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Present Status of the Commodities Clause of the Hepburn Act

THE PRESENT STATUS OF THE COMMODITIES CLAUSE OF THE HEPBURN ACT.

The states of Pennsylvania and New York began to feel the need of developing their anthracite coal fields in the early part of the 19th century. The legislatures of these states in 1823 incorporated the Delaware and Hudson Company, authorizing it to construct a canal from the anthracite coal fields of Pennsylvania to the Hudson River. The company was very successful in developing and fostering the coal industry and gradually became a tremendous corporation, owning and controlling several railroads and coal mines. Many millions of dollars were expended on the project. The Erie Railroad was chartered by New York in 1832, and in the same manner has acquired large interests in coal mines along its line. The Central Railroad of New Jersey was incorporated by New Jersey, which authorized it to hold stock in any other corporation either in New Jersey or elsewhere. The authority of the company was also sanctioned by two acts of assembly of Pennsylvania, one of which, approved in 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of the Commonwealth." Pursuant to this act the company has expended a vast amount of money in purchasing coal mines. The Delaware, Lackawanna and Western, Lehigh Valley, and Pennsylvania railroads were encouraged to purchase coal lands under similar enactments.

The evils of this system became apparent as the activity of railroads in the coal business increased. Independent coal mining companies found that the railroads would not furnish them with sufficient cars to send their coal to market, and that the railroads were lowering the price on coal, making up any loss thus incurred in earnings by the railroad on the increased tonnage caused by the lowered price. These and other abuses compelled the coal companies to either sell out or lease to railroads, or close down their mines.

Congress, realizing the dangerous power thus being wielded by the railroads, passed, on June 29, 1906, an amendment to the Interstate Commerce Act, which recited:

"From and after May 1, 1908, it shall be unlawful for any railroad company to transport (in interstate commerce) any article or

commodity other than timber * * * manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."[1]

As soon as this act went into effect the United States by its Attorney General filed six bills in equity against different railroad corporations;[2] Delaware and Hudson, Central of New Jersey, Delaware, Lackawanna and Western, Erie, Pennsylvania, and Lehigh Valley. There were also filed at the same time petitions in mandamus upon the same alleged facts.[2] It was not disputed that the railroads in question did mine and sell coal, but they attacked the right of Congress to pass such a law, destroying their property gained through a legitimate exercise of their functions as expressed in their charters. After reviewing the history of railroad development, especially as to acquiring coal interests, the court says:

"The enactment in question is not a regulation of commerce, within the meaning of those words, as used in the commerce clause of the Constitution, and therefore not within the power granted by that clause. It never has been decided that the power conferred upon Congress to regulate interstate commerce may be so expanded by construction as to warrant the prohibition of such commerce under all circumstances; and to us it does not seem to be reasonably possible that it should be. Moreover, this power, whatever its scope, certainly is subject to the limitations contained in the Constitution, and this can be said with especial emphasis as to those limitations found in amendments adopted after the ratification of the Constitution. Carroll v. Greenwich Ins. Co., 199 U. S. 401-410, 26 Sup. Ct. 66, 50 L. Ed. 246. It seems perfectly plain, then, that Congress cannot, in the exercise or pretended exercise of any legislative power conferred upon it, deprive any person within its jurisdiction of his liberty or property, without due process of law, nor can it be questioned that, with the possible exception of the war power, this is true, no matter under color of what power such deprivation is sought to be accomplished. No argument should be necessary, therefore, to show that this cannot be accomplished by an enactment in assertion of power under the commerce clause of the Constitution."

One member of the court dissented, proceeding upon the assumption that, as the commodities clause provided for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of

[1]34 Stat., at L. 585, Chap. 3591; Comp. Stat. 1913, Para. 8563.
[2]U. S. v. Delaware and Hudson Co., 164 Fed. 215.

Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even though to do so might in some way indirectly effect valid rights derived from prior state legislation.

On appeal[3] the Supreme Court said:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars Indemnity Co. v. Jarman, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Com. Comm., 211 U. S. 407."

The government contended that the phrase "any interest, direct or indirect," as used in the commodities clause, forbade a railroad to transport any article manufactured or owned by a bona fide corporation in which the railroad owned stock, however small the holding might be. The defendants claimed that the phrase meant any legal or equitable interest in the commodity itself. After considering the two contentions, the court says:

"If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded.

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manu-

[3]U. S. v. Delaware and Hudson Co., 213 U. S. 366.

factured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore articles or commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

"The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in New Haven R. R. Co. v. Interstate Com. Comm., 200 U. S. 361."

As to the contention of its invalidity based upon the due-process clause of the Fifth Amendment, the court says:

"These contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. * * *

"Without elaborating, we hold that contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike."

