THE MERGER TANGLE.

FOUR courses are usually open to judges dealing with the application of a statute, and sometimes a fifth line of action is available. An act may be enforced according to its letter, on the ground that the legislators meant just what they said; or according to a modified interpretation based on the idea that the legislature did not contemplate unreasonable consequences; or according to the concrete purpose of those who framed and passed the act, on the ground that the known legislative intent should govern throughout; or according to the underlying reason of the law as it presents itself to the judge, on the ground that the reason of the law is the law. If none of these methods of interpretation produces a conclusion satisfactory to the judge's sense of justice, he may find reason to declare the act unconstitutional, as against either the express provisions of the constitution, state or national, or against the fundamental principles underlying our constitutions and which they were made to enforce.

In the case of a well-drawn and carefully-reasoned law all methods of interpretation should lead to the same result, but clumsy legislation leads to divergence—the letter does not agree with the concrete purpose, nor either of these with the underlying reason that justifies legislation on the lines in question. It rarely happens, however, that the law gets into such a muddle as to lead to four or five different decisions on the same question in the same court. But this is the case with the recent merger decision in the United States Supreme Court.

The majority opinion, or rather the plurality opinion, in the Northern Securities Case, delivered by Justice Harlan and concurred in by Justices McKenna and Day, declares that the Sherman Anti-trust Act makes unlawful all contracts or combinations in restraint of trade among the States, whether the restraint is reasonable or unreasonable. Every agreement aiming at monopoly of any part of interstate commerce or tending to shut out competition

in such commerce, is void. The Northern Securities Merger did this, and therefore came within the prohibition of the Sherman Act.

Justice Brewer held that Congress must be presumed to have meant to outlaw only such contracts as are in *unreasonable* restraint of trade, but the Northern Securities, he thought, constituted an unreasonable restraint of interstate commerce and was within his interpretation of the law.

Justice Holmes said the statute was a penal act, and could not be held to punish as a crime what had always been lawful, unless such intent is expressed in clear words. He did not expect to hear that Mr. Morgan could be sent to jail for buying the majority of the stock in two or more railroads, and such purchases as an individual may lawfully make a corporation may be authorized to make. The act says nothing about competition. It covers contracts in restraint of trade, and these limit competition; but a contract may result in limiting competition, as in case of a fusion, and yet not be a contract in restraint of trade.

Justice White held that if the Sherman Act applied to the acquisition of the stock of two or more railways by an individual or a company, the enactment was beyond the power of Congress. The power of Congress to regulate interstate commerce does not extend to dictation of the ownership of properties engaged in interstate commerce.

Chief-Justice Fuller and Justice Peckham also dissented from the majority decision, but filed no separate opinions, though there were still one or two diverse lines of argument open to them.

Four for literal construction and enforcement; five against, but one of the five believing a liberal construction still covered the Northern Securities case; judgment went against the company by a vote of five to four.

The rules laid down by Justice Harlan in the plurality opinion would, if fully enforced, strike down every labor organization in the country that might in any way touch interstate commerce; every partnership, too, and every consolidation of competing plants even by individual purchase. When the facts are presented for decision, none of the judges will probably go to this limit. The

court has already held in the sugar case that the mere fact of ownership of refineries in various states by the same persons or company was not within the law. It would be startling indeed if it were held a criminal offence for a man or a company to own two or more factories or plants of any kind, whether in the same or different states, which affected in any way trade between the two states. Individual liberty must yield to the public good, and if it could be shown to be essential to the public good that ownership shall be limited to a single plant, I suppose the limitation might in time be enforced; but it would certainly take a long time to overcome the popular prejudice in favor of the right of any man to buy properties of the same or different kinds in the same or different states. The right of a state to authorize a corporation to make purchases that would be lawful for an individual to make is equally clear; and the right of the owners of various properties to form a partnership and manage the properties as partnership business can scarcely be doubted, either on the settled principles of the law or clear considerations of the public good. Yet such partnerships or purchases, whether by a company or an individual, seem clearly within both the letter and the spirit of the Sherman Act, where they result in the union under one management of sugar-refineries, rolling-mills, railroads, etc., which otherwise might compete with each other in interstate commerce; and such unions, ever growing larger and larger, tend to monopolies, the powers of which may be used to the great disadvantage of the public.

So we have this dilemma: On the one hand fundamental principles of property and contract leading to unions for economy and power, which involve monopoly and subject the people to oppression; on the other hand Federal and State legislation seeking to prevent this oppression by breaking up monopoly and union and fracturing the fundamentals of free contract and business organization.

No wonder the Supreme Court is shivered into fragments. It can hardly be considered its fault. The blame is with Congress, or rather with the lack of economic education of our people, in which lack Congress shares.

The union of railways, manufacturing plants, etc., is of the highest importance to civilization. It is part of the organization, integration, coördination of business. It means elimination of the wastes and debasements of competition. If the powers of the union are used in the public interest and its benefits duly diffused, it is a blessing of the first order. Legislative effort should be directed, therefore, not to the destruction of union and combination, but to the infusion of coöperative and public-spirited methods in their management, and the prevention of abuse. Combination will go on in one form or another, whatever Congress or Court may do. The movement is in obedience to the law of industrial gravitation and the growth of coördination. You cannot make men fight who have evolved to the stage of having sense enough to work together. But you can make them work together in accord with the public good, and when our legislators get wisdom enough to aim at this instead of at the destruction of combination, the solution of the trust problem and the railroad problem will be in sight.

In spite of its imperfections, the Sherman Act may be made useful, pending better legislation, by careful enforcement, personal penalties and all, not against combination *per se*, but against aggressive and evil-minded combinations. If the government would make it clearly understood that the law would be vigorously enforced against persons and companies watering or inflating capital, raising prices unduly, or keeping them too high, paying wages unduly low or ill-treating labor in any way, refusing to open their books to the inspection of public officers, or otherwise manifesting the spirit that has made monopolies in private hands obnoxious, while it has made equally clear that well-behaved combines would not be molested, the anti-trust law might accomplish a great deal of good. The discriminating use of a poor law may often secure much of the benefit to be obtained from the full use of a good law.

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