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THE RIGHT OF A MAJORITY IN A CHURCH TO CHANGE ITS DOCTRINE AND RETAIN PROPERTY AGAINST A DISSENTIENT MINORITY.

The case of the Free Church of Scotland (*Bannatyne v. Overtoun* [1904] App. C. 515–764) decides that a majority in a church assembly cannot sacrifice a tenet of the church (in this case the belief that it should be established by the state),* for the purpose of paving the way to join with another church. The case, both because of the immense property involved, and the intricacy of the question, has aroused considerable interest even in this country, and it has been suggested that a similar judgment would not be rendered in the United States.

In *Watson v. Jones*, 13 Wall. 679—a similar case in an American Presbytery—Mr. Justice Miller classifies the situations under which the civil courts are called upon to adjudicate property rights in religious controversies as follows:

1. Where property has been expressly devoted to the teaching, support or spread of some specific form of religious doctrine or belief.

2. Where property is held by a congregation which by the nature of its organization, is strictly independent of other ecclesiastical associations, and as to its church government owes no fealty or obligation to any higher authority.

* This point was the common ground of the five judges who formed the majority of the Court, though some, especially the Lord Chancellor, presented auxiliary reasons.

3. Where the property is held by a congregation or ecclesiastical body which is but a subordinate member of some general church organization, in which there are superior ecclesiastical tribunals, with a general power of control.

The first division needed and needs no extended discussion—religious organizations come before the court in much the same aspect as any voluntary association. Its rights of property and the actions of its members are subject to the same restraints. So that although the acceptance of gifts under expressed conditions has, time after time, owing to change in the general religious attitude, had the effect of vitiating the influence of the donees, as is the present condition of the Andover Theological Seminary—or of greatly hampering their natural growth—of which the retarded principles of some of the theological seminaries in our best universities bear witness—nevertheless there can be no option in applying the specific trust. See *Attorney-General v. Pearson*, 3 Meriv. 353.

The second class of cases has grown considerably in importance in this country of late years. Since, and before, Justice Miller's opinion it has been held that any property given to an independent organization cannot be presumed to be devoted to the inculcation of the beliefs which happen to be held by the church at the time of the donation. *Baptist Church v. Fort*, 93 Tex. 215; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577. Indeed, the presumption might more naturally be that the donors—often not even of the same denomination as the church to which they give—are actuated rather by the purpose of advancing religious belief than of promulgating a strict creed. In these churches the vote of the majority governs the creed, doctrine and management of the church. *Keyser v. Stanisfer*, 6 O. 363. The right thus to change accrues only to independent congregations, though some connection with synods and assemblies, such as sending delegates or forming a weak federation in the nature of a synod, is allowable. *Landis' Appeal*, 102 Pa. 464. This right seems to be purchased at the cost of extreme difficulty in federations, such as the Congregational associations, being able to become beneficiaries.

As to the third class, of which the Free Church case is an example, the American view opposes the House of Lords. Justice Miller justifies his renunciation on the ground that even the Scotch "Free" Church is not free in the American sense, and was still less so at the time when English precedent grew up, being greatly hampered by statute.* His suggestion, moreover, that the tribunals and assemblies of the church are more fitted through their special learning to grapple with questions of doctrine, seems justified by the bewildered questions and expressions of the Law Lords in the Free Church case—expressions which wrung from the counsel for the

* For a full record of the cases under which the English doctrine grew up, see Shaw's Reports of Cases in the Court of Sessions.

appellees the aggrieved exclamation, "But, my lords, we are dealing with a subject which requires learning!" American courts hold the decisions of the religious judicatory conclusive, even respecting property rights. *Church v. Halvorsen*, 42 Minn. 503.

There has been no call to the United States courts to adjudicate questions involving so vast an amount of property as in the Free Church case—most of our decisions being anent the retention of his salary by some unwelcome incumbent, or the possession of some isolated church. Certainly the American view is not so likely to produce the lamentable results present in the decision of the English courts, nor to necessitate the appointment of an *ex post facto* legislative committee, as has that case.

It is not a pleasant task for our courts of law to be forced to examine intangible and indistinct questions of theology, and they will, as the court remarked in *Mason v. Muncaster*, 9 Wheat. 445, "examine into proceedings of religious bodies with indulgence, and will suppose their proceedings to be in conformity with existing rights."

THE TREND OF DECISIONS UNDER THE SHERMAN ANTI-TRUST ACT.

That vast and varied interests militate for the centralization of the Government of the United States is indisputable. The adaptation of the Federal Constitution to meet the exigencies of territory newly acquired; the ever-enduring construction of the implied powers of Congress; the application of the Sherman Anti-Trust Act in the Northern Securities and other decisions—these are some of the influences which, to many, threaten to render abortive the finely balanced division of powers devised by the framers of the Constitution, and which recall the admonition: "In proportion as the General Government encroaches upon the rights of the states, in the same proportion does it impair its own power and detract from its ability to fulfill the purposes of its creation."

