COMMENT UPON SOME RECENT NEW JERSEY CASES ON CORPORATE CONTRACTS IN RESTRAINT OF TRADE AND TO PREVENT COMPETITION.

Political divisions of states and the territorial limits of mercantile intercourse have seldom been coextensive. Buyer and seller have always sought each other according to their respective needs regardless of national lines. Commerce has followed natural routes, the easiest course to get the article from producer to consumer. Territorial limits of nations are increasingly disregarded by lines of trade, and those restrictive barriers imposed by governments have often proved ineffective or disastrous. More insistent grows the demand that politics shall not retard business. They must not conflict. Colonize and acquire by conquest, if you please—as yet that is allowed to remain only an affair between the mighty and the weak—but the open door of trade must be maintained. With the modern facilities of communication and transportation there are no territorial bounds set. From everywhere may orders be solicited and received; to any place within the four corners of the earth may goods, wares and merchandise be delivered. With the expansion of territorial lines has come a change in the manner of conducting business. When producer and consumer lived in the same city, village or shire, and the means of transportation were crude, labor was limited and cheap, and the capital invested was small and the risk slight. There was little need of association, for few enterprises were great enough to require it, and a partnership was found effective enough when individual initiative became unequal to the task of coping with ever-expanding mercantile enterprise. But the day of the individual business man or group of men as partners, carrying on an interstate business, is past. Progression has been from the individual, through the partnership and the comparatively modern corporation to the up-to-date combination or trust, "that many-headed, monster thing." While the rights of natural persons in

business were long since ascertained under the English system, and the law of partnerships formed by such natural persons by their own act and without state aid has been more or less fixed and stable for many years, the law of corporations which come into being only by express permission and grant from the sovereign is, in these United States, being made and unmade by legislatures and interpreted and declared by the courts from day to day. In England, corporate franchises are acquired from the state, but here, whilst the federal government does not produce such offspring, the number of sovereignties within its jurisdiction which have such productive capacities is only limited by the number of states. Citizens of the United States must, no matter how extensively the contemplated enterprise is about to be conducted, apply to some state for a corporate franchise. In the absence of necessity, economy discourages incorporation in every state in which business may be done, nor by such means can a company obtain identical existence from each state, but by interstate comity a company created by one state is allowed to carry on business in and across others. As corporations are thus exclusively the creatures of state law, the grant of franchise can only be revoked by the proper tribunal in the state of origin under rules and procedure established by it. The authority of other state jurisdictions and of the federal government over a state corporation is restrictive and even prohibitive, within certain limits, but does not go to the dissolution of the corporation itself. It is therefore essential to consider companies engaged in interstate commerce from two points of view, first with what powers and under what duties and obligations such companies come into being in the state of origin, and next to ascertain the restriction and prohibitions which other states, in which such companies do business, and the federal government, impose upon the exercise of such powers.

New Jersey is the leading state in the number and importance of incorporated companies. No other state, and indeed no nation, has given corporate existence to such an immense business concern as the United States Steel Company, whose financial transactions approach in size those of

the national government; or the Northern Securities Company, incorporated to manage, through ownership of stock, two competing railway companies, neither of which have a single tie or rail in the state of origin, but whose lines extend thousands of miles in other states.

One of the most important questions at present pending is what rights have such corporations in acquiring and holding and exercising ownership over shares of stock in other corporations, and especially in corporations which were theretofore rivals in business? In view of the decision just announced by the United States Circuit Court in the Northern Securities case, it is of interest, before discussing the effect of that decision, and the likelihood of its affirmance or reversal by the United States Supreme Court, to examine the power and obligations of such a company under the law of the state which gave it birth.

It is proposed to here discuss some recent decisions of the New Jersey courts declaring the law affecting corporations, in cases in which the aid of the court was invoked to enforce or to enjoin contracts in restraint of trade and those tending to monopoly or to prevent competition.

Natural persons are at liberty to do any act, subject to rights surrendered to government for the good of society. A corporation can only conduct its affairs to carry out the object of incorporation, under powers granted by the state and as expressed in the charter or implied by law. It has no natural rights. It is the creature of legislation. Under compulsion its must find authority in legislative grant for every function it seeks to exercise.

