The bill was ordered to be engrossed for a third reading, read the third time, and passed.

ENROLLED BILLS SIGNED.

A message from the House of Representatives, by Mr. MCPHERSON, its Clerk, announced that the Speaker of the House had signed the following enrolled bills; and they were thereupon signed by the Vice-President:

A bill (S. 835) to increase the pensions of certain soldiers and sailors who are totally helpless from injuries received or diseases contracted while in the service of the United States; and

A bill (S. 896) to amend and alter an act entitled "An act to authorize the construction of a railroad, wagon, and foot-passenger bridge across the Mississippi River at or near Clinton, Iowa," approved July 16, 1888.

ORDER OF BUSINESS.

Mr. SHERMAN. I move that the Senate proceed to the consideration of the bill (S. 1) to declare unlawful trusts and combinations in restraint of trade and production.

Mr. CULLOM. I hope the Senator will allow me to get along to my public-building bill.

Mr. SHERMAN. That is at the very head of the list now.

Mr. CULLOM. The Senator called up the public-building bills the other day and got his all through. What is the Senator's object now in calling up Senate bill No. 1?

Mr. SHERMAN. To enable the Senator from Mississippi [Mr. GEORGE] to make a speech.

Mr. CULLOM. I hope we shall go on with the Calendar for awhile.

Mr. SHERMAN. I move that the Senate proceed to the consideration of Senate bill 1.

Mr. CULLOM. I hope the Senate will go on with the consideration of the Calendar.

The PRESIDING OFFICER (Mr. HAWLEY in the chair). The Senator from Ohio moves that the Senate proceed to the consideration of the bill (S. 1) to declare unlawful trusts and combinations in restraint of trade and production.

Mr. CULLOM. Do I understand that the Senator from Mississippi gave notice that he desired to make a speech to-day?

Mr. GEORGE. It would suit me as well to-day, and probably better than at any other time.

Mr. CULLOM. If the Senator has given notice and desires to speak I of course withdraw my opposition to taking up the bill.

Mr. GEORGE. I have not given any notice, but the Senator from Ohio about an hour ago told me he would call the bill up, and as I have a speech ready to deliver it would suit me to go on to-day.

Mr. HALE. What has become of the educational bill that was going to be pressed?

The PRESIDING OFFICER. It has gone over by agreement or understanding until Monday.

Mr. GEORGE. I believe I would prefer to take up the trust bill to-day.

Mr. CULLOM. I inquire of the Senator from Ohio if his purpose is to consider the bill until it is disposed of or to let it go back to the Calendar after the speech of the Senator from Mississippi?

Mr. SHERMAN. I should like to have it disposed of, but I presume it will have to go over after the Senator from Mississippi has concluded his remarks.

Mr. CULLOM. I hope when the Senator from Mississippi concludes his speech that we shall go back to the Calendar for awhile.

The PRESIDING OFFICER. The Chair understands that the objection is waived, and by unanimous consent the Senate will proceed to the consideration of the bill (S. 1) to declare unlawful trusts and combinations in restraint of trade and production.

Mr. ALLISON. Before the Senator from Mississippi proceeds I will ask him to yield to me for a moment.

Mr. GEORGE. The Senator from Ohio is entitled to the floor.

Mr. SHERMAN. I should like to have the bill read; that is all.

Mr. ALLISON. I only desire to call up Senate bill 907, a pension bill that was passed over on account of my necessary absence during the morning hour.

Mr. SHERMAN. I have no objection, and then let Senate bill No. 1 be read.

MRS. MARY L. BRADFORD.

The PRESIDING OFFICER. The Senator from Iowa asks unanimous consent that the Senate resume the consideration of the bill (S. 907) to restore the name of Mrs. Mary L. Bradford to the pension-roll.

Mr. ALLISON. It will take but a moment.

The Senate, as in Committee of the Whole, resumed the consideration of the bill.

The PRESIDING OFFICER. The bill has been read, and the amendment of the Committee on Pensions has been agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

TRUSTS AND COMBINATIONS.

The Senate, as in Committee of the Whole, proceeded to the consideration of the bill (S. 1) to declare unlawful trusts and combinations in restraint of trade and production.

The PRESIDING OFFICER. The bill will be read.

The Chief Clerk read the bill, as follows:

Be it enacted, etc., That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful, and void.

SEC. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination may sue for and recover, in any court of the United States of competent jurisdiction, of any person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination.

SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section 1 of this act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States shall be subject to a fine of not more than $10,000 or to imprisonment in the penitentiary for a term of not more than five years, or to both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which such persons reside to institute the proper proceedings to enforce the provisions of this act.

The bill was reported from the Committee on Finance with amendments.

Mr. SHERMAN. I do not intend to say anything with respect to the bill at this time; perhaps not at all, unless it becomes necessary. I wish to give notice, however, that I am directed by the Committee on Finance to move to strike out the third section of the bill, so that Senators may understand that that amendment is proposed by the Committee on Finance, and probably some modification will be made of the amendments that have already been reported. With this remark I leave the matter to the Senator from Mississippi.

Mr. GEORGE. Mr. President, I regard this legislation, or rather legislation on the subject-matter of this bill, as possibly the most important matter to come before the present Congress, and for that reason I have prepared with some care the remarks which I propose to submit to the Senate in opposition to the bill as it now stands, both as to its efficiency, if it be constitutional, and also upon the question of the constitutional power of Congress to enact it.

A careful analysis of the terms of the bill is essential. We must know what it means, what its legal effect is, if we give force to it as it is written. It is somewhat obscure; in some parts ambiguous. It is a a criminal and penal statute. Its second section provides for the recovery of a penalty. Its third and last section provides for an indictment and punishment of offenders for crimes defined in the first.

In considering such a bill Congress must necessarily determine with care what will be its meaning and effect in the courts. This is essential to prevent a result which would be both absurd and highly prejudicial, to wit, that Congress means one thing in passing the bill and the courts in enforcing it shall give it another and different meaning.

