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THE NORTHERN SECURITIES COMPANY.

It is not my purpose to discuss the legal merits of any of the litigations now pending in regard to the Northern Securities Company, nor is it my purpose to discuss the non-legal question whether such combinations of capital are for the true interest of the community.[1] I shall assume for the purposes of this article that the nation, being perhaps over-conservative, is afraid of industrial concentration and desires to perpetuate the ancient traditions of competition, especially in regard to parallel lines of railroad; that its public policy, as declared in Federal and State anti-monopoly laws and in the decisions of the courts thereunder, remains unshaken; and that we are interested to see that it is not circumvented by individuals, as long as it is not changed by the representatives of the people.

The Northern Securities Company is of interest because it is a very simple and yet striking illustration of the form which the industrial concentrators are now adopting. It is in essence a party of individuals who have gone away from home to obtain a license for the purpose of indirectly combining two great railroads whose combination the law regards as a public evil and therefore does not permit to be attained directly. A direct attempt at the combination of these very two roads—the Great Northern and the Northern Pacific

[1] This article incorporates a portion of a paper on "Parasite Corporations" read at the meeting of the American Social Science Association in April, 1902.

—had been declared illegal by the United States Supreme Court, administering the local laws of Minnesota.[1] Any agreement between them to suppress competition would violate the Federal statutes as well.[2] It is obvious however that competition could be practically suppressed if one individual could buy a majority of the stock of each road. Present laws could not touch his case, for a man can not be stopped from combining with himself. The owners of a majority of the stock of the two roads, if the Attorney General's charges are correct, concluded to put an end to competition by merging themselves into an artificial person, hoping that the law might then fail to distinguish between them and a single natural person. They therefore filed a paper and paid a fee in a far-off State, went through certain formalities, and thus became a corporation. They transferred to this corporation their own stock in the railroad and took the stock of the corporation in return. The corporation is to perform but two acts a year—one to vote its stock at the annual meeting of the Great Northern Company, the other to vote its stock at the annual meeting of the Northern Pacific.

It is obvious that if the corporation as an artificial person is indistinguishable from a natural person, the simple device is completely effective, the two railroads are for practical purposes combined, the public policy of the United States and of the States through which the railroads run is frustrated; and yet this result is achieved at trifling expense by the automatic operation of the laws of a State where few if any of the individuals interested reside, and which has no jurisdiction over either railroad. Taking the Northern Securities Company as an illustration, it is the object of this paper to consider whether a State in the position of New Jersey has the power to confer, by the process of incorporation, such privileges and immunities—whether anything that her officials may do can give the combiners any other character beyond her borders than that of a combination of individuals in restraint of competition.

As I have said, competition between parallel lines is destroyed if a single individual obtains control of a majority of the stock of each. Our laws have never attempted to prevent this, although it is not impossible that such attempts may be made if individual wealth sufficiently increases. The question has not been a vital one, because no individual has yet been rich enough to own a majority interest

[1] Pearsall v. Great Northern Railway, 161 U. S. 646.

[2] United States vs. Trans-Missouri Association, 166 U. S. 290; United States v. Joint Traffic Association, 171 U. S. 505.

in two lines sufficiently important to arouse the attention of the nation, although individuals have from time to time of course practically controlled railroad systems by influencing the votes of other stockholders.

It does not necessarily follow however that the State must permit associations to be formed for the purpose of ending competition by joint ownership of a majority of the stock of the competing lines, simply because it does not attempt to interfere with the investments of a single individual. A well directed combination of individuals is so much more powerful than a single individual, and is capable of so much more harm, that such combinations have often attracted the special attention of the public and been the subject of special legislation, both judicial and parliamentary. The greater danger to be apprehended from combinations of individuals is probably the true ground for the doctrine of penal law that conspiracies may be criminal, although their acts and objects are such as would not be criminal in the case of an individual;[1] for the similar doctrine of the civil courts;[2] and for the recent legislation against pools and against combinations in restraint of trade.

