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# THE NORTHERN SECURITIES COMPANY CASE; A REPLY TO PROFESSOR LANGDELL.

In April of the present year the case known as the Northern Securities case—*United States v. Northern Securities Co., et als.*[1] —was heard and decided in the United States Circuit Court of Appeals from the eighth circuit, sitting at St. Paul, Minnesota. The decision appears to have been unanimous, four judges having heard the case and three having signed the opinion and decree, the fourth not dissenting, so far as appears. The cause was most ably argued on both sides, the array of counsel being of the very highest order. It is also indisputable that the court itself, as well as the individual judges composing it, represent in the opinion of all competent minds, whether of the profession or of the public at large, the best type of our federal judiciary, regard being had to strict legal learning, to judicial experience, to sobriety and soundness of judgment, or to that highest form of judicial usefulness and greatness which has been described as "judicial statesmanship; that is, breadth of view, including retrospect and forecast";—a form of greatness which had its perfect illustration in the career and work on the bench of John Marshall.

The case in all its aspects was grave and far-reaching; grave even to solemnity in the reach and stretch of its issues. It was

[1] 120 *Fed. Rep.* 721.

so regarded by all parties to it, and by the general public, as well as by special students of legal topics as related to public concerns. It is not indulging in doubtful comment to say farther, that the opinion and decision in the case met the approval, with very few exceptions, of those best qualified to pass judgment upon it. Such general approval went farther, and in view of an appeal to our highest court, forbade a doubt that in that great final forum the decree would be affirmed, this confidence resting on the obvious fact that the judgment of the court below was a necessary result and sequel of at least three decisions of the higher court, as well as on the solid logic, reason, and conclusiveness of the opinion itself.

So stood the case, before the profession and the country, till the issue of the June (1903) number of the *Harvard Law Review,* in which appeared an article by Professor C. C. Langdell, not merely calling it in question fundamentally, but not shrinking from declaring, "That a more iniquitous decree was never made may be asserted with confidence";[1] and "That the decree is a mere act of arbitrary power and utterly without justification or excuse."[2]

Whether Professor Langdell's article has convinced any or many who were previously of another opinion, the present writer has little or no knowledge; but he is clearly of the mind that it is proper for some one to examine the article, with some care, in the interest of legal truth and of public intelligence. Whether viewed as an essay in forensics, or as a plea for a reversal of popular and professional judgment, the article should have decorous and thorough consideration. Prof. Langdell needs no man's praise; he is too well and too widely known as a great and almost life-long teacher of law. He is, too, a great academical lawyer, as well as a great dialectician and polemist.

In view of all this the present writer has only to remark that if he may be thought to have essayed a temerous task in attempting a review of, or reply to, Prof. Langdell's article, he is comforted by the reflection that even Prof. Langdell has perhaps essayed a like task in undertaking to overthrow such a decision and decree of such a court as has now been described. The smooth pebble from the brook may yet have its virtue as against the doughtiest champion of an unsound cause. A further consolation comes to the present

[1] *Harv. L. R.* xvi. 549.
[2] *Idem.* 553.

writer in the thought of the real simplicity of the defence which is now called for, of the decision in hand.

Whoever has read or shall read the Langdell article will find the Act of Congress of July 2nd, 1890, known as the Sherman Anti-Trust Act, out of which the Northern Securities case has sprung, fully and correctly set forth, and it will not be necessary here to repeat at large its provisions.

It will be the aim of the present article to demonstrate: (1) That the Sherman Anti-Trust Act includes and applies to, and must have been intended to include and apply to, railways and railway companies; (2) That if it does so include and apply, the acts complained of by the United States in the Northern Securities case were forbidden by the Sherman Act, and warranted the bill in equity in that case and the decree of the court thereon; and (3) That at least three decisions of the Supreme Court of the United States absolutely dictated and compelled the decree of the Circuit Court, now under discussion.

It will probably be conceded, on all hands, that if these three positions are completely maintained, the article of Professor Langdell will have been answered and controverted.