We must adopt, therefore, the known methods of the courts in determining what the bill means. Before passage this is a high duty, to prevent misconception and, from that, injustice. After its enactment we have no power of construction. It is then the sole duty of the courts to construe it to find out our meaning and intention in making the law. In the sense in which they interpret it, it becomes the law of the land, however contrary that intent may be to the individual opinion of Senators who vote for it.

Being a penal statute, and nothing else, it will be construed strictly in favor of alleged violators. Nothing will be brought within it which is outside of its plain words. Enlargement by construction will not be allowed. The party charged with violating it can stand, and will stand, on the strict letter of the statute. The courts will not go an inch beyond this in trying and punishing alleged offenders.

I proceed now to the analysis of the bill, to see what it provides for, what it prohibits, what it punishes, and what it permits as lawful.

In the first place, it must be noted that the bill deals only with agreements, arrangements, and combinations. It denounces and punishes these when made with a certain intent, but it neither punishes nor affects in the least any act done in pursuance of these combinations. It punishes a conspiracy with intent to do certain things, but treats these things when done as perfectly lawful, as harmless, even meritorious.

The making of the combination with the prohibited intent is the *corpus delicti*, the criminal act denounced by the statute. That and nothing more is the crime. The crime, in the main, is complete and perfect when this agreement is made. It makes no difference, so far as the bill goes, except in one case, whether acts are afterwards done in pursuance of the agreement or not. If no such act be done, still the making or entering into the agreement is criminal and punishable. If such act be done, it is neither punishable in itself, nor does it aggravate

in any way the criminality of the combination, or agreement, or whatever else the thing may be called. It is not a case (and this must be borne in mind) where the original agreement is one of a series of acts, all of which are necessary to be done in order to constitute the crime. But the entering into the agreement or combination (for these words cover the whole of the words descriptive of the crime as used in the bill) is *per se* the crime and the whole of it.

The first thing which attracts our attention, therefore, is that if the agreement or combination, which is the crime, be made outside of the jurisdiction of the United States it is also without the terms of the law and can not be punished in the United States. Mark that. Then if these conspirators are foreigners and remain at home, or, being citizens, shall cross our borders and enter into any foreign territory and there make the combination or agreement they escape the criminal part of this law; and proceedings carrying out the combination may be carried on with impunity in the United States. The raising of prices and the prevention of free and full competition may all take place in the United States, and yet no crime has been committed.

That this is a serious and not a mere fanciful and hypothetical objection is manifest. For it is certain, if the bill become a law, all combinations and agreements involving large amounts and therefore seriously affecting the welfare of the people of the United States will be made outside of the jurisdiction of the United States. Canada and Mexico are near neighbors, and the former will certainly become the locality in which these agreements will be made, as it has become the refuge of embezzlers at this day. The law will therefore operate only on little sinners, little men, combining with reference to interests so small as not to justify the expense and trouble of a visit to Canada or Mexico in order to make the agreement or combination. So that the bill is a sham so far as the real criminals are concerned, the men whose wealth enables them to fleece and rob the people.

But suppose, what I think, however, is highly improbable, some of these great combinations should be made in the United States. Will the case be any better for the people in whose interests we profess to legislate? The combination, agreement, or trusts, etc., must, under the bill, be made "with the intention to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States."

Here we have serious ambiguity and doubt, and it is impossible to say with certainty what the bill means. The word "imported," which describes the article about which the agreement is to be made, is in the past tense, and means, grammatically, articles already imported, and shows that the agreement must be in reference to articles which have then at the time of making the agreement been imported; yet in the same sentence we have denounced an agreement to prevent full and free competition in the importation of the articles described, and this necessarily means that the agreement shall precede the final act of importation. For it is certain that an agreement made after the act of importation is complete can not have any effect on that past and completed transaction. It is not in the power of man to change or affect the past. What has transpired is not a matter in action; it is only a matter of history.

So that we have this contradictory enactment contained in the same sentence, that the agreement denounced by the bill shall precede importation, and that it shall also come after importation. There is no way to reconcile this except to strike out the word "importation" in the sentence "prevent full and free competition in the importation, transportation, or sale of articles imported" or to insert "which shall be" before "imported." It certainly is not allowable to strike out a word in a criminal statute, nor can we insert words which change its meaning. If we insert "which shall be," then we make the "transportation and sale" prohibited precede the final act of importation. They will thus not only precede importation, but there is nothing in the bill to limit the time, so it be preceding time, in which such sale and transportation shall take place. It therefore covers any time in which, and any place, though in a foreign country, at which, such transportation and sale might take place. A provision so broad would make the statute unconstitutional, as embracing matters within a foreign jurisdiction and subject to regulation only by a foreign power.

There is only one other conceivable meaning, and that is, the phrase "agreements, etc., made with intention to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States," means, with reference to importation, that the agreement must precede the act of importation; and with reference to "transportation and sale," this agreement refers to those acts done after importation. With this meaning, if we are allowed to conjecture it in a criminal statute, the bill would be plainly unconstitutional. It would then include transportation and sale generally, there being no words to limit them. Transportation and sale generally are not within the jurisdiction of Congress, but only transportation and sale in interstate and foreign commerce. It will be hereafter shown to be an undeniable rule of constitutional law that where the language of a statute embraces matters within and without the constitutional power of Congress the whole of it is unconstitutional.

But if we were allowed to do this in this case, the result would be to demonstrate in the clearest manner the utter worthlessness of the bill as a remedy for the evils which afflict our country. For in this view we would have the prohibited agreement so far as importation is concerned preceding that event. As importation is the result of a transportation of goods from a foreign country, the agreement in relation to it would generally be made there, and would always be made there if such agreements were prohibited and punishable by law here. And as to the transportation and sales here, they would take place or could be made to take place after the article imported ceased to be imports in the constitutional sense of the term or after the original package in which they were imported had been broken. An agreement made with reference to them in that connection would be beyond the jurisdiction of Congress. This will be proven before I conclude.