The general corporation act of New Jersey provides incorporation for any object or objects, to carry on any lawful business whatever, with certain exceptions; it confers certain defined powers upon all companies, and in addition those selected and specified in each particular certificate of incorporation, which are by implication accompanied by all others necessary and convenient to the ones so selected and appropriate to the business of the company. Any company may purchase, own and dispose of stock and bonds of other companies, domestic or foreign, and exercise all rights of ownership over them, including the right

to vote such stock. It may of course acquire, own, use and dispose of property and rights in any way useful and desirable to its business. It may, so far as any limitation appears in the enabling act, acquire control of all competing businesses, if its coin will stretch so far. Merging in a company created for the purpose, or combining, by companies engaged in similar business, is contemplated by a supplement to the act, and the terms under which such merger may take place are set out in detail; even a dissenting minority stockholder cannot prevent such merger, for (if the supplement act is constitutional, and it has not yet been questioned) the company may sell his shares, and compel him by order of court to transfer them to the company, in aid of such sale, and so be rid of him.

The powers of a company incorporated under this act, touching the right of the company to hold stock in rival concerns, and to contract to restrain trade and prevent competition, were well analyzed by Vice-Chancellor Green in *Ellerman* v. *Chicago Junction Railway, etc., Co.*[1] A bill was filed by stockholder seeking to enjoin the carrying out of a contract executed by the defendant company named, with three stockyard companies and two rival land-holding and railway companies. The contract, among other things, provided a settlement of suits between some of the parties, a purchase and holding of stock, by the Junction Company, of the two land-owning railway companies, and contained covenants that the stockyard companies would not, so long as the Transit Company (whose stock was owned by the Junction Company) conducted its business on its premises in Chicago, carry on there the business of stockyards for the general use of the public; and further, that for fifteen years they would not carry on the business of stockyards in or within two hundred miles of Chicago. The contract was criticised as not being within the chartered powers of the company in that it provided for purchase and ownership of stock and property of other companies, and for settlement of suits, and that some of the covenants were for non-competition and in restraint of trade. Passing briefly on the atti-

[1] 49 N. J. Eq. 217, 1891.

tude of the complainant stockholder before the court as of one whose property investment might be damaged by corporate acts of directors and who might therefore be entitled to relief, if such acts were found to be *ultra vires* or otherwise unlawful, the vice-chancellor found that the general act gives to all corporations organized under it general corporate powers and all others necessary to their exercise, the certificate of incorporation being the charter of the company and equivalent to a special act of the legislature; that a corporation so organized was vested with the powers conferred by the general act, and contemplated by the certificate, and such incidental powers as were convenient, reasonable and proper to carry out the general purposes of the company's creation; but such a company was not empowered to do those things which would deprive it of ability to carry out the objects for which it was formed, or to discharge any duties which it might, under its charter, owe to the public, or which were contrary to the policy of the law. The language of Lord Chancellor Selbourne was quoted with approval, that the doctrine of *ultra vires* should be reasonably applied, and what might be fairly regarded as incidental to and consequential upon the things which were authorized by the charter ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*. The certificate of the Junction Company expressly authorizing it to buy, hold, exercise ownership over and dispose of securities of persons and corporations, the contract was held to be not illegal in this regard; the covenants for compromise of suits and non-competition were thought not referable to any specification in the charter, but the power to make such agreements was incident to corporate management and business and was approved. Criticism of the covenants as being in restraint of trade was discussed. Mr. Freeman's formulation of the rule was approved, that "contracts which impose an unreasonable restraint upon the exercise of a business were void, but those in reasonable restraint were valid," and that validity of restrictions was to be governed by their reasonableness at the time of making the contract. It was held restrictions in question were reason-

able in time and territory, were necessary to afford fair protection to the interests of the party in whose favor they were given, and did not interfere with the interests of the public.

In *Willoughby* v. *Chicago Junction Railway, etc., Co. et al.*,[2] in which leading counsel of the New York, as well as the New Jersey Bar appeared, the same vice-chancellor filed the opinion, which was concurred in by Vice-Chancellor Van Fleet, who also heard the case. Another stockholder of the Junction Company attacked, on the same general grounds, a subsequent contract between the same and additional parties, containing, *inter alia*, similar agreements, but expressly annulling the contract examined in the *Ellerman* case. The court refused to disturb its findings in the *Ellerman* case and against complainant's insistment that it was not competent, under the laws of New Jersey, to organize a corporation, one of the objects of which was to hold the stock of another corporation, it was decided such a contention was an attack upon the original incorporation of the company and could not be presented to the court by a stockholder in an equity proceeding, but only by the attorney-general on behalf of the state.