The proper review of the Langdell article, to the great regret of the present writer, cannot be brief; though it can easily be made much briefer than the original article to be reviewed; for a considerable part of the article, consisting of what may be, not unfairly, styled mere disquisition, can be somewhat summarily disposed of. The article, *e.g.* contends at some length that the acts forbidden by the Sherman Act are not thereby made civil torts, because "a civil tort must necessarily be an injury to some person in respect to his personal rights or his rights of property."[1] Why this position, if conceded or established, should be regarded as of consequence, it is not easy to see. Whether acts in order to be properly or validly prohibited by statute must be thereby made civil torts, is a question as unimportant here as it is curious. The short of it all is that certain acts are forbidden by the Sherman Act and the Circuit Courts of the United States are invested with jurisdiction in equity to prevent and restrain the forbidden acts, and in addition the prosecuting officers of the United States are commanded to bring proceedings in equity to prevent and restrain such acts. Prof. Langdell nowhere seems to deny or even to

[1] *Harv. L. R.* xvi. 540, *et seq.*

question the power of Congress to do what is attempted to be done in the Sherman Act. It may be a discursive satisfaction to a law professor to show by elaborate disquisition that the Sherman Act is "a criminal statute, pure and simple," and that but for the jurisdiction conferred by the Sherman Act, "no court of equity could have entertained any suit founded on the Act." Here the impatient query and reply must be, "What of it? Does not the Sherman Act, by Prof. Langdell's own showing, denounce as criminal and forbid the acts charged against the Northern Securities Company, and give the Circuit Court jurisdiction to prevent and restrain them? If it does, does it matter whether the said acts are civil torts or not, or whether the Sherman Act is a criminal or a civil statute? And if it does not matter, why elaborate and labor the point?"

When, however, Prof. Langdell declares that the Sherman Act "has no application to railways or railway companies," he raises a more serious, or really serious, point.[1]

For aught we know, it may be true that "there is not, indeed," as Prof. Langdell asserts, "in the Act itself a single word which can lead anyone to think that its authors had either railways or railway companies at all in their contemplation"; and it may be further true that they did not intend to bring such companies within the purview of the Act. Be that as it may, the language of the Act does include them, for it directs its prohibitions against "Every contract (in the form of trust or otherwise), combination, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Railway companies are surely capable of entering into contracts, if not into combinations and conspiracies, though no reason has been given, or, it may be safe to say, can be given, why they may not enter into combinations and conspiracies. Now, it is a primary rule of legal construction that the scope and intent of a statute, or written instrument, are to be learned, first of all, from its language. If the language is clear, we look no farther. The Sherman Act expressly forbids or makes criminal, as we have seen, "Every contract, combination (in the form of trust or otherwise), or conspiracy," having a certain named intent or effect. There are no other words in the statute which limit, confine, or modify the full force of these quoted words. It may, therefore, be said absolutely that, as a matter of law and of fact, the Sherman

[1] *Harv. L. R.* xvi. 543.

Act includes all the inhibited acts when done by railways or railway companies, precisely as when done by any other person or persons; Section 8 of the Act expressly declaring that "The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign nation."

Prof. Langdell conceding, as he could not help conceding, that "If the acts so specified (*i.e.* in Section 2 of the Sherman Act) can be committed by railway companies as such, the words 'every person' are sufficient to include such companies," raises the question, "Can, then, railway companies commit the acts specified in Section 2?"[1]

The answer which he makes to this question brings us to the most remarkable part of the *Harvard Law Review* article. This answer is no less than amazing; amazing if coming from any mind or pen; more than amazing coming, as it does, from the mind and pen of a profound lawyer and student and teacher of law. The answer covers the larger part of two pages of his article, pp. 544-545. It must be read to be believed or appreciated. In brief and in exact substance, it is that the carriage of persons and goods is not trade or commerce; and that by consequence such carriage from State to State is not interstate trade and commerce; and hence railway companies as such "are not within Section 2 of the Act."

This is the answer and the argument, and the whole of it! Comment here is as impossible as it would be superfluous. It is only proper or becoming in the writer to beg all who are interested in this matter to read the above specified two pages of the Langdell article.

Prof. Langdell next attacks or criticises the decree in question, by asking, "Did Section 1 of the (Sherman) Act forbid the organization of the Northern Securities Company for the purpose of acquiring and holding a majority of the shares in the Northern Pacific and Great Northern Railroad Companies, and the carrying out of that purpose through the acquisition by that company of such shares?"