There is another trouble—a very serious obstacle—in enforcing the bill as a law. The agreement or combination must be made with a certain specified intent. A combination or arrangement between two or more in relation to the business mentioned in the bill is altogether an innocent and lawful transaction, unless it be made with the intent named in the bill. The unlawful intent therefore is the gist of the offense. Without this intent the act is lawful, even meritorious. With it, the act is unlawful and criminal.

In such cases it is settled law that the specific intent which constitutes the crime must be proven on the trial to exist as is stated in the statute. A lawful act made unlawful when done with a specific intent mentioned in the statute, remains still lawful, so far as that statute is concerned, if not done with that specific intent, though it may have been done with some other intent, which may be recognized in morals and even in law as equally objectionable as the specific intent named in the statute.

In all such cases the specific intent named in the statute must not only exist, but must on the trial be proven to exist beyond a reasonable doubt or the party indicted must be acquitted; the proof of a different intent, though it be also unlawful, will not do. So that under the first branch of the statute relating to imported goods, it must be proven that the intention was to prevent competition in the transportation, when it is not purely internal and domestic, or in the sale of the article whilst it was still an import in the constitutional sense; that is, before it has been sold by the importer or before the original package in which it is imported has been broken. If the combination relates to sales to be made by others than the importers or even by the importers themselves after the original package is broken, then it is with different intention than the one included in the statute, and with an intention that can not be constitutionally included in it and therefore there can be no conviction under the statute.

So that all the benefits of this bill, so far as preventing increased price coming from combinations to prevent free competition in the sale of imported goods, come to naught if the parties making the combinations will only make them with the intent to operate on sales taking place after they have ceased to be imports by either having been sold by the importer, or he, still being owner, has broken the package in which they were imported. Of course, if the bill becomes a law, the combinations and arrangments will be made outside of it, when that can be so easily done.

I pass now to the second branch of the bill: combinations and arrangements "with intention to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production or domestic raw material" that competes with any similar article upon which a duty is levied by the United States, intended for and which shall be transported in interstate commerce for sale.

This is a most remarkable provision, possibly unparalleled in penal legislation.

To constitute the crime under this part of the bill there must be combined three intents, entirely distinct, two of them not unlawful, and one act which may be done by a third party in no wise connected with the party who is made criminal. This act of such third party is not only not criminal but is even meritorious and the subject of encouragement by law. That is, a crime is by statute compounded of three intents, two of them lawful, and of the separate and independent and subsequent lawful act of another, all of these concurring to constitute the crime.

To convict a party indicted under this clause of the bill, it must be proved beyond a reasonable doubt—

First. That he entered into the combination or arrangement named with another, or others, with the specific intent to prevent the full and free competition in the production, manufacture, or sale of domestic articles which compete with dutiable foreign goods;

Second. That these domestic articles must be intended for transportation in interstate commerce for sale; and

Third. That these goods have been so transported for sale.

Suppose the United States succeeds in proving the unlawful combination or arrangement to permit full and free competition. This alone will not do, as under the first branch of the bill something further must be proven. It must be further shown that the articles in relation to which the combination was made do actually compete with the dutiable foreign article. The language is that the domestic article "competes" with the foreign article, not that it may compete or has the tendency to compete. There must be actual competition. If we

may, as this bill does, apply the action indicated by the verb "to compete" to inanimate and insensible subjects, as articles of merchandise, we can do it only in the sense that the separate owners of these articles are maintaining a contest, seeking and striving for the same thing; that is, each is striving to sell his own article, as against the other, in the same market and to the same set of customers or buyers.

This actual competition in the sense above named must be proven as stated. The statute is a penal one and must not only be strictly construed in favor of the alleged violator, but the acts constituting the crime must be proven beyond reasonable doubt. It must be shown, then, that the domestic article, in the language of the bill, "competes" with the foreign article; that this competition must be actual, a real, substantive fact actually transpiring and capable of observation, not a mere potentiality or possibility or even probability of competition. This it will be impossible to prove unless both articles should be actually in a particular market, as New York, and their owners are seeking and striving against each other to sell them. If the foreign article be absent and not offered in the market, there is no competition. If the domestic article be absent there is no competition, for in neither case can it be said the domestic article, in the language of the statute, "competes" with the other. And it makes no difference what may cause the absence of the foreign article, except that such absence shall not be caused by the combination. For if the foreign owner will not on any account bring or send his goods to our markets, there can be nothing here which competes with them. And so if the foreign goods be excluded by a law of the United States denouncing them as unlawful objects of commerce, for then they can not be brought here at all.

Is not the same thing true if their entrance into our ports be excluded by the imposition of a duty so high that it is prohibitory? In either case it is prohibition of competition, complete and effectual. In the one case the prohibition is absolute and *eo nomine;* in the other it is equally effectual, though prohibition is not expressly and by that name enacted. In both cases there is no actual competition, nor does the *casus* named in the bill, that the domestic articles "compete" with the foreign article, arise.

So it appears that in a large majority of instances under our protective tariff, enacted expressly, as the friends of it claim, to prevent full and free competition between foreign and domestic goods, this bill, if enacted, will furnish no remedy. It will be a sham and nothing more.

But suppose the difficulty is surmounted and the actual competition is proven beyond a reasonable doubt, then it must also be proven that the domestic goods or raw materials were intended by the parties to the combination for transportation from one State or Territory to another for sale.

The intention to transport for sale must be the intention of the parties to the combination and the party on trial. However we may make one man responsible for the open and overt acts of another, I believe it has never been contended that we could make one man liable for the secret and uncommunicated intention and thoughts of another. So it must be proven that the combination was made not only with the intent to prevent full and free competition between the goods produced under it and the foreign article, but that the intent was that the goods produced should be transported from State to State for sale. These intents must coexist at the making of the arrangement in the minds of the parties to it. If either is wanting there can be no crime under this bill.

