THE MERGER DECISION

Justice Harlan, speaking for a majority of the United States supreme court, has sustained, in the most emphatic language, the circuit court decision against the Northern Securities railway merger. The opinion delivered by Justice Harlan covers all phases of the case and announces the doctrine that any combination tending to restrain commerce between the states or with foreign nations is unlawful. According to Justice Harlan's decision, it is not necessary to show that the restraint is complete. When the natural effect of an agreement is to prevent competition, the agreement is in restraint of trade and prohibited by law. To prove that a combination or monopoly exists within the meaning of the law, it is not necessary to show that the immediate effect is to suppress competition or establish a monopoly. It is sufficient to show that they tend to bring about these results.

Justice Harlan very clearly shows that the opinion of the court does not interfere with the rights of the states and that no other power than the federal is competent to deal with interstate trusts. On this point, Justice Harlan says:

> "Is there, then, any escape from the conclusion that, subject to such limitations, the power of congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce? If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?"

Referring to the contention that interference by the federal government with the affairs of a state corporation would be an invasion of the rights of the state, under which the company was chartered, Justice Harlan said:

> "We reject any such view of the relations of the national government and the states composing the union. It cannot be given effect without destroying the just authority of the United States. Every corporation created by a state is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the states, in violation of an act of congress, is hostile to the reserved rights of the states.
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> "The federal court may not have power to forfeit the charter of the securities company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate nor diminish or increase its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, as lawfully expressed by congress, it may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce."

It is particularly important to observe that Justice Harlan leaves no ground for the violators of the anti-trust law to stand upon. Evidently, in his opinion, lawlessness is lawlessness and there can be no such thing as a "reasonable" violation of the law.

Justice Harlan said that whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which the court need not consider or determine; but he adds:

> "Many persons, we may judicially know, of wisdom, experience and learning believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history; indeed, that the time has come when the public needs to be protected against the exactions of corporations wielding the power which attends the possession of unlimited capital."

He pointed out that the law declares to be illegal "every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever make the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states, or with foreign nations."

The following extracts from Justice Harlan's opinions on this point will be of interest:

> "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but is directed against all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy or monopoly upon such trade or commerce.
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> "That railroad carriers engaged in interstate or international trade or commerce are embraced by the act.
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> "That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act.
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> "That congress has the power to establish rules by which interstate and international commerce shall be governed, and by the anti-trust act has prescribed the rule of free competition among those engaged in such commerce.
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> "That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce is made illegal by the act.
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> "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition, restrains instead of promotes trade and commerce.
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> "That to vitiate a combination, such as the act of congress condemns, it need not be shown that such combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

The opinion of the court as delivered by Justice Harlan is the most striking arraignment of the trust system that has ever been made in the history of this country. In effect, it holds with the democratic national platform that "private monopolies are indefensible and intolerable."

The only weak point in the attitude of the majority is in the opinion delivered by Justice Brewer. While agreeing with Justice Harlan and his associates in the conclusion reached in this particular case, Justice Brewer discriminates between reasonable and unreasonable restraint of trade. Justice Brewer holds that the purpose of the lawmakers "was to aid a statutory prohibition with prescribed penalties and remedies to nullify those contracts which were in direct restraint of trade, unreasonable and against public policy."

Justice Brewer intimated that he held with the majority because he looked upon the Northern Securities merger as "an unreasonable combination in restraint of interstate commerce—one in conflict with state law and within the letter and spirit of the statute and the power of congress." But, Justice Brewer said that some of the recent decisions of the supreme court in the anti-trust cases had gone too far, and he added:

> "Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were in themselves unreasonable restraints of interstate trade, and therefore within the scope of the act. Congress did not intend by that act to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."

It will be seen, therefore, that while Justice Brewer concurred in the judgment of the court in this particular case, he is distinctly at variance with Justice Harlan and his associates in the clear and striking interpretation they put upon the law. Should Justice Brewer's theory prevail the entire question as to what the law prohibited would be left to the court and would be determined by an inquiry into the reasonableness or unreasonableness of the violation; and so, while this decision is of the greatest importance, we may find in the next case Justice Brewer joining the four justices who took their stand on the side of the trust system, and holding that the restraint is "reasonable" and therefore lawful.

Aside from this particular consideration, large significance attaches to Justice Brewer's opinion. The Brewer theory relates to the Foraker bill recently introduced in the senate. This feature is referred to in another article in this issue.

The dissenting opinion of Justice Holmes is, in at least one particular, of great importance. Justice Holmes said that, logically construed, the decision should be followed by the criminal prosecution of the parties at interest. That is quite true and it remains to be seen whether the administration will avail itself of the powerful weapon within its reach. It may be said, however, that there is no likelihood that criminal prosecution will follow in any case. On the contrary, republican newspapers, speaking evidently with authority, say that it is not the purpose of the administration to proceed against other trusts or in any wise engage in an anti-trust crusade.

Emphasis has been laid upon the fact that of the four justices who dissented from the opinion of the majority of the court, three are democrats. These are Chief Justice Fuller, Justice White and Justice Beckham. Democrats may not fairly be held responsible for the attitude of these three justices. They were appointed by Mr. Cleveland and evidently reflect the sentiment of the Cleveland element. It is fair to say that the attitude taken with respect to the trust question by these Cleveland appointees would be reflected in any administration controlled by the Cleveland wing.

All for Capital.

Secretary of War Taft has made a trip to Wall street to interest capitalists in the Philippines. Starting out with the theory that American capital must be induced to go to the Philippines it will not take the administration long to reach the second proposition, namely that it must make the terms liberal, as liberal as is demanded, and as it will be giving away property belonging to the Filipinos and giving it to influential Americans the inducements are likely to be sufficient. Then having, by generous promises, induced American capital to go to the Philippines the administration will insist that a large army and navy are necessary to protect American interests there, and the more liberal the concessions to capital the more soldiers will be needed to hold in subjection the despoiled and disinherited natives.

Nothing shows better the commercialization of the American conscience than the willingness of so many republicans to turn the Filipinos over to the tender mercies of the syndicates organized in Wall street for their development.

But how can we expect the plundering of distant islands to arouse public indignation when trusts are allowed to oppress our own people, when railroads are permitted to collect dividends upon watered stock, and when American financiers are invited to convert the federal treasury into a business asset?

If it seems that everything done in the Philippines is done for capital, it does not improve the situation to know that our domestic legislation is also very largely in the interest of capital—not in the interest of that capital which represents the slow accumulations of honest effort and is widely diffused, but that capital which represents the pilferings of predatory wealth. For a quarter of a century the corporations have been increasing in size and in boldness and now that the resources of this country are about monopolized the administration solicits capitalists to enter the virgin fields of the Orient. How long will it be before the public conscience will be awakened and an effective protest be made?

Attorney General Knox seems to think that having shown that the trusts can be killed it is not necessary to do more. He is like the old toper who, having shown that he could go by a saloon without going in, rewarded himself by going back and taking a drink.

So many cartoons are malicious that it is refreshing to find one that contains a little innocent fund. The editor has recently had his attention called to one of these which appeared in the Indianapolis Journal. It appeared while Mr. Bryan was in Russia and represented him as sipping tea with the czar. The following was, according to the Journal, the conversation: The Czar: "Havesky you ever triedovitch to be presidentsky?" Mr. Bryan: "Yesovitch; twicesky."