Voluntary associations of individuals for the purpose of executing great financial schemes are difficult to hold together. The personal interests of the various associates become diverse, temptations become strong, and secession or treachery is liable to develop at any moment. Consequently such associations have always tried to secure some bond of union that would be recognized and enforced by the law. They have tried the method of irrevocable proxies to vote their stock for a series of years, and they have transferred their stock to common trustees, taking in return certificates purporting to secure to them the dividends, while the trustees should cast the vote; but all such contrivances have been condemned by a majority of our States, except in the case of insolvent corporations or corporations formed to take up some bankrupt enterprise, where the rights of creditors have become involved and justify the institution of a temporary

[1]See State v. Buchanan, 5 Harr. & Johns. 317, 351, 354; Commonwealth v. Waterman, 122 Mass. 43, 57; 1 Clark & Marshall on Crimes, Sec. 142; 1 Bishop on Criminal Law. Sec. 592; 2 Id. Sections 181-3.

[2]Mogul Co. v. McGregor, 1892 App. Cas. 25, 45, 60,; Quinn v. Leathem, 1901 App. Cas. 495, 511, 537, 538. The proposed abrogation of this principle by legislation so far as it applies to labor combinations shows no more than that this particular application is believed by the legislators or their constituents to be productive of more harm than good.

trust.[1] Attempts to separate the voting power of their stock from its beneficial enjoyment having thus ended in failure, these associations were forced to the present step of forming themselves into a corporation to which their stock shall be assigned, and which shall assimilate them as nearly as possible to the position of a single individual.

This step is a very easy one. It involves not even an application to any legislative department. It involves nothing but the preparation of a few comparatively simple papers and the payment of comparatively trifling fees. Certain of the States of our Union have found it profitable to engage in the promotion, on a large scale, of corporations intended to operate entirely without their limits. The promoting States, of whom New Jersey is the most successful, vie with each other in the breadth of their invitations, in the simplicity of their requirements, and in the moderation of their fees. Their progeny are born full fledged. They promptly leave their native territory and settle down wherever permission can be obtained, bringing with them their attribute of artificial individuality. The sole object of the fledgling may be the destruction of competition and defeat of the public policy of the United States and of the State where it builds its nest; but if complaint is made, it answers simply that a corporation is a person, that a block of stock is just a piece of property, that a corporation may own property, and that a person, corporate or individual, may vote any stock that he owns according to his private judgment.

Now the personality of a corporation is a very ancient legal fiction, and one which for many purposes has very high authority.[2] A corporation is deemed to be a person within the meaning even of certain provisions of the United States Constitution.[3] "But fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."[4] This fiction therefore never should be used as an engine for thwarting the interests of the State.[4] However often and properly a corporation is called a person, it really is a collection of

[1] Hon. S. E. Baldwin in 1 Yale L. J. 1; E. W. Moore in 36 Am. Law Rev. 222.

[2] United States v. Amedy, 11 Wheat. 392, 412; Providence Bank v. Billings, 4 Pet. 514, 562; Dartmouth College v. Woodward, 4 Wheat. 517, 636, 667; People v. Assessors, 1 Hill, 616, 620.

[3] Lord Mansfield in Morris v. Pugh, 3 Burr. 1242.

[4] State v. Standard Oil Co., 49 Ohio St. 137, 177; People v. North River Sugar Refining Co., 121 N. Y. 582, 621.

persons, and while it has some of the attributes of personality, others are lacking.[1]