Parties, therefore, entering into these combinations after this bill becomes a law will of course make them according to law. It is their duty to make their action conform to the law. It will be presumed that they did so conform to law unless the contrary is proven. Seeing, then, when the bill passes, that it is not unlawful to make combinations and arrangements in the production, manufacture, and sale of goods, with intent to prevent the competition denounced by the bill unless is shown the further intent that these goods shall be transported for sale from one State to another, they will limit the intention to selling them or exchanging them in the State in which they are produced. They will refuse to sell except at their doors. They will agree to make and produce goods to sell to whosoever will there at that very place and in that State buy them. Calling to mind the rule of law before alluded to, that when the specific intent is the gist of the crime, it must exist and be proven to exist, specifically as stated in the statute, we see that no crime is established.

That a part of the goods produced may and actually does go into interstate commerce will not do to prove the specific intent mentioned in the bill; for that would only prove that the intent of the combination was to produce goods which parties to whom they were sold and over whom the combination had no control might or might not put into interstate commerce as circumstances of trade might afterward indicate as most profitable. This is a very different intent from the specific intent named in the statute, the intent solely to transport in interstate commerce.

To show how impossible it is to produce a conviction upon a statute where the gist of the offense is the intent to transport in the manufacture of goods, I read from a decision of the Supreme Court at the October term, 1888, Kidd *vs.* Pearson:

> Even in the exercise of the power contended for Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen, but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State, and the interminable trouble would be presented that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments and more provocative of conflicts between the General Government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine.

But, Mr. President, if this trouble should be removed there remains another. It must also be shown that the goods produced were actually so transported, and that, too, with another specific intent, namely, for sale.

It is not stated in the statute who shall entertain this last intent. We are left to conjecture as to whether the purpose of sale shall be the purpose of the persons making the combination, or of any person to whom they may have sold the goods, or of a subpurchaser from them, being the consignor in the transportation, or of the consignee in the State in which the transportation ends. But though doubtful we must assume that the intent or purpose of sale was the intent and purpose of the party on trial, of the parties to the combination, for, as stated before, one man can not be punished for the secret and uncommunicated intent of another.

But if this obstacle, insurmountable as it appears to be, should be found in fact removable, then we will find that the statute will nevertheless be a worthless remedy against the evils arising from these combinations. For, as the transportation must be for sale, and not for anything else, it must be negatived in the proof that it was for exchange or for consumption.

But up to this point, if all the proof be made as required, there must be proven a superadded or fourth intention; that is, it shall be the intent of the parties to the combination to advance the cost of the articles described to the consumer. The intent to advance the price to the wholesale or retail dealer alone will not do; it must be to advance it to the consumer. This leaves unpunished and perfectly lawful all those combinations which have proven so disastrous, that have for their object a decrease in the price to be given to the producer, and also those speculative movements now so common by which there shall be a temporary advance in the market, to last till a day not far off, when there shall be a settlement.

These arrangements, combinations, or corners, or whatever else they may be called, are made wholly for speculative purposes—intended alone to squeeze those who are "short," as the saying is. It is true they do, as an incident, sometimes affect, while they last, the price paid by the consumer; but that is not the intent, the specific intent with which they are formed, and they are, therefore, not embraced in the statute. Nor are such combinations made in reference to articles intended for interstate transportation and sale, for such speculations are made wholly without expectation of a delivery of the articles, and settlements are made by merely paying the price on the day agreed upon.

Mr. President, up to this point I have been considering the bill in its aspect as a punisher of crime. But there is a section which gives the injured party a civil action to recover a penalty; that is, double damages. If we suppose that such a suit would ever be brought, an event almost certain not to transpire, the plaintiff would encounter all the difficulties of a criminal prosecution, as I have pointed them out, with one single exception and only one. That exception is that he would not be compelled to make out his case beyond a reasonable doubt. He would, however, be compelled to prove every fact shown to be necessary in the criminal proceeding by clear evidence to the satisfaction of the court and jury. He would not be allowed to rely on mere conjecture or supposition, but he must establish his case affirmatively so as to satisfy the court and jury that all the facts and all the intents existed which I have shown to be necessary in the criminal prosecution. That this would be impossible is seen from what I have stated, and is also shown more clearly even by what follows.

The right of action against the persons in the combination is given to the party damnified. Who is this party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured."

This is the express provision of the bill, as I think is clear from the last clause of the first section. But even if it were not the express language of the bill, it so results as a logical necessity. An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advance would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so of all of them, including the last, who sells directly to the consumer. The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.

Who are the consumers? The people of the United States as indi-

viduals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination. It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be—though in the aggregate large, indeed—so small as not to justify the expense and trouble of a suit in a distant court. The consumer claims a loss of, say, $25, on a particular article, as sugar, affected by the combination. If he succeeds he gets double damages; that is, $50. He may live in Missouri, or Texas, or Kansas; he must go to New York, or Boston, or Chicago, or some distant city to bring his suit. He is poor, a farmer, or mechanic, or laborer. He undertakes to get damages from a powerful and rich corporation, or combination of corporations and persons. He must employ lawyers; he must hunt up and interview witnesses, many of them unwilling to communicate what they know and some interested in misleading him. He must summon them; pay their expenses. He must attend the court. If he is ready for trial the cause will be probably continued. The result will be in nearly every case that, crushed by the expense, wearied by the delays, he will abandon the suit in despair.

I do not hesitate to say that few, if any, of such suits will ever be instituted, and not one will ever be successful.

Mr. President, I have proven this bill to be worthless even if it be constitutional. These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which make the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.