Of a more serious import, however, than the adjudications of the Supreme Court is the recommendation recently made by the Commissioner of Corporations. This report urges federal license or incorporation—perferably license—of corporations engaged in interstate commerce. Presumably its purport is to enable the general government to regulate practically all of the large corporations of the country. This is indicated by the suggestion that the insurance business under present conditions is interstate commerce and as such should be brought under federal control, and this notwithstanding that the courts, commencing with *Paul v. Virginia*, 8 Wall. 168, have uniformly held that insurance is not interstate commerce. That such legislation would be a long stride in the growth of paternalism is manifest. That such legislation is favorably regarded by many is equally manifest by the report made by

the committee on Commercial Law at the last meeting of the American Bar Association, which took the position that the Sherman Act had reached the limit of its usefulness, and recommended legislation substantially along these lines.

In view of these conditions, we read with interest the recent case of *Swift & Co. v. United States*, 25 Sup. Ct. 276, rendered by a unanimous court, which may be regarded as a potent factor in the crystallization of the law under the Sherman Act, and which is a striking illustration, not only of the potentialities of that act, but of the desire of the justices for an efficacious enforcement of its provisions. The defendants in this case, composed of dealers handling a dominant proportion of fresh meats throughout the United States, formed a combination, unaccompanied by a fusion of property interests, the object and result of which was (1) to prevent competitive bidding in the purchase of live stock transported from the states of its origin and held for sale by the owners at various stockyards, and (2) to fix and maintain prices in the sale of meat thoughout the country. The Court held that the purchase of live stock under the conditions named constitutes interstate commerce—a point never before adjudicated—and that the general purpose of the agreement brought it within the prohibition of the Sherman Act.

A brief survey of the cases under the Sherman Act will be of assistance in considering the present decision. The first of these is *United States v. Knight*, 156 U. S. 1, where it was the opinion of a majority of the Court that a combination to purchase refineries throughout the United States, involving a fusion of property interests is not a restraint of trade, as the products of such refineries might never enter into the channels of interstate commerce. Little stress was laid upon the purpose to monopolize the sale, as it was regarded as merely an incident to the manufacture. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505, held that the act applies to railroads and contained *dicta* to the effect that it prohibits all agreements in restraint of interstate commerce, whether reasonable or unreasonable. In *Hopkins v. United States* 171 U. S. 578, and *Anderson v. United States*, 171 U. S 604, it was held that the act is not violated by an agreement among persons engaged, not in interstate commerce, but in furnishing merely a local aid and facility to commerce. Then the important case of *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, was decided, holding that a combination among formerly competing factories, accompanied by a division of territory, which restrained the sale as well as the manufacture of a commodity among the several states, is prohibited. *Montague & Co. v. Lowry*, 193 U. S. 38, held that an agreement between manufacturers and dealers in different states, whereby the prices of articles are fixed and controlled, is illegal. Following this *Northern Securities Co. v. United States*, 193 U. S. 197,

decided that an agreement between two parallel and competing railroads engaged in interstate commerce, whereby the control of both was given to a holding company organized for the purpose, thus destroying all motive for competition, is prohibited by the act.

Of the decisions enumerated above, two especially may be compared, with the present—the Knight and Hopkins cases. While Justice Holmes, who wrote the opinion in the instant case, remarked that the line of demarcation between this and the Knight Case was finely drawn, there are two distinctions worthy of mention: (1) In the Knight Case the subject matter of the combination was manufacture. It is true that monopoly of commerce among the states in the article manufactured might follow from the agreement, but it was not a necessary consequence. In the present case the subject matter was sales and the primary purpose of the combination was to restrain and monopolize commerce among the states in respect to such sales. (2) In the the Knight Case combination was effected by the acquisition of property rights and the consequent fusion of competing properties; whereas here the agreement did not accomplish any acquisition by any of the defendants of property rights in the business of the others. In this respect therefore the instant case may also be distinguished from the Northern Securities decision. The Knight Case was in effect modified by the Addyston Pipe decision; and in view of the Northern Securities Case, which involved an indirect restraint only, it would seem perhaps that the Knight Case would receive a different construction were it now to come before the court for the first time. While the dissentient opinions in the Northern Securities Case, in connection with Justice Brewer's statement, indicate that the court no longer adheres to the *dictum* in the Freight Association Case that the act prohibits all agreements in restaint of interstate commerce, whether reasonable or unreasonable—thus making the criterion of reasonableness the same as at common law—this position cannot be said to decrease the efficacy of the act, inasmuch as no combination has been declared illegal under its provisions which could not have been reached by an application of common law principles.

