, stifle or retard wholesale business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation.

In view of the opinions expressed by the four justices who dissented from the decision of the court, and of the separate opinion filed by the fifth, or pivotal, justice, it is easy to understand why Attorney General Knox should declare that the federal government has no intention of "running amuck" among the corporations accused of violating the anti-trust act. He knows that, in the case of many of those corporations, the government has much less reason to expect a favorable decision, now that the attitude of the court has been defined by the proceedings of March 14, than it had when that attitude was presumed to have been definitely indicated by the decisions rendered and by the opinions filed in the trans-Missouri and Joint Traffic cases. Then the government felt sure, under the general principle propounded, of a favorable decision in every case. Now it knows that the general principle has been discarded by the majority of the court—by majority we here mean Justice Brewer added to Chief Justice Fuller and Justices Peckham, White, and Holmes—that every case will have to be tried on its specific merits; and that the judgment of the tribunal can by no means be foreseen. It does not follow, of course, that absolutely nothing will be done in the way of prosecutions under the anti-trust act. Other suits are already pending, and have been more or less advanced toward final adjudication. A report sent on February 11 by the department of justice to the house of representatives showed that no fewer than twenty-three actions had been begun, all of which had been expedited under the authority of the recent act of congress. Fourteen railroad injunction cases are before the United States circuit court at Chicago, and three cases—those against the beef trust, against the Nashville, Chattanooga & St. Louis railway, and against Baird and others, are already on appeal before the United States supreme court. We may, therefore, count upon a further elucidation of the anti-trust act on the part of the highest federal tribunal at no distant date.—Harper's Weekly.

Some Parker Figures.

After all it doesn't appear that Judge Parker is phenomenally strong. It is pointed out that he was elected to his present position only because the opposition failed to nominate a candidate. In referring to Mr. Hill's attack on Tammany and his proposal to put Parker to the front as the "only" available democrat, a prominent Tammany man says:

"Tammany has not issued pamphlets to say that while Mr. Coler was an excellent and able gentleman Mr. Hill's association and identification with him defeated him. Tammany has issued no circular attacking Mr. Hill's present candidate and officially showing that Judge Parker's election was due to the fact that one of the opposing political parties failed to nominate a candidate against him. Tammany has not called attention to the fact that Judge Parker's total vote in New York was only 554,680, whereas Mr. Coler received 655,398 votes, or 100,710 more than Parker, and was still defeated for governor, and Bryan received 678,386 votes, or 123,706 more than Parker and was still defeated for president."—Johnstown Democrat.