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"The Rule of Reason"

(Written for the North American Review by W. J. Bryan.)

The decision of the United States supreme court in the Standard Oil case—and the language of the opinion is repeated with emphasis in the tobacco case—is epoch-making, although people will differ as to the character of the epoch which it ushers in. There are a number of things that impress one as he reads the majority and minority opinions, and the impression made is so deep that feeling increases with contemplation. It is easier for the public to discuss the subject in diplomatic language now than it will be when the far-reaching effect of the decision is fully understood. The position one takes in regard to the majority and minority opinions depends largely upon the point of view from which he looks at the trust question. Those who regard the trust as a benevolent institution, or as a natural and necessary economic development, will be likely to approve of the position taken by the majority of the court, and if they approve of the position taken by the court they will quite naturally endorse the reasons given. Those, on the contrary, who look upon the trust as a real menace to economic independence and to our political institutions will applaud Justice Harlan for having so vigorously dissented, even though in dissenting he stood alone.

Let us consider the position taken by the court and the language in which the court's position is stated.

First—The opinion was written by Chief Justice White, and no one can fail to note the tone of triumph that runs through it. It exhibits something of the spirit of the Battle Hymn of the Republic, "Be swift, my soul," "Be jubilant, my feet." But the chief justice can be excused for betraying something of the exultation of the conqueror. Judges are merely human beings, if in saying this I am not guilty of contempt—that is, "unreasonable" contempt—and we must expect to find in them some of the faults that appear in common clay. Fifteen years ago the chief justice, then Justice White, wrote the dissenting opinion in the Trans-Missouri Freight case and in that opinion, in which three other justices joined him, he set forth the same doctrine that he presents with so much emphasis in the Standard Oil and Tobacco cases. His achievement in converting a minority into a majority is being loudly praised by those who agree with his conclusions. Even so conservative a journal as the Springfield (Mass.) Republican says: "How can we give a second place to Chief Justice White, whose great achievement in bringing a long and sharply divided court into practical unity on the famous statute of 1890, elevates him at once to the very first rank among the country's great judges, and makes him comparable with Chief Justice Marshall alone in his demonstrated powers of judicial leadership," although the friends of the chief justice may think that this literary bouquet is robbed of some of its fragrance by the fact that the aforesaid journal refers to Justice Harlan as the "noblest Roman of them all."

The spirit of the successful gladiator oozes from the opinion—so much so that Justice Harlan in his oral opinion in the Tobacco case protests against a seeming reflection upon the distinguished jurists who joined in the opinion of the majority of the court in the Trans-Missouri Freight case. Justice Harlan is quoted as saying: "No one is more ready that I am to concede the ability of this court as it is now constituted, excepting, of course, only myself. It never was stronger in all of its history than it is now, perhaps; but I would be slow, as a member of this court, on or off the bench, to say that such men as Melville W. Fuller, David J. Brewer, Henry Billings Brown and Rufus W. Peckham did not know what the rule of reason was when they decided the Trans-Missouri Freight case and the Joint Traffic case. This court was never stronger than it was on that day. It never had four men upon it that were wiser in the knowledge of the law and of the constitution than the four men whom I am now mentioning, and yet we are told here today, as we were told in the Standard Oil case, that this court decided those cases, great as they were, without any regard to the rule of reason. I think that these men knew what reason was, and knew what the light of reason was, and intended to apply reason; but we are so wise in this day and generation that we are prepared to say that our predecessors did not know what reason was and decided cases of vast importance without any regard to the rule of reason. Others may say that; I won't."