He begins his answer to this crucial question by remarking that "The Circuit Court of Appeals professed to follow three decisions of the Supreme Court arising upon the same statute," and he asks, "Was the Court right in thus holding?" To this question he answers, "No, it seems not."

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[1] *Harv. L. R.* xvi. 544.

Here, if nowhere else, it might have been expected that Professor Langdell would examine fully and carefully, at least respectfully, the three cases thus referred to, for they are indeed the essential foundation and substructure of the decree now under discussion. But the only examination or notice bestowed on these great leading cases[1] is embraced in just eight lines on p. 546 of the *Harvard Law Review,* Vol. xvi. !

It is necessary, however, to examine and state these three cases with circumspection and accuracy; for they are final determinations, as we all know, of the points which were properly involved in them.

The first of the three cases is *U. S. v. Freight Association,* 166 U. S. 290, a case interesting and authoritative in every view, no less than fifteen of the foremost lawyers of the country being engaged in its argument at Washington. The case is familiarly known to the profession as "The Pooling Case." One notable feature of the case arose from the fact that before the case was reached by the Supreme Court, the pool had been dissolved and abandoned. This fact was expressly considered by the court, and the court held that while parties to private suits involving only private rights, might thus terminate causes pending, yet as in this case public rights were concerned, these rights could not be thus foreclosed, or their determination thus withdrawn from the court, by the defendants, the railroad companies. Upon the point, too, of the amount involved—a jurisdictional question ordinarily strictly adjudged—the court held that a liberal view should be taken in this case for the facilitation of the decision of important public questions.

Two questions were then asked and answered by the court: *First.* Does the (Sherman) Act of July 2nd, 1890, cover common carriers by railroads? *Second.* If yes, does the pooling agreement here in controversy violate the said Act? The court held squarely, (1) that the Act does cover common carriers by rail; (2) that the pooling agreement is forbidden by the Act.

Disregarding for the moment the decision of the last question, of what avail can be the elaborate ratiocination of the Langdell article in the effort to show that the Act does not apply to railway companies? It cannot be said to exceed possibility, that if Prof. Langdell had presented his present argument to the Supreme Court before its decision was made, it might have prevailed; but does it

[1] *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290; *U. S. v. Joint Traffic Association,* 171 U. S. 505; *Addystone Pipe and Steel Co. v. U. S.,* 175 U. S. 211.

not border on gratuitous temerity, or at least super-confidence, to urge this argument now? If the greater still includes the less, it may be said without qualification that the pooling or Freight Association case more than covers the Northern Securities case upon the question of the application of the Act to railways and railway companies.

The second of the three cases—*U. S. v. Joint Traffic Association,* 171 U. S. 505—involved an agreement between thirty-one railroad companies doing business between Chicago and the Atlantic coast, which gave the association, called the "Joint Traffic Association," power over competitive business, to fix rates, etc. When this case reached the Supreme Court it was argued for the railroads, defendants, among others, by Messrs. Carter, Phelps, and Edmunds; a fact showing that in all human probability nothing was omitted which might be imagined to be of force or value in influencing the court towards a decision favorable to the railroad companies. The decision of the court was again squarely to the point, that the agreement there involved was obnoxious to right and to the Sherman Act. The court in this case states and lays down this proposition, which really ought to have made the Langdell article, as well as the reply of the present writer, wholly superfluous, not to say, professionally disrespectful; namely, "That Congress, with regard to interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce by shutting out the operation of the general law of competition."

The present writer pauses here long enough to observe that, in his humble judgment, the above proposition has never been exceeded in soundness, and rarely, if ever, in importance, in the long line of our Supreme Court decisions.

The third of the three cases—*Addystone Pipe and Steel Co. v. U. S.,* 175 U. S. 211,—involved the tenability of an injunction against the carrying on of an agreement between several companies engaged in the manufacture, sale, and transportation of iron pipe; the injunction having been upheld by the United States Circuit Court of Appeals for the sixth circuit, as in violation of the Sherman Act, in fixing prices, destroying competition, etc. This case was, as has been said, of companies engaged in the manufacture, sale, and transportation of iron pipe, which had entered into an agreement regulating prices of their goods.

