The Commoner.

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"PACKING THE SUPREME COURT"

Foxcraft, Me., Sept. 27, 1911.—Editor The Commoner: Replying to the article in The Commoner for June 23, entitled, "Packing the Supreme Court"—A Reminder of 1908: I sincerely wish that every citizen of this country could (or would) "read, mark, learn and inwardly digest" the contents of that article. Every thinking man and woman fully realizes that the decision recently handed down by the supreme court possesses unusual significance, and that on the whole it is a dangerous precedent; but what of those who do not think clearly of such matters? To them the decision is good; it fully serves its purpose; it relieves the common people from the oppression of the great trusts. It is for such credulous people as these that the articles in The Commoner seem to be to be especially written, and to them these articles should be useful and suggestive. The man must be wilfully blind or hopelessly prejudiced who does not get from a careful consideration of the discussions in The Commoner the convicton that he is being deluded right and left by the regular daily papers; that the news in them is padded, pruned, and otherwise rendered "safe and sane" before it ever reaches him; that conditions must be decidedly wrong when, in spite of the fact that he is paying ever and ever higher prices for everything he eats, drinks and wears, he is calmly assured by these same papers that everything is for the best, and that to make any change whatever is to take a step downwards.

Now, the thing that the average man fails utterly to see is that the supreme court of these United States has come to be the one great bulwark behind which the guns of the interests are safely concealed until such time as the owners thereof desire to take from the people yet another of those rights which the people had supposed were forever granted to them by the constitution. The guns are then flaunted defiantly in their face, and they are bidden to stand and deliver, while the judges, who are not nominally but actually the defenders of the people against corporate greed, stand silently by, or at best bid the robbers to be "reasonable" in their demands! As if, forsooth, robbers were ever known to be reasonable! Perhaps these judges who stand by and see such things going on are innocent, and believe that they have done their full duty by the people, but it is hard indeed for those who stand at a distance and observe the condition of affairs to believe that such is the case. If so, then our supreme court has failed utterly of its purpose, and should be abolished. This we do not for a moment believe, and it behooves us as citizens of this commonwealth to educate ourselves to the possibilities of the ballot box to eradicate these evils, and to do all in our power to expose these attempts of the judges to betray the people. He who reads carefully the signs of the times can not help getting the impression that the courts of today have a different attitude toward their office and toward the people than the judges of a generation ago. Justice Harlan fairly typifies the justice of that period—a man to whom his office is a sacred trust, to be administered in the sole interest of those by whom he was invested with it. If the citizens of this country realized as fully as they should the right relations between judges and people, there would be a speedy readjustment of the relations which now exist, and wrong which originates in our courts would be far less prevalent. This, however, can not be as long as it is possible for the court to be packed in the interest of the trusts, with no hope of relief save the death of one of the judges, who, perhaps, will be succeeded by one worse than he.

Mr. Bryan is doing a great work in his efforts to put before the people the facts behind these denials of justice to the citizens of this country. But he is greatly weakened in these same attempts by the indifference of so many. If he is to be the Moses to lead us out of our bondage, he assuredly deserves and should freely receive the ungrudging assistance of as many as can find it in their power to render him the help which must mean so much to him. He has, I believe, sounded the warning which shall finally bring victory in his insistent demand for the recall of judges. Only the fear of reprimand from the ones who are alone able to administer it will effectually crush out this injustice and corruption, and make our courts, and so our legislatures, which to a great extent guide their conduct by considering the possible or probable action of the courts toward a piece of legislation, truly representative of the people.

We wish Mr. Bryan every success in his work, and many of us, and an increasing number, I trust, and believe, pledge him our support in his endeavors. With faith in the future, I am, yours very truly, CHAS. E. KENNEDY.

"THE RULE OF REASON"

Writing in the Indianapolis News, William A. Ketcham, one of the great lawyers of Indiana, a stalwart republican, and recently attorney general for that state, makes this interesting comment on "The Rule of Reason:"

The carefully considered elaborate opinion of the chief justice in the Standard Oil case, concurred in by seven of the associate justices to which Justice Harlan filed a vigorous, aggressive, dissenting opinion, deserves considerably more than a passing notice, illustrating, as it does, how in the course of fifteen years, that which was recognized as the proper construction of the anti-trust act of 1890, has been repudiated.

1. In 1892 the United States filed a bill in equity against the Trans-Missouri Freight association et al., asking, among other things, an injunction against the carrying out of an agreement alleged to be in violation of the Sherman act as a conspiracy in restraint of trade. The bill was dismissed, 53 Fed. 440, from which an appeal was taken to the circuit court of appeals.