Legal fictions, like other fictions, stand cross-examination with difficulty. Nowhere is the confusion resulting from the use of a legal fiction better illustrated than by the development of the doctrine which gave corporations their standing in suits in the Federal Courts. The Constitution permits a citizen of one State to sue or be sued by a citizen of another. In 1809 the question whether a corporation was a citizen was argued at the bar of the Supreme Court, in a series of cases presenting the question in various lights and employing the leading counsel of the day.[2] On the one hand it was argued that a corporation is different from the individuals which compose it; that it may do business although they are all infants; that it may own land although they are all aliens; that the individuals cannot be noticed because they are lost in the corporation; that the stock shifts so rapidly that the members at any particular date are unascertainable; that the corporation sues and not its members. On the other hand it was argued that a corporation is a fiction of law, and that a fiction cannot shut out the truth; that the corporation is the form, while the individuals are the substance; that whenever justice or convenience requires the individuals are disclosed. Chief Justice Marshall, delivering the opinion of the court, said that a corporation was certainly not a citizen, and would be excluded altogether if "considered as a mere faculty and not as a company of individuals," but that the Constitution refers to "the real persons who come into court," and hence that when the members of the corporation are all citizens of a single State they can sue or be sued by a citizen of another State, notwithstanding the corporate form in which they are enveloped. For thirty-five years this authority stood unshaken, and so eminent a lawyer as Daniel Webster seems not to have attempted to question it.[3] Suddenly, in the case of the Louisville, Cincinnati and Charleston Railroad vs. Letson,[4] the earlier decisions were

[1]1Kyd on Corporations, 13; Taylor on Private Corporations, Sec. 51; 1 Morawetz on Private Corporations, Sections 1, 227-234.

[2]Hope Insurance Co. v. Boardman, 5 Cranch, 57, and Maryland Insurance Co. v. Wood, id. 78, where the corporation disputed the jurisdiction; United States v. Deveaux, id. 61, where the corporation claimed the jurisdiction.

[3]Sullivan v. Fulton Steam Boat Co., 6 Wheat. 450; Breithaupt v. Bank of Georgia, 1 Pet. 238; Commercial Bank v. Slocomb, 14 Pet. 60; Bank of Cumberland v. Willis, 3 Sumn. 472.

[4]2How. 497. Mr. Alfred Russell, in his attack on this case, calls it the first railroad case that made its appearance in the Supreme Court (Reports of American Bar Association 1891 p. 221), but this is not quite accurate (13 Pet. 519).

overruled, and the contrary doctrine was announced that a corporation is not only an artificial person but a citizen within the meaning of the Constitution.[1] There is something a little mysterious about this Letson case. The opinion is reported as the unanimous opinion of the six justices[2] who sat in the case, and there is nothing of record to the contrary. It speaks of the case as having been argued by counsel as able as those who appeared before Chief Justice Marshall; but these counsel did not question the earlier decisions. Their main point was that the corporation is sufficiently represented by its officers and directors for purposes of suit, and that the citizenship of a mere stockholder is not important enough to divest jurisdiction. One of the justices who concurred in the opinion afterwards stated that he understood the court to have decided the case on this ground, and half of them subsequently dissented from the views in which they had been recorded as concurring.[3] These views were never again repeated by the court, but the jurisdiction was maintained. Chief Justice Taney, in the cases which finally settled the law upon the jurisdictional point,[4] says that it is based upon a presumption which, no matter how contrary to the truth, the courts will not permit in future to be rebutted—a presumption that although the suit of the corporation is really "the suit of the individual persons who compose it," these persons all reside in the State in which the Company is incorporated. These propositions are still recognized by the Supreme Court as established, and in difficult cases the court still reasons from the premise that it is the individual members who sue.[5] No attempt, so far as I am aware, has been made to reconcile this doctrine with the numerous cases where an individual stockholder sues his corporation in the Federal courts, basing jurisdiction upon diversity of citizenship; but these cases must be regarded

[1] p. 558.

[2] 16 How. at p. 349. The records in the clerk's office show that Taney, C. J., McLean, Baldwin, Wayne, Catron and Daniel JJ., were on the bench when it was submitted in March, 1843. The other three were ill and had left for the term. (1 How. p. 71.)

[3] McLean, Catron and Daniel, JJ. (Rundle v. Delaware & Raritan R. R. Co., 14 How. 80, 94, 95; Northern Indiana R. R. Co. v. Michigan Central R. R. Co., 15 How. 233, 248, 249; Marshall v. Baltimore & Ohio R. R. Co., 16 How. 314, 338). Campbell, J., joined in the subsequent dissent (16 How. at p. 347). Kent regarded the decision as salutary (1 Kent Comm. 347 *n*).