The people see this and they are restless and discontented. The farmers especially have been the victims of this and other policies which have brought them to the verge of ruin. Debts and mortgages accumulate. The home, the farm, the workshop, are becoming the properties by encumbrances of lordly creditors, who, by methods encouraged and fostered by law in some instances and permitted by law in others, have extorted their ill-gotten gains from the poor and then used the money thus obtained to complete the ruin of the people. The people ask us for redress. They plead for security against these wrongs. What is offered them is this bill, which, even if it be constitutional, is, as I have shown it to be, utterly worthless. It will aggravate rather than diminish the evils.

Mr. President, I do not charge the committee with bad faith in the presentation of this bill. I have faith in the fairness and justice of their intentions. The truth is, sir, the committee, by its methods, undertook to accomplish the impossible. They have undertaken to compound from reserved and granted powers a valid bill, and the result is the incongruities I have pointed out, that curious commingling of inconsistent and inefficient provisions which has produced this abortion. There is one power in the Constitution which would have been efficient if it had been resorted to. It is the power to levy taxes, duties, imposts, etc. The author of this bill at one time concurred in the opinion that this was the only power in Congress on the subject which would be efficient. Speaking of legislation to suppress trusts, on August 14, 1888, Mr. SHERMAN said:

> Whether such legislation can be ingrafted in our peculiar system by the national authority there is some doubt. If it can be done at all it must be done upon a tariff bill or revenue bill. I do not see in what other way it can be done.

That, sir, is exactly my position. There is no other way under the Constitution.

And to show what he meant by legislation on a tariff bill the same great Senator on January 2, 1888, commenting on a passage in President Cleveland's message recommending lower duties to prevent trusts, said:

> Where such combinations to prevent a reduction of price by fair competition exist I agree that they may and ought to be met by a reduction of duty.

But that distinguished Senator and the great Committee on Finance who have produced this bill believe in high duties, in protective duties, in even prohibitive duties. They are wedded to the conviction that the home market is the best market, and that the American manufacturer is entitled to this American market as against the world. They are unwilling to give up this theory. Notwithstanding they see "that combinations to prevent a reduction of price by fair competition do exist" and that a fair and effectual "way to meet them is by a reduction of duty," they can not make up their minds to do this. So, contrary to the views expressed, as above quoted, by Mr. SHERMAN, they have sought another power in the Constitution to suppress trusts. But they have sought in vain, as Mr. SHERMAN said they would. They seek to make two inconsistent, even repellant, things coexist and harmonize, to wit: a high protective tariff, which shuts out foreign competition, and the vain prohibition that the protected parties shall not avail themselves of the advantage thus given them. They throw the coveted sop to the hungry and greedy Cerberus and then say to the dog, "You shall not eat it."

The attempt to do this must fail. Success is impossible. You can no more make moral contradictory laws coalesce and work in harmony than you can construct a system dependent on contradictory physical and mathematical laws. The power of Congress is impotent to reconcile and harmonize truth and error. It is powerless also to make truth error or to make error truth. We can not enact that the three angles of a triangle shall be more or less than two right angles. We can not repeal the law of gravity. We can not enact that vice shall be virtue, that falsehood shall be truth. We can not change human nature. We can not by our tariff laws administer to and stimulate the greed of men, and then, without removing the stimulant, enact successfully, as is attempted by this bill, that this greed shall be generosity and self-abnegation. By our tariff laws we hold out to the owners of the protected industries the offer of 47 per cent. advance in price. We tell them they are entitled to it; that it is right and just. By this bill we say to them, you must not take the offer.

Of course, Mr. President, a bill framed with these utterly contradictory and irreconcilable ends will be inefficient, the miserable sham I have shown this to be.

THE BILL UNCONSTITUTIONAL.

Mr. President, I now proceed to show that the bill is utterly unconstitutional.

This task is an easy one, since the principles applicable to this examination have again and again been settled by the Supreme Court. I warn Senators now that no attempt will be made to show the bill unconstitutional upon that narrow and strict theory of State rights which they may suppose is entertained by the Southern people and by them only. In all I shall say on this subject I shall plant my argument on an exposition of the Constitution made by the tribunal which the Constitution itself appoints to perform that duty.

The power to enact the bill is claimed in the bill itself under the commercial clause of the Constitution: the power "to regulate commerce with foreign nations and among the States."

A statute enacted under this grant must be the exercise of a power of regulation, a regulation of commerce, either foreign or interstate. It must be this and nothing else.

A regulation of commerce is prescribing rules for carrying on that commerce; that is, regulating the doing of the things which of themselves constitute that commerce; the very transactions between men which are commerce, interstate or foreign, are the things to be regulated.

The transactions which take place before this interstate or foreign commerce begins and the transactions occurring after it ends, though they be strictly commercial, do not constitute interstate or foreign commerce nor any part of it. They are only domestic commerce in the State in which they take place, and are beyond the power of Congress to regulate. They belong exclusively to the State in which they originate and are consummated. The power of Congress commences with the initiation of interstate or foreign commerce and ceases with its termination. The regulation, therefore, must be of things done, transactions taking place, after this initial point and before the point of termination. The power of Congress extends to nothing before the beginning and to nothing occurring after the end of this commerce.

So far as this bill is concerned, it is needful only to specify the acts, without reference to the citizenship of the actors, which constitute interstate or foreign commerce. They embrace purchase, sale, exchange, barter, transportation, and intercourse for the purpose of trade in all its forms. (See Welborn *vs.* Missouri, 91 U. S. R., and Mobile *vs.* Kimball, 102 U. S. R., 702.) Of these acts this bill specifies and claims jurisdiction over importation (purchase and transportation combined), transportation, and sale of imported articles. This relates to foreign commerce. So far as interstate commerce is concerned, it specifies transportation for sale only. The extent of these under the power of Congress will be discussed further on.

But, Mr. President, among these commercial acts are not manufactures or any other kind of production, nor sales, nor transportation purely within a State or wholly outside the territorial jurisdiction of the United States. The bill proceeds on the idea that as to interstate commerce the jurisdiction of Congress extends to the regulation of the production and manufacture of articles taking place in a State, if only it be intended that, after such manufacture or production shall be complete, all or a portion of the articles shall become subjects of interstate commerce, and shall in fact be transported as such.