Here again, in an opinion of perfect clearness and of force equal to its clearness, the court declares the agreement obnoxious to the Sherman Act as checking competition in interstate trade and commerce.

The three decisions now examined, of necessity, summarily are a veritable triple cord which no man can break, while they stand unreversed. They compelled the obedience of the court, which pronounced the decision in the Northern Securities case; they equally compel the assent, admiration, and gratitude, as it seems to the present writer, of the understanding and conscience of the citizen who recognizes the greatness and value of the function borne by our highest court.

There remains but one word more to be said; a notice of Prof. Langdell's discussion of the special question of the amenability of the Northern Securities Company to the provisions of the Sherman Act. This discussion is found on pages 546-554, and is naturally the backbone of his entire argument.

He begins [p. 546], by saying, "In the Northern Securities case, on the other hand," that is, in contrast to the fact in the three cases just examined, "there is only one person concerned, namely, the Northern Securities Company." Whether this fact, if conceded, would differentiate the latter case from the former cases, in principle or effect, need not be discussed here. But what are the facts in the Northern Securities case? The briefest possible statement of the case must here suffice. Instead of "only one person" being concerned in the Northern Securities case, there were certainly three persons; corporations, who were formal defendants on the record, as well as real defendants in the untechnical sense, namely, the *Northern Pacific Railway Company,* the *Great Northern Railway Company,* and the *Northern Securities Company.* These three defendants were as inextricably linked together as Chang and Eng. In fact, these corporations stood to each other in the precise relations of Milton's "subtle Fiend" to Sin and Death; and between them, in view of their designs, might have passed the words put by the great poet into Satan's mouth:

> "I bring ye to the place where thou and Death
> Shall dwell at ease, and up and down, unseen,
> Wing silently the buxom air, embalmed
> With odors. *There ye shall be fed and filled*
> *Immeasurably; all things shall be your prey.*"[1]

[1] *Paradise Lost,* Book IV., 840-845.

The first two of these three defendants were, in 1901, owners, respectively, of lines of railway extending from Minnesota to Puget Sound; being actually parallel and competing lines. Early in 1901, they united in purchasing nearly all the stock—98 per cent.—of the Chicago, Burlington and Quincy Railway Company, and made themselves joint sureties of the bonds of the last-named company, whereby the purchase was accomplished. Subsequently, in 1901, certain stockholders of the first two companies who practically controlled the two roads, agreed with each other to procure the formation of a New Jersey corporation to buy all, or the greater part, of the stock of the Northern Pacific and Great Northern Companies; the promoters of this agreement agreeing with each other to exchange their respective holdings of stock in the last-named companies for the stock of the New Jersey company, to the end that the New Jersey company might become the owner of the major part of the stock of both companies. Accordingly the Northern Securities Company came into existence as a New Jersey corporation, and almost at once acquired a large majority of the stock of both companies—about 96 per cent. of all the stock of the Northern Pacific, and about 76 per cent. of the Great Northern.

The scheme thus devised and carried into effect led at least to two inevitable results: *first,* it placed the control of the two parallel and competing roads in the hands of a single person, to wit, the Northern Securities Company; *second,* it destroyed all motive for competition between two parallel and competing roads engaged in interstate trade and commerce.

This was the Northern Securities case, as it presented itself to the Circuit Court of Appeals. The present writer pledges all his present small stock of professional reputation or learning for the entire accuracy and sufficiency of the foregoing statement of this famous case; destined, too, he firmly believes, to be far more famous in the future. He does not hesitate to believe that in the view of the general professional, and lay mind as well, the case must have been decided, by an honest and intelligent court, as it was decided; and that what has now been set forth in this notice of Prof. Langdell's article must force such conviction. Learning and skill, intellectual, professional, dialectical, and forensic, have spent themselves lavishly, and will to the end, in the effort to defeat the decision; but while reason rules and integrity presides over the courts, it will stand. It will do more than stand; it will be a monument and beacon marking, as the present writer certainly hopes as well as believes, a great victory in the long and perilous struggle of justice and right against the domination of individual and corporate greed and of individual and corporate wealth.

*D. H. Chamberlain.*

Columbia, S. C., Nov. 6, 1903.