[4] Covington Drawbridge Co. v. Shepherd, 20 How. 227, 233; Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 286, 296, 297.

[5] Lehigh Co. v. Kelly, 160 U. S. 327, 338-9; St. Louis & San Francisco Railway v. James, 161 U. S. 545, 563, 565.

as anomalous, and resting upon precedents in which the jurisdictional question was not properly presented to the court. The Supreme Court has recently, and with emphasis, repeated the rule that when a corporation is incorporated first in one State and then in another, its members are presumed to be citizens of the former State, and therefore it cannot be recognized for purposes of Federal jurisdiction as a corporation of the latter.[1]

It is indeed often said that the consent of the stockholders, acting individually, is not equivalent to the consent of the corporation; but this is not always true,[2] nor does it mean that the corporation is anything different from the sum of the individual stockholders. It merely means that, when they bind themselves for corporate purposes, they must act as provided by the law of their incorporation. When they attempt to circumvent and violate that law, its vindication will not be restricted by any legal fictions.[3]

The Northern Securities Company is an association of individuals, few of whom, and none of any importance, are citizens of New Jersey. This association is clothed with the attributes of an artificial individuality so far as New Jersey undertook to confer them, and so far as she had power to do so. By availing themselves of the corporation laws of New Jersey they identified themselves with that State; but when the New Jersey corporation invested its entire property in the stock of a Minnesota and of a Wisconsin corporation it identified itself and its shareholders with Minnesota and Wisconsin.[4] It can never come into contact with the outside world except when in the stockholders' meetings of the Minnesota and Wisconsin corporations it meets the minority stockholders of those companies. Its connection with New Jersey is nominal. Its sphere of action is confined to the States through which the Great Northern and Northern Pacific railway systems extend, and to any other State where their corporate meetings may be held. Its railway stock as is shown in tax and foreign attachment cases may be treated by the States which incorporated the railways as located within their respective boundaries.[5]

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[1]Louisville, New Albany & Chicago Railway Co. v. Louisville Trust Co., 174 U. S. 552, 565-6.

[2]1Morawetz on Private Corporations, Section 228; Woodbridge v. Pratt & Whitney Co., 69 Conn. 304, 330.

[3]State v. Standard Oil Co., 49 Ohio St. 137.

[4]Under the principle of Covington Drawbridge Co., v. Shepard, *supra*, and cases following it.

[5]State v. Travelers Insurance Co., 70 Conn. 590; In re Bronson, 150 N. Y. 1; Winslow v. Fletcher, 53 Conn. 390; Plimpton v. Bigelow, 93 N. Y. 592.

What then are the attributes of artificial individuality which pertain to this New Jersey concoction? Upon the face of the papers they are very complete, but they are limited by the general restriction in the New Jersey Corporation Act,[1] that the purpose or purposes of the incorporation must be lawful. We cannot impute to New Jersey the intent to manufacture and export corporations whose purposes, while lawful if sought in New Jersey, would be unlawful if sought where the corporations are intended to operate. Hence if the sole object of the Northern Securities Company had been to bring two Northwestern railroads under a single control, and if that object had been stated in the papers filed by the corporators, and if the object was illegal under the laws of the United States and of the Northwestern States, we are entitled to infer that the corporation would be illegal in New Jersey itself, and that the Attorney General of New Jersey would bring an action to annul the corporation. It is unnecessary however to trouble ourselves with the true construction of the New Jersey statute, for New Jersey can grant no privileges to be exercised in other States against the laws or policies of those States, or without their permission expressed or implied. Corporate privileges must be exercised within the State which grants them, unless they receive extension elsewhere from some other sovereignty.[2] Any act performed elsewhere must point for its sanction to some provision of the Federal constitution or statutes, or to the consent, expressed or implied, of the State within whose limits the act occurs.[3] No State can authorize a combination of men to act as a corporation within another State without that other State's consent; nor can any State give privileges which in the slightest degree obstruct the policy of the National Government in matters of interstate or foreign commerce. If, then, Congress wills that men shall not combine to restrain competition in interstate commerce, what possible authority can they obtain from any State to that end, whether by the particular form of license called an incorporation certificate or any other? And if Minnesota wills that men shall not combine to restrain competition in the local railway traffic of her own territory, what document can they obtain from an official of New Jersey which can lawfully be used to thwart that will? I know

[1] Section 6.