So thorough was the examination of the law and so able were the opinions by the court, in these two cases, that despite the very large interests involved and the eminence of counsel engaged, neither case was appealed to the Court of Appeals. The soundness of these decisions has never been questioned.

Meredith v. *Zinc and Iron Company et al.*[3] was decided in 1897. Stockholders sought to enjoin performance of a contract entered into by rival mining companies, who had been carrying on litigation against each other for some time, to consolidate the various companies by sale and transfer to one of them of the properties of the others for cash and stock, take in other plants outside of New Jersey and increase the capital stock of the company to pay for such purchases. Some of the illegalities charged against the contract were that it was in violation of the company's charter, and of the original contract between the stock-

[2] 50 N. J. Eq. 656, 1892.

[3] 55 N. J. Equity, p. 221.

holders, because it provided for purchase of wholesale interests in a large number of corporations, and would result in the creation of a monopoly and thereby render complainant's stock and rights liable to forfeiture at suit of the state. It was decided, by Vice-Chancellor Pitney, that buying up by one corporation of the property of another and consolidating the whole into one business, to the extent and in the manner provided in the agreement, was not contrary to public policy, citing with approval the *Ellerman* and *Willoughby* cases. This case was taken to the Court of Appeals and there affirmed on the opinion of the vice-chancellor. It will be observed the contract passed upon contained, so far as mentioned in the report, no covenant in restraint of trade. The subject-matter was such as to make it unnecessary, being mines and property over which vendors could exercise no further control, after sale. It was found, too, that the ore produced by all of these mines was but a small fraction of that product throughout the country.

A different situation was presented to the Chancery Court in *Attorney-General et al.* v. *American Tobacco Co. et al.*,[4] also decided in 1897. The defendant corporation had been organized under the general act, in conformity with an agreement, theretofore executed, between a number of competing firms and companies engaged in making and selling cigarettes, their combined business therein amounting to 95 per cent. of such articles manufactured and sold in the United States. The agreement provided that all of the good-will, plants and property of the parties should be taken over by the company for stock, in certain proportions, and that none of the officers, without the unanimous consent of the board of directors, should engage in any similar business, etc. After the agreement was carried out and the company organized accordingly, its objects being, as set forth in its charter, to do a general tobacco business, and to cure, manufacture, buy and sell tobacco in all its forms, etc., the attorney-general, at the relation of two individual competitors, and the two competitors themselves, as parties complainant, then filed

[4] 55 N. J. Equity.

the bill against the parties to the agreement and the company, attacking the incorporation of defendant as being in fraud of the laws of the state, charging that the stock issues were in violation of the corporation act, and that the real purpose of incorporation, as evidenced by the preliminary agreement between the corporators and subsequent acts of the corporation, was to restrain jobbers and others from selling any paper cigarettes except those manufactured by the combination, and to prevent competition in such articles of commerce. The prayer was for decree that organization of defendant was unlawful, and that it had no power to use its corporate franchise to destroy competition in the business or to take over or carry on the business of the firms and corporations interested, or to injure or destroy business of competitors, and for injunction against parties to the agreement, restraining them from using the corporate organization of the American Tobacco Company in the conduct of their business, or in stifling competition in the business or in destroying or injuring the business of complainants and other competitors. In the opinion by Reed, V. C., the bill was held maintainable by the attorney-general, as the representative of the people, to protect them from acts alleged to amount to public injury, and by relators, as claiming to suffer special injury. It was said the bill directly challenged the existence of the corporation itself and that the law was settled in this state that a court of equity has no jurisdiction to consider such a matter; that neither an illegal issuing of the capital stock, nor the taking of any other defective step in the process of its organization, nor even unlawful intent in organizing, would make the corporate existence of the company amenable to equitable cognizance; that if the preliminary agreement was inimical to public policy, as tending to create a monopoly or destroy competition and control trade, yet it had been executed, and had ceased to have any efficacy. It was suggested if the agreement was bad, for the reasons advanced by complainants, it would have been unenforceable in any court, and that it was possible such a contract might have been annulled before execution, on a bill then filed by the attorney-general. It was

decided that the corporation had complied with the forms of law, and was certainly a *de facto*, and apparently a *de jure* corporation, and that as such it had power to manufacture and sell cigarettes and carry on its business in accordance with the powers named in its charter. On the subject of the disposition of its goods by the corporation which was sought to be enjoined, it was said that an individual manufacturer could sell his manufactured stock to whom he pleased, or on any terms he pleased, and could refuse to sell to any one with whom for his own reasons, however capricious, he did not care to deal; and that a corporation, acting within the powers granted it, was privileged to conduct its business in the same way. The court used this language:

"The fact that a corporation is an entity, representing an aggregation of skill and capital, does not curtail its right to transact the business which the state's charter empowers it to conduct with exactly the same freedom as a citizen. So long as by the policy of this state the formation of corporations is permitted, so long will the right of such artificial persons to act within the scope of their franchises be in no sense different from the right of an individual. The control of a court of equity over the business conduct of either is exactly the same. The contracts of either will be rectified, annulled or specifically enforced, and the duties of either as trustee or its right as *cestui que trust* will be enforced and protected. Any illegal conduct of either leading to irreparable injury will be enjoined. A nuisance created by either will be restrained. Indeed, whenever either an individual or corporation becomes related to any other individual or corporation, so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals or both corporations, or that one is natural and the other an artificial person."

And it was finally concluded that a court of equity does not possess authority to enjoin an act done by a corporation organized under the forms of law within the scope of the powers conferred upon it by its charter merely because of defects in the organization of the company, or because

it was organized with a design of exercising its powers illegally. The acts of the corporation since its organization were held to be legal, no illegal agreement made by it to combine with any other corporation or person to fix or establish a monopoly being presented to the court.

On appeal from decree entered the Court of Appeals affirmed on the opinon of the Court of Chancery.

The most recent case of large importance on the question of the power of corporations to prevent competition by buying up control of rival concerns is *Trenton Potteries Company* v. *Oliphant*,[5] decided in 1899, on appeal. The suit was on bill by the Trenton Potteries Company, to enforce contracts made with the Oliphants, in which they agreed not to carry on a competing business, sold to the complainant corporation, within certain limits of time and space. It was said that contracts of that sort generally declared enforceable were such as restrained trade, not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use of the business purchased and not otherwise injurious to public interests. Changed modern conditions were commented upon, as to whether or not the rule thus stated was not too broad for modern conditions; but that question was not decided, as it was held that the contracts before the court were not in general, but only in partial restraint of trade. But on the question of whether or not sanitary pottery ware was a necessity of life, and that the public might therefore have such an interest in its manufacture and sale that public policy would justify judicial interference and refusal to enforce illegal combinations to enhance its price, it was held that the facts did not show clearly that the public would suffer by the enforcement of the contracts; and it was further said that, while contracts restraining or limiting competition in the production of that ware might be repugnant to public interest, such restraint or limit might result from contracts which the courts are bound to enforce; and that a person engaged in any manufacture, having the right to acquire and possess property, might lawfully buy the business of any of his competitors, and that,

[5] 58 N. J. Equity, p. 507.

in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired, the courts could impose no limitation; they would be obliged to enforce such contracts, notwithstanding the effect would be to diminish or even to exclude competition.

Passing on to whether a corporation was vested with like powers, it was said that a corporation may lawfully do any act within the corporate powers conferred on it by legislative grant; that, under New Jersey corporation laws, authority may be acquired by aggregations of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade; that such corporations might purchase and hold the stock of other companies, and that under such powers it was obvious that a corporation might purchase the plant and business of competing individuals and concerns; that in the absence of prohibition or limitation by the legislature of such corporate powers, it was impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy; that the grant of the legislature, authorizing and permitting such acts, must fix for the courts the character and limit of public policy in that regard, and that it followed that a corporation empowered to carry on a particular business might lawfully purchase the plant and business of a competitor, although such purchase might diminish or, for a time at least, destroy competition; and that contracts for such purchase could not be refused enforcement. Such was the language of the Court of Appeals, speaking through the present chancellor, then the chief justice.

Further discussion of these cases and of some federal decisions affecting New Jersey corporations engaged in interstate commerce will be carried on in another article.

Norman Grey.

Camden, N. J.