Harlan Says the Court Makes Black White and White Black; "People Will Not Submit"

"Ninety Millions of People---All Sorts of People With All Sorts of Opinions---Are Not Going to Submit to the Usurpation by the Judiciary of the Functions of Other Departments of the Government and Power to Declare Public Policy of the United States"

Washington, May 29.—(Special to New York World)—Associate Justice Harlan delivered a vigorous dissent today to part of the decision of the supreme court of the United States in the Tobacco trust case, although he agreed that the American Tobacco company and its accessory and subsidiary corporations were members of an unlawful combination in violation of the Sherman anti-trust act. He said:

"I concur with some things said in the opinion just delivered for the court, but some observations are made in the opinion from which I am compelled to withhold my assent. What I have now to say must necessarily be oral, for the court's opinion was not delivered to me until late Saturday evening, and it has been impossible for me, since then, to put in writing the views which I deem it necessary to express. I do not refer to this by way of complaint, for the delay in delivering to me a copy of the opinion of the court has no doubt been unavoidable. I will hereafter prepare and file a written opinion expressing my views fully.

AN ILLEGAL COMBINATION

"I agree with the court in holding that the principal defendant, the American Tobacco company, and its accessory and subsidiary corporations and companies, including the defendant English corporations, are co-operators in a combination which, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, are illegal under the anti-trust act of 1890 and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

"The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details that will effectually suppress the evils of the combination in question. But the court sends the case back with the direction to further hear the parties so as to ascertain whether a new condition cannot be recreated in harmony with the law. I have found nothing in the record which makes me at all anxious to perpetuate any new combination among these companies, which the court concedes had at all times exhibited a conscious wrong-doing.

"The court says: 'The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.'

FORM OF THE DECREE

"Why should this court with a record before it that enables it to indict that corporation, and to say, in substance, that it is an enemy and a menace to the public interests, order this case to the circuit court, not to exercise its discretion, but to hear the parties again by evidence or otherwise, to see if they cannot create a condition consistent with the law? I will not now say what should be the details of the decree or the order hereafter to be made, nor speculate as to what the details of that decree should be, when this miserable combination is given an opportunity to let itself down easy before the public, after what it has done toward the public according to the language of this court it will be time enough to speak on that subject when we have the decree before us.

"THE COMBINATION IN QUESTION ILLEGAL UNDER ANY CONSTRUCTION."

"Why should this court with a record before it that enables it to indict that corporation and say it is an enemy and a menace to the public interests order this case to the circuit court to see if they cannot create a condition cinsistent with the law?"—"This miserable combination is given an opportunity to let itself down easy before the public."

"I will, however, say now that in my opinion the decree below should be affirmed as to the tobacco company and its accessory and subsidiary companies, and reversed on the cross-appeal of the government.

"But my objections have particular reference to those parts of the court's opinion which reaffirm what it said recently in the Standard Oil case about the former decisions of this court touching the anti-trust act. We are reminded again, as we were in the Standard Oil case, of the necessity to apply the 'rule of reason' in the construction of the act of congress which is, I think, expressed in language so clear and simple that there is no room whatever for construction.

"Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid EVERY restraint of interstate trade in whatever form or to whatever extent, but the court has assumed to insert in the act, by construction merely, words which make congress say that it means only to prohibit 'undue' restraint of trade.

"If I do not misapprehend the opinion just delivered, the court says that what was said in the opinion in the Standard Oil case was in accordance with our previous decisions in the trans-Missouri and joint traffic cases, if we 'resort to reason.' This statement surprises me quite as much as would a statement that black was white or white was black.

"It is scarcely just for the court at this late day to say or intimate that Justice Peckham and his colleagues, who agreed with him, interpreted the act of congress without regard to the 'rule of reason' or to assume that the act was, for the first time in the Standard Oil case, interpreted in the 'light of reason.'

"The 'rule of reason,' I am sure, does not justify the perversion of the plain words of an act of congress in order to defeat the will of congress.

REVERSING CONGRESS

"By every conceivable form of expression Justice Peckham and his associates in the trans-Missouri and joint traffic cases said that the act of congress did not allow restraint of interstate trade to any extent or in any form, and three times distinctly rejected the theory persistently advanced that the act should be construed as if it had in it the word 'unreasonable' or 'undue.' But now the court, in accordance with what it denominates the 'rule of reason,' in effect, inserts in the act the word 'undue,' and makes congress say what it did not say, what it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say.

"It has steadily refused to amend the act so as to allow a restraint of interstate commerce that was 'reasonable' or 'due.' In short, the court now, by JUDICIAL LEGISLATION, in effect, AMENDS AN ACT OF CONGRESS relating to a subject over which that department of the government has exclusive cognizance. Without intending in the slightest degree to underrate the ability of my brethren, I beg to say that in my judgment Justice Peckham and his assistants in the former cases were guided by the 'rule of reason,' and knew quite as well as others what the rules of reason required when the court sought to ascertain the will of congress.

"MINDS UNMYSTIFIED"

"They did not grope about in darkness, but in discharging the solemn duty put on them by the constitution they stood out with minds unmystified, in the full glare of the 'light of reason,' and felt and said time and again that the court COULD NOT and ought not, under the constitution, to usurp the functions of congress by indulging in judicial legislation.

"They said that to insert by construction the word 'unreasonable' or 'undue' in the act of congress would be judicial legislation. Let me say also that as we all agree that the combination in question was illegal under any construction of the anti-trust act, whether it contained a prohibition of interstate trade that was due or undue, or the word reasonable or unreasonable, there was not the slightest necessity to enter upon an argument to show that the act of congress was read as if it contained the word 'unreasonable' or 'undue.' All that the court says on the subject is, I submit, OBITER DICTA, pure and simple.

PEOPLE WILL NOT SUBMIT

"Nobody can tell what will happen. When this American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the government, and by judicial construction only is declaring what is the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people with all sorts of opinions—are not going to submit to the usurpation by the judiciary of the functions of other departments of the government and the power on its part, to declare what is the public policy of the United States.

"More than that, and still more than that, it is a very serious matter. What does it matter, so far as this case is concerned, whether that act of congress contains the word 'reasonable' or does not contain the word 'reasonable?' We will agree—every man on this bench agrees—that this is an organization in violation of the act of congress, whether the word 'reasonable' is or is not in the act. It is a violation of the law of congress. Then, why could not this court have said, under these facts, 'this corporation violates a law of congress,' and stop there—and stop there? Why was it necessary for us to go on, in an elaborate and ingenious argument worthy of the genius of the chief justice, and attempt to show that this act should be interpreted as if it contained the word 'reasonable' or the word 'unreasonable?'"