[2] Lafayette Insurance Co. v. French, 18 How. 404, 407; Doyle v. Continental Insurance Co., 94 U. S. 535, 540; Pinney v. Nelson, 183 U. S. 144.

[3] Runyan v. Coster's Lessee, 14 Pet. 122, 129-30; Thompson v. Waters, 25 Mich. 214, 221.

of none, if the will is properly expressed. His certificate is, after all, but a form of words, and by a form of words a rule of policy can never be evaded.[1]

This reasoning applies to the purchase of the stock of another corporation for control, as much as it does to any other power which New Jersey is claimed by her corporation to have given it. The right to purchase and permanently hold stock in another corporation is not one universally inherent.[2] It depends upon special grants, expressed or implied, while purchase for control requires express permission.[3] In order to sustain a purchase by one corporation of stock in another, each of the two must have a special permit. The purchasing body must have been given by the State which incorporated it the special right to purchase stock. The body whose stock is purchased must have been given by the State which incorporated it the special right to have another corporation as a stockholder. Every State has undisputedly the power to determine the qualifications of membership of its own corporate progeny,[4] as well as their right to apply for membership in other similar bodies. Hence when a corporation of one State desires to hold and vote shares in a corporation of another State, the concurrent permission of both these States is a necessity; and the permission of the latter State, where the actual work is being done, is the more important, especially when the purchasing corporation has no separate function in the industrial world, but is an association licensed for the sole purpose of participating in the advantages of the other. Not only is it common to overlook the difference between a natural and an artificial person, but it is common also to overlook the difference between a share of stock and other kinds of property. An industrial incorporation is, like a partnership, an association engaged in a business enterprise, and a shareholder is simply one of the persons engaged in the enterprise. Each share which he owns is a right to participate *pro rata* in the profits and property of the incorporated body, and, by vote at its annual election,

[1] Jessel, M. R., in Bellairs v. Bellairs, L. R., 18 Eq. 510, 516; Louisville & Nashville R. R. v. Kentucky, 161 U. S. 677, 693. Whether the acquisition by one company of all the shares of two others is a consolidation, merger or amalgamation of the latter is merely a matter of definition. See 2 Morawetz on Private Corporations, Section 942; Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47, 57; Standard Oil Case, *supra*.

[2] 161 U. S. at p. 698.

[3] De La Vergne Co. v. German Savings Institution, 175 U. S. 40, 55; 1 Morawetz on Private Corporations, Section 432.

[4] 1 Morawetz on Private Corporations, Section 35.

in its management.[1] It is a piece of property in the same sense only in which a partnership interest is a piece of property. When one corporation lawfully buys stock in another, the result is simply that while the latter still remains a collection of individuals, some of those individuals constitute collectively an association within an association, voting and drawing their dividends as a body, their vote being decided by their joint agent. It was the practical difficulty of this complicated situation, forcibly presented to the Supreme Court in the Letson case, which mainly influenced the court of its own volition to overrule its previous decisions, and to adopt for the future an arbitrary legal fiction.

It is obvious that there are many ways in which a State may protect itself in the future against such organizations as this Northern Securities Company, whether they be domestic or foreign. It may require that no corporation shall hereafter acquire, or shall after a reasonably distant future date continue to hold, more than say one hundred million dollars' worth of the stock of any corporation doing a local business within its territory.[2] It may even place the limit below this now modest appearing figure. It may place a limit upon the proportionate interest which one corporation can hold in another. Congress may supplement such legislation so that it may include interstate and foreign as well as strictly local commerce.

