Justice John M. Harlan's Great Dissenting Opinion

Special dispatch to the Chicago Record-Herald: Washington, May 16.—The dissenting opinion in the Standard Oil case delivered in the supreme court yesterday by Associate Justice Harlan, orally and without notes, was available in its entirety tonight for the first time. The opinion is expected to be further elaborated later.

Justice Harlan in his opinion stated from the bench held that his brother judges had no right to usurp the functions of the legislative branch of the government by writing into the statute a differentiation between "reasonable" and "unreasonable" restraint of trade. He declared that congress had resisted all appeals so to amend the act and that there was every reason to believe that such amendment never could be put through the legislative branch.

Under these circumstances and in their extremity great aggregations of wealth applied to the court in an effort to have it construe the law in a way that would be a flat reversal of what it had held on two previous occasions.

Justice Harlan declined to be a party to such a reversal, and hence his dissenting opinion. He denounced as "the most alarming tendency of the day" the tendency to judicial legislation. Men of power, he said, always were trying to get the courts to do what congress would not.

TEXT OF HARLAN'S OPINION

Justice Harlan said:

I feel constrained by a sense of duty to state some objections which I have to the opinion of the court, which I have heretofore examined in typewriting.

I shall not say anything about the decree except to say that upon hearing the arguments on this act some years ago, and since my examination of this case, I came to the conclusion that the decree of the circuit court was substantially right in all particulars.

As to the modifications referred to by the learned judge, when I see the opinion and the decree in print I can understand them better; and in the opinion which I am hereafter to file I can express my views distinctly as to those modifications.

As to all the chief justice has said about the illegal combinations of this oil company and its coming within the anti-trust act I cordially concur.

SEES CAUSES FOR ALARM

There are, however, some things in this opinion, and some that are to result from this opinion, which I think may very well alarm thoughtful men, or many thoughtful men; and I am unwilling to let them pass with any idea that I approve them.

The anti-trust act of 1890 was passed at a time when this country was in a state of great unrest, arising out of enormous aggregation of capital in a few hands, and arising out of combinations which had their hands upon the throat of this country in respect even to the necessities of life; and congress had before it the great question as to how these evils were to be remedied, so far as congress had the power to remedy them.

The question was: What shall we do? They finally, after great debate by able statesmen, passed the anti-trust act of 1890.

PROVISIONS OF THE LAW

Let me call your attention to a few of the words of that act. It provides, in section 1:

"That every contract, combination in form of trust or otherwise, or conspiracy"——

Not in restraint of trade, as the learned chief justice said in one part of his remarks, but——

"* * * in restraint of trade among the several states and with foreign nations is hereby declared to be illegal."

Congress has nothing to do with domestic trade in the states, but as to interstate trade it has a great deal to do, and therefore it fell upon this policy.

The men who were in the congress of the United States at that time knew what the common law was about the restraint of trade. They knew what restraints of trade at common law were lawful and what were unlawful. But congress said:

"The surest way to protect interstate commerce is not to start upon any distinctions at all as to the kinds of trade; 'every' contract in restraint of trade among the states is hereby declared to be illegal."

QUESTION OF MONOPOLIES

Then, in the second section:

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize"——

Monopolize what?

"Any part of interstate trade or commerce shall be liable to the penalties prescribed by this act."

What becomes, then, of the statement that this act did not condemn monopoly in itself? Did not these men know what a monopoly was? And when congress said that we will punish any man who monopolizes or attempts to monopolize any part of interstate commerce, did it not know what it intended? That is not all:

"Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the states, is hereby declared illegal."

ANY RESTRAINT ILLEGAL

Therefore congress said to all the people of this country:

"We are not going to bother the courts or ourselves with any inquiries as to what contracts are in restraint of trade, reasonably or unreasonably. We are not going to leave that to any jury. We are not going to leave that to any circuit judge.

"We will determine it as a part of the policy of the United States, that, so far as interstate trade is concerned, no body or corporation shall make or attempt to enforce a contract, any contract, that in any degree restrains interstate trade."

Can anybody doubt the meaning of those words? If you say two and two make four you do not make it any plainer than these words make out the intention of congress.

What occurred next? Look at this, step by step, and I shall get, directly, to the part of this opinion that I say may well alarm the country, notwithstanding the many good things that are in it, magnificently said.

TRANS-MISSOURI CASE

In 1896, fifteen years ago, a case was in this court known as the trans-Missouri case. The railroads in that case had come to make an agreement about rates, and the question was whether or not that agreement was in violation of the anti-trust law of 1890.

That question involved the construction as to the scope and meaning of that anti-trust law. Who was here to instruct the court on that occasion? We hear a good deal about the "lamp of reason." We hear that the time has come when we should hold up the light of reason and look at this act; as if the men of that day, freshly after the pasage of the act, were moving about in darkness and did not know what they were doing or saying.

Let us see who were the men in the case that were moving about in darkness and did not have the light of reason by which to interpret the act.

In the first place, there was here in that case—I well remember it; and I said at the time I had never heard, in all my professional life, a more magnificient argument than was made in that case—who was here in that case to enlighten the court?

LEGAL EXPERTS IN CASE

First, the attorney general of the United States, William F. Guthrie of New York, John F. Dillon of New York, James C. Carter, the leader of the American bar of that day; Edward J. Phelps of Vermont, Lloyd W. Bowers, as representing some of the railroads—one of the greatest lawyers this country ever has had, and John G. Johnson of Philadelphia was on one of the briefs.

Those were the men who were before this court at that time. And what was their contention? That that act of congress did not embrace reasonable restraint of trade, but only unreasonable restraint of trade. That was the question that they pressed upon this court.

What did this court say? Pardon me for reading a little to show exactly what was in their minds.

QUOTES JUSTICE PECKHAM

It is said in an opinion delivered by a great jurist, Mr. Justice Peckham:

"While the statute prohibits all combinations in the form of trusts or otherwise, the limitations are not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form."

And then they came directly to the question pressed by these eminent lawyers upon the attention of the court, and the court said in the opinion:

"The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroads. What is the meaning, the court asks, of the language used in the statute, that every contract, combination in the form of trusts, or otherwise, or conspiracy in restraint of trade or commerce among the states; or with foreign nations, is hereby declared to be illegal?"

MEANING IS ANALYZED

"What is the meaning of that?" asks the court. "Is it confined to a contract or combination which is only an unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers:—'all contracts of that nature'—all contracts that restrain trade at all among the states are prohibited by this statute.

"It is now, with much amplification or argument, urged that this statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it means only to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law——"

We hear a good deal about that in this opinion—

"That the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and where that term is used in the federal statute it is not intended to include all contracts in restraint, but only those which are in unreasonable restraint thereof."

DECISION OF THE COURT

That was the argument of these eminent lawyers. The court says:

"By the simple use of the term 'contract in restraint of trade' all contracts of that nature, whether invalid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.

"When, therefore, the body of the act pronounces as illegal every contract or combination in restraint among the several states, the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all the contracts are included in such language, and no exceptions or limitations can be added without placing in the act that which has been omitted by congress."

QUOTES OPINION FURTHER

Another part of the same opinion reads:

"The arguments which have been addressed to us suggest that the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that congress, notwithstanding the language of the act could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade.

"Whether that be the result or not we do not know and cannot predict. These circumstances"——

I call attention to those words:

"These circumstances are not for us. If the act ought to read as contended for by defendants congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable.

"Large numbers do not agree that the view of the law taken by defendants is sound or true in substance, and congress may, and very probably did, share in that belief in passing the act.

PUBLIC POLICY IN STATUTES

"The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate