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EDITORIAL

Justice Harlan's Dissenting Opinion.

Since the decision in the Standard Oil case, when he expressed oral dissent to the argument of Chief Justice White, Justice Harlan has put his dissenting opinion into written form as one of the records of the Court. It is a document of the highest importance, historically and judicially. If in choosing the Chief Justice, President Taft passed over Justice Harlan, of his own party and the senior member of the Court, in order to appoint a Democrat of the old anti-Lincoln type,—if in this choice he was governed by any notion that Justice White was the abler jurist, he must know now that he was mistaken. Chief Justice White's opinion, representing the majority, is manifestly inferior to Justice Harlan's dissenting opinion.

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Other reasons for Mr. Taft's preference are hinted at broadly by Mr. Bryan in the Commoner of the 26th, and not with over emphasis under the circumstances. In enumerating what the decision explains, this Commoner editorial says:

> First, it explains why Justice White was made Chief Justice instead of Justice Harlan. Second, it explains why Governor Hughes was made a Justice of the Supreme Court. Third, it explains the discriminating care exercised by the President in selecting Democrats who would help the Republicans out of a hole by making the Democratic party bear some of the odium of a decision that builds a bulwark around the predatory corporations. And, fourth, it

explains why Wall street went over to Mr. Taft in March or April of 1908 and then coerced their employes and the business public into the support of the Republican candidate in November. "Who will appoint the judges?" was the question raised toward the close of the campaign, and Mr. Bryan was given an opportunity to decline to make any pledges. The people will learn after a while, what the corporations have long known, namely, that the power to appoint United States judges is a far-reaching power. The people agitate and Congress legislates to little effect so long as the highest court in the land is in sympathy with those who exploit the public.

It is of course very wicked of Mr. Bryan to write in that way about judges, especially about Wall street judges; but the truth ought to be told once in a while even about judges, and there does seem to be an interesting coincidence between the magical conversion of Wall street to Candidate Taft in 1908 and President Taft's Supreme Court appointments in 1910. But culpable as Mr. Bryan may be, his indictment rests solidly upon Justice Harlan's dissenting opinion.

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"Why was it necessary," asks Justice Harlan, "to make an elaborate argument, as is done in the opinion, to show that according to the 'rule of reason' the [anti-trust] act as passed by Congress should be interpreted as if it contained the word 'unreasonable' or the word 'undue'," restraint of interstate commerce? Sure enough, why *was* it necessary? Since the court was "unanimous in holding," to quote Justice Harlan further, "that the particular things done by the Standard Oil Company and its subsidiary companies in this case were illegal under the anti-trust act, whether those things were in reasonable or unreasonable restraint of interstate commerce," why did Chief Justice White write, and all his associates except Justice Harlan acquiesce in an opinion which not only interprets the anti-trust act in favor of trusts but in doing so flies into the face of all previous interpretations by the same court?

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If Justice Harlan's dissenting opinion does not answer that question, at least it suggests the answer in quite forceful fashion. In the first place, it shows historically that Congress could not have intended to discriminate between conspiracies in restraint of interstate commerce in any such manner as to leave questions of reasonable or unreasonable conspiracies open to dispute. In the second place, this dissenting opinion shows that in 1896 the Supreme Court interpreted the anti-trust act flatly against Chief Justice White's present interpretation, and that the Supreme Court has held to its original interpretation in every case in which the question was involved. In the third place, this dissenting opinion shows that when Big Business found that the courts were against them on this point, they tried to get the act amended in Congress and failed. In the fourth place, Justice Harlan shows that when the court settled the question against the interpretation now put upon the anti-trust act by "obiter dicta," the present Chief Justice wrote a dissenting opinion to the same effect as his present prevailing opinion. Justice Harlan does not say, as Mr. Bryan pretty plainly does say, that President Taft may have packed the Supreme Court so as to secure what Congress refuses, a reversal of its prior interpretation of the act in favor of "reasonable" conspiracies in restraint of trade; but what he does say leaves little room for escape from that inference. What Chief Justice White has tried in the past to have the court do, what in all previous cases the court has refused to do, what Congress also has steadily refused to do, what the court could not do in this case because the point of "reasonableness" or not wasn't involved,—this is precisely what Chief Justice White and his majority announce that the court will do if a case involving the point comes before them. Was President Taft innocent of this outcome when he made his Supreme Court appointments? Was Big Business uninformed when it became reconciled to Mr. Roosevelt's candidate for President? Did Big Business fish for pledges on judicial appointments unsuccessfully with Candidate Bryan but satisfactorily with Candidate Taft?