There has been as yet, however, no legislation specifically attacking this form of combination. Does existing legislation, judicial or parliamentary, cover it? This is a question now in litigation, and I shall not discuss it. It is claimed by the corporations that the question is not a justiciable one, at least outside the limits of the particular State that sues, and an attempt is made to liken the case to one for the collection of a penalty.[3] This claim seems to me unsustainable. A State may sue to redress injuries which are strictly analogous to those suffered by a private individual,[4] even though there may be penal remedies.[5] The Federal courts should

[1] Fisher v. Essex Bank, 5 Gray 373, 378.

[2] I speak of corporations whose charters can, as in the case of most of these with which we are concerned, be amended, altered or repealed. Of course the stockholding company must be given time to dispose of its excess of stock.

[3] Wisconsin v. Pelican Insurance Co., 127 U. S. 297.

[4] See Emperor of Austria v. Day and Kossuth, 2 Giff. 628; 3 DeG. F. & J., 217; United States v. Bell Telephone Co., 128 U. S. 315, 367; Missouri v. Illinois, 180 U. S. 240 and cases cited; Kansas v. Colorado, U. S. Sup. Ct. 1902.

[5] In re Debs, 158 U. S. 564.

be liberal in entertaining suits of our own States, who are allowed the right neither of fighting nor of agreeing with each other. Since, however, Minnesota can remedy her own injuries by legislation, especially since one of the railways is her own creation, there may be a question whether she has an adequate remedy which prevents her from suing in equity. An individual cannot go into chancery when he has a complete remedy in his own hands. There would be disadvantages, however, in an affirmative answer, as some State legislatures meet but once in four years, and special sessions are costly.

Interesting questions of jurisdiction have been disclosed already in the Northern Securities litigation. The two railroads run parallel through the northern tier of States, from Wisconsin to Washington inclusive. The Great Northern is an incorporation of the State of Minnesota, subsequently reincorporated or licensed by the other States. The merger has been attacked in the courts by three sovereignties, the United States, Minnesota and Washington. The United States attacks the new combination on account of its bearing upon interstate commerce. Minnesota and Washington attack it on account of its bearing upon their local interests. Now, of these three, Minnesota seems to have the highest standing in court, for she created and to some extent endowed the Great Northern Company. Her real controversy is with that company, or with the individuals composing it, principal among whom is one of her own citizens, yet when she sues in the Federal Courts, relying upon the conclusive presumption that the members of the Northern Securities Company are citizens of New Jersey, she is turned out of court on the ground that the Great Northern Railway Company is a necessary party, and that the stockholders of that company (including of course the Northern Securities Company) are conclusively presumed to be her own citizens.[1] When, thereupon, she sues the Northern Securities Company, together with the other necessary parties, in her own tribunals, the main defendant takes the point that the real controversy is entirely between the State and itself, and therefore removes the case to the Federal Courts again. Thus we are led to the rather mortifying conclusion that when, under such circumstances, a sovereign State of the Union gets into controversy with

[1]Minnesota v. Northern Securities Co., 184 U. S. 199. It is somewhat remarkable that the point was not taken by the counsel for the defendant, and that it was decided by the court without giving the State an opportunity to be heard upon it.

a private corporation, the private corporation has the choice of forum while the State has not. The Supreme Court seems to have considered this to be the necessary result of a rather technical decision in a previous case[1] where a more ancient and broader doctrine[2] had been narrowly limited. The State of Washington, however, is free to prosecute the new corporation in the Federal Courts, because she is less interested and less injured than is Minnesota, since Washington only licensed the company which Minnesota created.[3]

Edward B. Whitney.

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[1] California v. Southern Pacific Co., 157 U. S. 259.

[2] Florida v. Georgia, 17 How. 478.

[3] Washington v. Northern Securities Co., U. S. Sup. Ct., April 21, 1902.