Second—The next thing that impresses the reader of the opinion written by the chief justice is that "the rule of reason," which is presented as a great discovery was not discovered by the chief justice, although he is its most distinguished exponent at this time. It was really discovered by those who were violating the law, and was presented by the very learned counsel who attempted, at that time, unsuccessfully, to convince the court that the anti-trust law did not mean what it said, or at least did not say what the court, after a long hearing, declared that it did say. It does not detract, however, from the prestige of the chief justice that he was not the first to think of inserting the word "unreasonable" in a criminal law. The inventor is very often lost sight of—the man who makes the invention a success is the one who becomes known to the public, and the attorneys who attempted to use the word "unreasonable" as a shield to protect the defendants in the Trans-Missouri Freight case and later in the Joint Traffic association case, will have to content themselves with such consolation as they can obtain from the consciousness that they made the discovery (and from their fees), while the chief justice bows and smilingly accepts the plaudits of those who desired the repeal of the criminal part of the anti-trust law and a paralysis of its usefulness in the civil courts.

Third—The fact that the chief justice has now with him all of the new members—those who have come upon the supreme bench since "the rule of reason" was promulgated by him fifteen years ago, suggests an inquiry which, however interesting, can not be answered, namely WHY DO ALL OF THE NEW JUDGES CONCUR IN WHAT WAS AT FIRST THE OPINION OF A MINORITY? Why is Justice Harlan, the only survivor of those who joined in the majority opinion fifteen years ago, the only dissenter today? If it was due to the persuasive powers of the chief justice, why is he so much more successful than he was fifteen years ago? If it were proper to assume that judges were appointed to the supreme court BECAUSE OF THEIR KNOWN VIEWS UPON IMPORTANT QUESTIONS, it would be easy to explain the change in the court, for the judges are appointed by the president and it would not be difficult for a president to select from the large number of well qualified lawyers those who held a particular view on an important question. Some influence might be exerted in the selection of judges even without actual knowledge of their views on a particular subject, if the general sympathy of the applicant was known, his bias for or against a certain class. It is no reflection upon a man to say that he possesses one of the biases which run through society—the aristocratic and the democratic biases being the most fundamental. The plutocratic bias is also a fact to be dealt with, and a very important fact, too. A man is often unconscious of the bias that he has, and the bias is, as a rule, more pronounced in proportion as the possessor is unconscious of it, and it is more likely to influence him, too, when unconscious. If a man is conscious of a bias for or against a certain class he is on his guard, and in his effort to overcome it he may lean to the other side; it is the man who is unconscious of his bias who is likely to go to an extreme, and that, too, with perfect honesty of purpose.

Opinion on the trust question is largely a matter of bias; it is a question for the heart as well as the head. It is a poor head that can not find reasons for doing what the heart wants to do. It is a fundamental "rule of reason" that a man can generally find a reason—not always conclusive and sometimes not even plausible, but a reason sufficient for himself—for doing anything upon which his heart is really set. If bias is admitted—bias in the president as well as in the judge—it is entirely possible that a president might unconsciously select judges who would, without any previous pledge, agree quite naturally with those who represent their side of the great fundamental issues that divide society. If it "just happened" that in the selection of eight judges ALL should take the view of Justice White, and if it is NOT accounted for by bias on great subjects—then it shows what a lottery is conducted at the white house when the president blindfolds himself and picks judges at random, only to find that all the prizes have gone to those who do not fear reasonable trusts, and none to those who oppose all restraint of trade.

Fourth—Another thing that strikes one as he studies the opinion of the court is that the court's decree is entirely lost sight of in the reasons set forth. The court decided that the Standard Oil company (and also the Tobacco company) violated the law and it ordered a dissolution. But even the defendants did not seem to regard the order as of any serious moment, while the reasons given by the court have aroused the entire nation, and this submerging of the immediate result is the more remarkable when it is remembered that the language which has startled the country WAS NOT NECESSARY TO THE DECISION OF EITHER CASE. Justice Harlan calls attention to this fact quite pointedly. In the oral opinion delivered in the Tobacco case he said: "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 all agree—every man on this bench agrees—that this is an organization in violation of the act of congress, whether the 'reasonable' is or is not in the act. It is a violation of a law of congress. Then why could

CONTENTS