Much has been said about the quieting effect upon "the business of the country" which the Supreme Court's advertisement of its intention will have. Justice Harlan answers all that when he says:

On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination or monopoly in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by every one wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be no restraint of trade, in any form, and this Court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words,

and that it could not add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

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Of greater importance still are Justice Harlan's comments upon the proposal of the Supreme Court as now constituted to embark upon the open sea of judicial legislation. "This court, let me repeat," he proceeds, "solemnly adjudged many years ago that it could not, except by 'judicial legislation,' read words into the anti-trust act not put there by Congress, and which, being inserted, gives it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The Court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is Constitutional, the courts must respect it. They have no function to declare a public policy nor to amend legislative enactments. . . . To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all." Truly there are worse things in a republic than denouncing judges for judicial legislation. One of them is legislation by judges; another is appointments of judges to legislate.

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Elizabeth Smith Miller.

How many were there who, upon reading of the death of Elizabeth Smith Miller last week, associated her with one of the great figures of one of the great epochs of American history? She was the daughter of Gerrit Smith, a man whose name was on everybody's tongue somewhat more than half a century ago—with undeserved execration by most, with honor by some. The reason why may be read in volume viii, of The Public, at pages 540 and 546.* Gerrit Smith was an abolitionist who believed in his cause, which he served faithfully and courageously during one term in Congress and for many years besides. He was a pioneer, too, in the doctrine of "the land for the people." Slavery through man-ownership was hardly more offensive to his conscience than servitude through land-monopoly. Although he had not worked out the economic relationship of man to the land as Henry George did a quarter of a century after him, he stands out in our history quite distinctly in a way as the Henry George of his earlier time. Born in 1822, his daughter was old enough to share with him the feelings and thoughts and sacrifices of his public experience, and during all the years of her surviving him his faith and spirit were also hers. In the woman suffrage movement she won a reputation of her own. She died May 24, near Geneva, New York, at the age of 89.

*Published in pamphlet form by The Public Publishing Co., price, ten cents.

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Proving Its Worth by its Enemies.

When Congressman Thomas M. Bell asked the editor of The National Democrat, published at Washington, D. C., to cancel his endorsement of the Democrat because it favors the Initiative, Referendum and Recall, the editor proved by his reply the worthiness of The Democrat as a truly democratic newspaper. "It is only through the Initiative, Referendum and Recall," he reminded Congressman Bell, "that the people of this country can hope to regain control of the government," and informed him that he is not in harmony with his own party when he opposes those principles, and that his doing so makes his disapproval of the paper preferable to his approval.

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Industrial Efficiency.

It is to be regretted that there is a tendency in labor organizations to discredit unreservedly the movement for securing industrial efficiency. This movement seems to us to raise precisely the same question that labor saving machinery raises.

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Labor saving machinery does not proportionately improve the economic condition of the hired class, as a class, nor very much even absolutely. This is a fairly obvious fact already; and at the last the hired class will probably not be benefited at all by labor-saving machinery, and may be positively harmed. But none of this is the fault of labor-saving machinery. It is the fault of those social regulations, both institutional and statutory, under which much of the higher earnings of labor from its use of labor-saving machinery is automatically diverted from earners to parasites. What is true in this respect of labor-saving machinery is true also of labor-saving methods.