In reversing the cases the Supreme Court gave directions for such further proceedings as might be necessary to apply and inforce the statute as they had interpreted it. The United States then asked leave in the Circuit Court to file an amended bill to the equity case against the Lehigh Valley Railroad, but the Circuit Court denied leave to so file on the ground that nothing substantially new was contained in the amended bill. The United States moved for a decree dismissing its original bill without prejudice, and this motion was also denied. Thereupon, on motion of counsel for the defendants, the court dismissed the bill absolutely. The government prosecuted an appeal[4] relying for reversal on the error which it was insisted was committed in refusing to allow the proposed amended bill to be filed and in dismissing the suit. The

[4]United States v. Lehigh Valley R. R. Co., 220 U. S. 257.

court decided that error was committed in denying leave to file the amended bill and reversed the decree below. For the purpose of deciding whether the government's motion should have been allowed the Supreme Court necessarily assumed that the averments of the amended bill were true. (For summary of the bill see 213 Fed. 245.)

"That the facts thus averred and other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company, so far as its right to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal company and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, * * * "

However, on January 27, 1913, the amended bill was dismissed with the consent of the government, but without prejudice to the right to bring a new suit.

The next move of the United States was to institute a suit in equity against the Delaware, Lackawanna and Western Railroad Co. and the Delaware, Lackawanna and Western Coal Co.[5] In an effort to comply with the commodities clause the Lackawanna Railroad formed a new corporation called the Delaware, Lackawanna and Western Coal Co., selling the stock of the coal company to the stockholders of the railroad. It naturally resulted that the group who controlled the railroad also controlled the coal company. A contract was entered into by the two companies whereby the railroad sold all of its derricks and appurtenances for handling coal at the mines to the coal company and agreed to sell all of its coal to the coal company at the mines. This contract is fully set out in 213 Federal Reporter, pages 255-59. The substance of the con-

[5]U. S. v. Delaware, Lackawanna and Western R. R. Co., and D. L. & W. Coal Co., 213 Fed. 240.

tract was: that (a) The railroad agreed to sell and the coal company agreed to buy all of the coal which the railroad mined or acquired. (b) The price to be 65 per cent of the New York price on all prepared sizes. (c) The amount to be delivered to be at the option of the railroad. (d) The coal company was not to buy coal from any other source. (e) The coal company was to sell the coal so as to preserve the best interests of the railroad. (f) The coal company was to continue to fill the orders of the present customers of the railroad even though some of them were unprofitable. (g) The railroad leased to the coal company all of its docks at 5 per cent of their value. (h) The contract was to be terminated by either party on giving six months' notice.

The government attacks this contract on the ground that it obliterates all distinction between the two companies and that the power of the railroad has been so exercised as to commingle the affairs of the two companies to make both corporations to be one for all purposes. The government asks the court to enjoin the defendant from "Shipping, transporting, or causing to be transported, any anthracite coal, the product of mines owned by the defendant railroad company, or purchased by it from others, and sold, transferred, or delivered to the defendant coal company, in pursuance of the above described agreement or arrangement existing between them, or any similar one." In its opinion the court says:

"That the transactions between the two companies began and have been carried on in good faith, in obedience to the decision of the Supreme Court and in reliance thereon; that the distinction between the two companies has not been obliterated; that their affairs have not been so commingled as by necessary effect to make their affairs indistinguishable; and that the two are not one for all purposes, but are two distinct and separate legal beings, actually engaged in separate and distinct operations. It follows that the railroad does not own the coal in question, either in whole or in part, during its carriage, but has in good faith dissociated itself therefrom before the beginning of the act of transportation."

As to the government's contention that the railroad retains an interest in the larger sizes of coal while it is being transported, because the contract contained the provision relating to the price to be paid for these sizes:

"We think it is clear that after the title passes to the coal company at the mines the railroad retains nothing more than an interest in the price, and that this is not the same thing as an interest in the coal."

The interest claimed by the government because the stockholders of the railroad and the coal company are identical has no foundation, for a person who owns stock in a railroad is not prohibited thereby from owning stock in a coal company.

The court entered a decree dismissing the bill without prejudice to the right of the government to institute other proceedings any time the situation changed to warrant such proceedings. In reviewing the case on appeal to the Supreme Court,[6] Justice Lamar condemned the contract as being one which rendered the coal company a mere agent of the railroad with no independence or right to carry on a coal business except to the extent that the railroad permitted. However, he says:

"Mere stock ownership by a railroad company, or by its stockholders, in a producing company, cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the commodities clause was under discussion attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the commodity clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock." * * *

"The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a sales agency the transportation was illegal because the railroad company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-Trust Law. The validity of the contract cannot be determined by consideration of the single fact that it did not provide for a sale. It must be considered as a whole, and in the light of the fact that the sale at the mine was but one link in the business of a railroad engaged in buying, mining, selling, and transporting coal. * * *

"The coal company was neither an independent buyer nor a free agent. It was to handle nothing except the railroad's coal, and was the instrument through which the railroad sold all its product. The coal company, though incorporated to do a general coal business, was dependent solely upon the railroad for the

[6] U S. v. Delaware, Lackawanna and Western R. R. Co., and the D. L. & W. Coal Co., 35 Sup. Ct. 873.

amount it could procure and sell, and was absolutely excluded from the right to purchase elsewhere without the consent of the railroad company, which, however, was under no corresponding obligation to supply any definite amount at any definite date."

The decree of the Circuit Court was reversed, with directions to enter a decree enjoining the railroad from further transporting coal under the provisions of the contract.