2. Over a vigorous dissenting opinion this decree was affirmed, the court holding that the act of 1890 must be construed in connection with the common law as prohibiting only contracts that were in unreasonable restraint of trade and commerce, 58 Fed. 58.

3. From this an appeal was taken to the supreme court of the United States, where the judgment was reversed in 1896, the court holding in definite and specific terms that the act of 1890 prohibited all contracts in restraint of trade and denying the contention that contracts that were reasonably in restraint of trade were permissible. Eminent counsel, including Lloyd W. Bowers, John F. Dillon, James C. Carter and E. J. Phelps appeared for the appellees, thus insuring a full and complete presentation of the questions involved. The opinion was pronounced by Justice Peckham and concurred in by the chief justice and Associates Justices Harlan, Brewer and Brown, all of whom have since died except Justice Brown who has since retired from the bench, and Justice Harlan. Justice White dissented in a vigorous opinion, in which the doctrine of "reason" and "reasonableness" were brought prominently to the front. In this dissent Justice Shiras, who retired in 1903; Field, who retired in 1897, and Gray, who died in 1902, concurred. A vigorous petition for rehearing was filed in this case, which was, however, denied. (See 171, U. S., pp. 573-4.)

4. In 1896, the United States filed a bill in equity in the southern district of New York against the Joint Traffic association to enjoin violations of the interstate commerce law, which was dismissed, 76 Fed. 895, and on appeal this decree was affirmed, 89 Fed. 1020, from which an appeal was taken to the supreme court.

5. Upon this appeal, 171 U. S. 505, the principles laid down in the Trans-Missouri Freight association case were adhered to and reaffirmed, October 24, 1898, the chief justice and associate justices, Harlan, Brewer, Brown and Peckham, uniting in the opinion, while Associate Justices Gray and Shiras concurred in the dissenting opinion of Justice White who again in his dissenting opinion reiterated his doctrine of "reason" and "reasonableness" with respect to contracts in restraint of trade, Justice McKenna not participating. The government was represented by Solicitor-General Richards, the attorney-general, Mr. Griggs, not participating, while the appellees were represented by such eminent counsel as Mr. Carter, Mr. Ledyard, Mr. Phelps and George F. Edmunds, so that it could not be said that the railroads were not amply represented.

6. After these decisions were rendered an effort was made in congress to amend the act so as to embody in it the doctrine of "reasonableness," but upon its being pointed out that this might have the effect of rendering nugatory the criminal parts of the statute as being indefinite and uncertain, the effort to amend the act failed and it stood as it had been construed by the supreme court in the Trans-Missouri and Joint Traffic association cases and has ever since so remained unamended and unmodified.

7. In Northern Securities company vs. United States, 193 U S. 197, Justice White again dissented, the chief justice and Justice Peckham (who had united in the Trans-Missouri and the Joint Traffic association decisions) and Justice Holmes, who had not been on the bench when those cases were decided, united in the dissent.

8. From this time forward it was the accepted doctrine of the supreme court, of the lower courts of the United States and of congress, by acquiescence and inaction when the opportunity was afforded it for fifteen years to amend the acts of 1887 and 1890 if it conceived the construction given to them by the supreme court was an erroneous one, or not in accord with the intention and purpose of congress.

9. In the meantime the Standard Oil and tobacco trust cases found their way to the supreme court on decrees adjudging them to be in violation of the anti-trust act and also meanwhile the personnel of the supreme court had radically changed. By death and retirement, seven of the nine judges who participated in the Trans-Missouri decision; six of the eight who participated in the Joint Traffic association decision and four of the nine who took part in the Northern Securities decision had disappeared from the bench, and in their places were Justice McKenna, who went on the bench in 1898. Mr. Holmes, in 1902; Mr. Day, in 1903; Mr. Lurton, in 1909; Mr. Hughes, in 1910; Mr. Lamar and Mr. Van Devanter, in 1911, and Associate Justice White had been promoted and was the chief justice and so it was practically a new bench, so far as personnel was concerned, that heard the arguments and the reargruments in the Standard Oil and tobacco trust cases.

The law except as amended by the law making power or in rare and occasional instances when courts are constrained to overrule previous decisions, is or should be the same, no matter who might occupy the bench for the time being. If the construction of a statute formally settled by repeated decisions, solemnly made upon full consideration, fully acquiesced in by the law making power for a period of fifteen years with full knowledge of such construction, given to it by the highest court of the land or the world is to be overturned because forsooth, a capable and gifted associate justice has become the chief justice and has found as his associates new raw material upon which he can with effect work, what is to become of the rule of "stare decisis" or the certainty of the law?

Dissenting opinions never constitute the law; "on the contrary, quite the reverse," but they not inferquently emphasize and particularize what the decision really means. Mr. Justice