This basis of the bill is expressly confuted by the decisions I shall quote.

The Supreme Court in Veazie *vs.* Moor, 14 How. R., on page 574, speaking of the commercial clause of the Constitution, says it can not "be properly concluded that because the products of domestic enterprise in agriculture or manufactures or in the arts may ultimately become the subjects of foreign" (or interstate) "commerce, the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase 'foreign commerce,' or fairly implied in any investiture of the power to regulate such commerce. A pretension so far reaching as this would extend to contracts between citizen and citizen of the same State; would control

the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these vocations the results of which may not become the subject of foreign" (interstate) "commerce."

The court further condemns the position that Congress has jurisdiction over a commerce "which * * * is unquestionably internal, although intermediately or ultimately it might become foreign."

This case, though decided in 1852, was very recently (in 1880) confirmed by the Supreme Court in Lord *vs.* Steam-Ship Company, 102 U. S.

This case expressly condemns that provision in the bill which seeks for jurisdiction in Congress over production and sales in a State merely upon the ground that the articles so produced or so sold might be afterwards transported in interstate commerce. There are other cases to the same effect.

But the bill, though originally written by its author to stand on this basis only, of a subsequent interstate transportation in interstate commerce, seems now, as amended by the committee, to abandon that position and to place the power of Congress on such subsequent transportation, combined with an intention existing in the mind of the parties to these arrangements or trusts, at the time of production and manufacture, that the articles should be so transported.

That the conjoining of this intent in the production, with the subsequent transportation, does not help the case for the validity of the bill, I now proceed to show.

Production of all kinds, manufactures of all kinds, as we have seen, are subject to the jurisdiction and power of the State in which they are carried on. Whatever regulations, therefore, may be made for carrying on these must be made by State authority. The methods of these operations of industry and art are exclusively for the States to regulate.

What is lawful by the State regulation can not be made unlawful by the United States. The bill concedes this, for it professes not to undertake to condemn these operations as carried on under State authority. So far as this bill goes, these manufactures and productions are perfectly lawful, even when made with the intent of subsequent interstate transportation. Nor is interstate commerce in them interdicted or even regulated in any manner or to the smallest extent.

Whether Congress can interdict commerce between two States in articles lawfully produced in either, and which one State wishes to sell and another wishes to buy, merely upon the ground that Congress disapproves the methods of production or dislikes the motive on which production took place, these methods and motives being perfectly lawful in these States, I shall not discuss now. That question does not arise on the bill as it now stands.

The question is, Can Congress, in the exercise of the power to regulate commerce among the States, make a law—prescribe a regulation—which punishes the intent with which an article is produced in a State and then permit it to be a lawful subject of interstate commerce, with no regulation whatever of that commerce in that article? That is exactly what this bill undertakes to do, neither more nor less. The result is that there is no regulation of interstate commerce, but there is a regulation of something else. That something is the domestic and internal production and business of a State. The power to do this will not be contended for.

Mr. President, if it be conceded that the punishment of an intent with which goods are produced, and which, when produced, are lawful subjects of interstate commerce, exactly as all other goods are, is a regulation of commerce, and not of production merely, still the bill is unconstitutional. This results from the fact that the acts and the intent with which they are associated, and which are punished by the bill, are not the carrying on of interstate commerce, but precede the commencement of that commerce, and therefore are not subject to the jurisdiction of Congress.

I now, therefore, proceed to inquire when goods intended for interstate commerce become subject to the jurisdiction of Congress. The answer to that is furnished by well considered decisions of the Supreme Court.

In Coe *vs.* Errol (116 United States, —) the articles of commerce were logs cut in the State of New Hampshire for transportation by floating on the Androscoggin River to Lewiston, in the State of Maine. So in that case the production of the article, the cutting of the logs, was with the intent to transport them to another State. But the logs were not only cut with this intent, but they were actually transported to the river with the intent to transport them as soon as the water should rise. They had gone through the initial domestic transportation necessary to enable them to be started on the final journey from New Hampshire to Maine. In that condition they were taxed by New Hampshire. If they were the subjects of interstate commerce, if the jurisdiction of New Hampshire had ceased and the power of the United States had commenced, the tax was unconstitutional.

On this case the Supreme Court say:

> There must be a point of time when they [the logs] cease to be governed exclusively—

Yes, exclusively—

> by the domestic law, and begin—

Note the point of time when they begin—

> begin to be governed and protected by the law of commercial regulation; and that moment seems to us to be a legitimate one for this purpose—in which they commence their final movement for transportation from the State of their origin to the State of their destination. (Coe *vs.* Errol, 116 U. S. R., 525.)

The court then quotes from its own decision in the case of the Daniel Ball (10 Wallace R., 565), as follows:

> Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity has commenced.

The decision is that when the article of commerce has begun to move—not begun to be produced with an intent to move—from one State to another, then at that time interstate commerce in that commodity has commenced. Not before that time, but then, at the commencement of the interstate movement.

And in Coe *vs.* Errol, the court, speaking of an article intended for transportation to another State and moved by internal transportation to a depot from which the final transportation was intended to be commenced, proceeds to say:

> Until actually launched on its way to another State or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State and never be put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose it is true, but only for the purpose—

What is the purpose but the intent?—

> of putting it into a course of exportation. It is no part of the exportation itself.

And therefore no part of interstate transportation and of interstate commerce.

> Until shipped or started on its final journey out of the State its exportation is altogether a matter *in fieri*, and not at all a fixed and certain thing. (*Ibid.*, page 528.)

That case, Mr. President, would seem to settle this question forever. There seems to be no escape from the conclusion that it fixes the unconstitutionality of this bill. Here was the intent to transport to another State, not only in the production of the logs, the cutting of them from the forest with intent to send them to another State, but there was transportation to a depot in the same State from which it was intended to ship them to another State. We have the goods produced with the intent to put them in interstate commerce. We have all the preparation necessary, with the same intent. But because the final act of transportation had not commenced the goods were not subject to the jurisdiction of Congress. They were not interstate commerce.