Again, the agreements between the defendants did not relate to a subject collateral or incidental to commerce or to anything that may be considered an instrumentality of commerce. They were made by persons engaged themselves in interstate commerce and in respect to the conduct of commerce itself. Therefore the case may be differentiated from the Hopkins Case, when the court deemed those in the combination to be engaged, not in commerce, but in furnishing merely a local aid and facility to commerce.

It is patent that there is a marked tendency on the part of the Supreme Court to broaden the significance of the term "interstate commerce" and to enlarge the scope of the Sherman Act, even at the expense of invading the domain of States'

Rights; this tendency being noticeable in the Addyston Pipe Case and especially so in the Northern Securities Case. In view, then, of the present construction of the Sherman Act and the increasing proof that the common law, even in the absence of statutory enactment, is sufficient, if manfully invoked, to protect the rights of individuals, may not those who favor local autonomy well ask that pause be given to additional repressive legislation in so far as it makes the Federal Government the depository of powers formerly residing in the states?

THE RIGHTS AND POWERS OF TELEGRAPH COMPANIES UNDER THE ACT OF 1866.

In the case of *W. U. Tel. Co. v. Penn. R. Co.*, 25 Sup. Ct. 133, recently decided by the United States Supreme Court, a definite, and probably final, interpretation has been put upon the act of Congress of 1866 relating to telegraph companies. Questions as to the rights and powers of telegraph companies have arisen a number of times under the following portion of the act: "That any telegraph company now organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States; provided, it does not interfere with ordinary travel on such military or post road." 14 Stat. at L. 221. By other acts, Congress declared all railroads post roads. Stat. at L. 5–271, 10–255, 17–283. Under these acts the telegraph company claimed the right to maintain its lines upon the right of way of the Pennsylvania Railroad Co. after the contract under which it came upon the company's property had expired. It maintained that the act gave a power equal to that of eminent domain, under the exercise of which it might remain upon the railroad's property as long as it did not interfere with ordinary travel. The railroad successfully contended that the act was merely declaratory of the interstate nature of the telegraph business, and intended only to prevent state interference.

In *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, the Court decided adversely to the existence of the right of eminent domain under the act. This decision was reaffirmed in *W. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239. In the Pensacola case the Court stated the fundamental idea and sole purpose of the statute to be the prohibiting of all state monopolies in commercial intercourse by telegraph, adding that the act gives no foreign corporation the right to enter upon private property without the consent of the owner; that whenever the consent of the owner is obtained, no state legislature shall prevent the occupation of post roads for telegraph purposes, by such corporations as are willing to avail themselves of its privileges.

Under the act there is no provision for condemnation proceedings nor for compensations. As stated in the Pensacola case, *supra*, "If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized." *Tel. Co. v. Cleveland L. R. Co.*, 94 Fed. 234. In *Sweet v. Rechel*, 159 U. S. 399, it is said that it is a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner. *Cherokee Nation v. So. Kan. R. Co.*, 135 U. S. 641; *Kohl v. U. S.*, 91 U. S. 367.

Postal Tel. Co. v. Ore. S. L. Co., 104 Fed. 623, and *P. Tel. Co. v. R. Co.*, 114 Fed. 787, appear to support the telegraph company's contention, but they were so influenced by state statutes that they have but little weight. And in *P. Tel. Co. v. So. R. Co.*, 89 Fed. 190, it was said that while the Act of 1866 gave the right to build on all post roads, yet the laws of North Carolina governed the method of exercising that right. However, in *St. P. R. Co. v. Tel. Co..*, 118 Fed. 497, the Court, where the telegraph company came upon the right of way with the consent of the owners, declined to compel it to remove, especially since it appeared that no express agreement for removal had been made when the lines were erected. It would also seem that *Osborn Co. v. Mo. P. R. Co.*, 147 U. S. 248, and *Elroy v. Kan. City*, 21 Fed. 257, support the proposition that where a court has general jurisdiction it may find a means of enforcing the right of eminent domain even though no provision has been made for compensation.

In the dissenting opinion of Justice Harlan, in *W. U. Tel. Co. v. Penn. R. Co.*, *supra*, much force is placed upon *Kohl v. U. S.*, *supra*, but in that case the power to condemn was given. It is also maintained that the Pensacola and Ann Arbor cases are mere *dicta* and not binding upon the courts. It must be admitted that, though the power granted by the Act of 1866 was discussed and passed upon, it was not directly in issue. Justice Brewer expressed the opinion that Justice Harlan's view was correct in theory but considered the Pensacola and Ann Arbor cases binding.