The case of Coe *vs.* Errol, just commented on, was confirmed in the late case of Kidd *vs.* Pearson (128 U. S. R., page 1), decided in 1888.

In that case the attempt was made to bring the production of goods in a State within the jurisdiction of the commercial clause of the Constitution, because they were manufactured with the intent to export them in interstate commerce. The court, after alluding to the right of the State to regulate the manufacture of an article of commerce as being settled beyond dispute, say:

> Is this right overthrown by the fact that the manufacturer intends to export the liquors when made? Does the statute, in omitting to except from its operations the manufacture of intoxicating liquor within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?
>
> These questions are well answered in the language of this court in the License Tax cases (5 Wallace, 462, 470). Over this commerce and trade (the internal commerce and domestic trade of the States) Congress has no power of regulation or control. This power belongs exclusively to the State. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject.
>
> The manufacture of intoxicating liquors in a State is none the less a business within that State because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.
>
> This court has already decided that the fact that an article was manufactured for export to another State does not of itself make it an article of interstate commerce within the meaning of section 8, Article I, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

The court then referred to Coe *vs.* Errol, above cited, for this position, and then quote largely from it to show that was its true meaning.

There is but one remaining point in this part of the bill—referring to domestic production with the intent named—which may be considered as pointing to a fact giving Congress jurisdiction. The point is embraced in the language which describes the goods as competing with dutiable goods imported into the United States.

The question on this point is, has Congress jurisdiction, under the power to regulate commerce, to regulate the manufacture, production, and sale in purely internal State commerce of goods because they compete with dutiable goods imported into the United States? An answer is found in the proposition that if the power exists as to production, to regulate by prescribing the rule laid down in this bill as to full and free competition, it may prescribe any other regulation. There is nothing in the prevention of full and free competition in the manufacture and production of goods which of itself would give Congress jurisdiction as to goods competing with dutiable goods which would not authorize Congress to make any other regulation they might deem wise in such production of such goods.

If competition with dutiable goods gives jurisdiction for one regu-

lation, it gives it for all regulations deemed wise by Congress. It results, therefore, that if such competition be a ground of Federal jurisdiction, then Congress can assume or acquire the jurisdiction over the manufacture and production of all goods whatever manufactured and produced in any State by simply levying a duty on the competing foreign articles, and in this way would the whole internal business of the State be brought within the jurisdiction of Congress to regulate and control as Congress might deem proper. The two facts, dutiable foreign goods and competing domestic goods, co-existing, would, in this view, give Congress full jurisdiction as to the manufacture and sale of the latter. As the power of Congress is unlimited as to the selection of articles on which duties are to be levied, so by the exercise of this power its jurisdiction over domestic production and manufactures would be unlimited, and nothing would remain to the States of their ancient and undoubted jurisdiction over their internal business.

This *reductio ad absurdum* is a sufficient answer. But there is another answer as full and complete by direct argument. It is that the power of Congress is simply a power to regulate interstate and foreign commerce; that is, a power to prescribe rules for carrying on this commerce where it exists and as it is being actually carried on as between States and between the United States and foreign countries. This statute prescribes no rule for carrying on this commerce. On the contrary it prescribes a rule for carrying on something else; that is, for carrying on the business of manufacturing and producing domestic articles within the limits of a State and the sale of them even in the State of their origin.

I come now, Mr. President, to consider the power of Congress as proposed to be exerted in this bill in its first clause in relation to imports.

This clause makes it criminal to enter into a combination or arrangement "with intent to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States."

This is, to say the least of it, a singular provision. It is difficult to extract the meaning of the draughtsman.

Evidently as to "importation" preventing full and free competition in the importing of goods, the combination must precede the act of importation; otherwise it could not affect the importation. A combination to affect importation could not by any human power change or alter that which has already transpired, an act of importation already complete. So if the bill be not absurd and impracticable on its face we must make the unlawful agreement precede the act of importation. What, then, are we to do with the other words of the sentence, "transportation or sale of articles imported into the United States?" "Imported" means an act of importation already transpired. Note that the phrase "articles imported" means articles already imported. If it does not mean this, but is to be construed as if written "articles which shall be imported," then the agreement condemned must not only precede importation, but must precede the transportation and sale, which must also precede importation.

Then we have a provision which makes criminal an agreement to prevent competition in the transportation or sale of an article produced in a foreign country by whomsoever made and wheresoever made, and as to the time of the making indefinite and unlimited, except only that it shall precede the transportation and sale affected by it, which transportation and sale may have taken place anywhere on the face of the globe and at any time within the lives of the parties to the agreement. Of course a statute of that sort, embracing within its provisions transactions wholly without the territorial jurisdiction of Congress can not stand. It will not help it that it may also embrace transactions within the jurisdiction of Congress, for in such a case, as I will show hereafter, the courts can not restrict the plain meaning of the words used, by running a line which Congress itself would not run, excluding the unconstitutional part and giving the statute operation and effect on those transactions which might fall within Congressional power.

There is only one other conjectural meaning of this language, and that is, that as to transportation and sale of the imported articles the meaning is: that the transportation and sale of the articles shall be after they are imported. This would confine the acts of transportation and sale to the United States—a place at least in which Congress has some jurisdiction. But here again we encounter the difficulty above alluded to, that the language embraces too much, embraces transactions within the power of Congress and transactions beyond or outside of this power. It embraces both interstate and domestic transportation; that is, transportation generally. Besides, the words "articles imported" are not the same as, nor equivalent in meaning to, the word "imports" in its constitutional sense. Articles once imported from a foreign country, always, as long as they remain in the United States, wherever situated and in whosesoever hands they may be and in whatsoever condition, as to being in the original package or not, continue to be "imported articles." That is, they are articles not of domestic production, but foreign articles which have been imported into the United States.

But "imports" in a constitutional sense are imported articles in the hands of the importer and in the original package. When they are sold to another or the package is broken, though there be no sale, then they cease to be "imports" in the constitutional sense; they cease to be within the jurisdiction of Congress to regulate and control, and become subject to State jurisdiction exclusively. They might be regulated as to interstate transportation, but, as we have seen, this is not provided for, but only transportation generally.

This rule is well settled and well known; but, since this distinction is not recognized in this bill and since the power of Congress is asserted in it to regulate "imported articles" generally in their transportation and sale, without reference to their condition as imports, as I have defined them, I will now read some authorities on that point.

The first case in which it was settled when imported articles ceased to be imports under the jurisdiction of Congress and become a part of the great mass of the property of the State in which they were located was Brown *vs.* Maryland, reported in 12 Wheat. R., 419. I take the exposition of that case as made by Chief-Justice Taney and Justice McLean in the License Cases, in 5 Howard Reports, because it is not only correct, but because it illustrates the last-named cases, which I also wish to bring to the consideration of the Senate.

In that case (Brown *vs.* Maryland)—

Says Chief-Justice Taney—

the court held that an import continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package, or vessel in which it was imported, * * * but that when the original package was broken up for use or retail by the importer, and also when the commodity had passed from the hands of the importer into the hands of a purchaser, it ceased to be an import or a part of the foreign commerce and became subject to the laws of the State and might be taxed for State purposes and the sale regulated by the State like any other property.

This I understand to be substantially the decision in Brown *vs.* Maryland, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control. (See License Cases, 5 Howard R., on page 575.)

Mr. Justice McLean, in the same case, after adopting the same rule above defined by Judge Taney, as to when imports ceased to be such and got beyond the control of Congress, says:

When this happens the imported article becomes mingled with the other property of the State and is subject to its laws.

And in the same case, referring to the police powers of the States and the "powers of Congress," Judge McLean says they—

must stand together. Neither of them can be so exercised as materially to affect the other. The source and object of these powers are exclusive, distinct, and independent. The one operates on foreign—

Or interstate—

commerce, the other upon the internal commerce of the States. The former—

Power of Congress—

ceases when the product becomes commingled with the other property in the State. At this point the local law attaches and regulates it as it does other property. (5 Howard R., page 592.)

A rule even more liberal than this, it may as well be stated here, is allowed in favor of the power of a State over goods brought into it from another State. In that case the goods are not imports at all, and as soon as they arrive at their destination, in whosesoever hands they may be, they are subject to the jurisdiction of the State, just as other goods therein are. (Woodruff *vs.* Parham, 8 Wall.; Hinson *vs.* Lott, ib.)

Mr. President, tested by these principles all that part of the bill that relates to these combinations in reference to the importation, transportation, and sale of goods imported into the United States must be unconstitutional, unless we restrict the plain meaning of the general language employed in the bill and confine it to transportation and sale of goods imported whilst they still remain imports; that is, to sale or transportation of the goods whilst they remain in the hands of the importer and also in the original bale or package in which they were imported. If we so restrict the meaning of the bill, it is utterly worthless, for the agreement may be made to relate only to the transportation of the goods after they have been sold by the importer, or being still owned by him after he has put them in a different bale or package from the one in which they were imported.

How worthless such a provision would be to suppress trusts is so evident as to need no comment. So of the sales of such articles. The combination need only relate to such sales by a purchaser from the importer, or even by the importer himself if he will only take the trouble to sell them in bales and packages made and put up after importation, to be wholly without the restraint of this bill. How near these transactions when they are beyond the jurisdiction of Congress may come to the act of importation is shown by the decision of the Supreme Court in Waring *vs.* Mayor (8 Wall. R., 110). In that case it was held that a purchaser of goods in transit from a foreign country to the United States and whilst at sea was not an importer if the agreement was that they should be at the risk of the seller till delivery. This purchaser not being an importer, the goods even in his hands and in the original packages after delivery remained no longer a part of the foreign commerce and subject to the jurisdiction of the United States. So it is seen again how utterly worthless this bill is if we restrict its meaning so as to make it constitutional.

But, Mr. President, we are not allowed to so restrict the language of the bill in this provision nor in the others which I have pointed out.

In United States *vs.* Reese, 92 U. S. R., 214, this matter was up for decision. The court stated the question in these words:

We are, therefore, directly called upon to decide whether a penal statute enacted by Congress with its limited power, which is in general language broad enough to cover wrongful acts without as well as within the constitutional juris-

diction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish.

In answering this question the court says:

It would certainly be dangerous if the legislature should set a net large enough to catch all possible offenders, and leave it to the court to step inside and say who might rightfully be detained and who should be set at large. That would, to some extent, substitute the judicial for the legislative department of the Government.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one.

In Trade-mark cases, 100, U. S. R., page 82, the same question arose. In that case, as in this bill, the language of the statute was general, embracing interstate and foreign commerce as well as domestic commerce. The acts condemned embraced equally acts done in domestic commerce and in interstate and foreign commerce, and Congress had power over the latter only. The court was asked to restrict the language so as to apply it only to foreign and interstate commerce, and therefore make the statute constitutional. This the court refused to do, saying:

While it may be true that, where one part of a statute is valid and constitutional and another part unconstitutional and void, the court may enforce the valid part where they are distinctly separated so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. (100 U. S. R., page 100.)

This settles the unconstitutionality of the whole bill. That there are some things included in the general words of the bill, which, if separately stated and disconnected from the great mass of the provisions of the bill, Congress can constitutionally enact, is admitted. But they are not so separated, and, if they were, they are utterly without efficacy in remedying the great evil of these trusts and combinations, as has been shown.

But, Mr. President, there is another ground upon which the bill is clearly unconstitutional. I mention these various grounds with that prolixity of detail which I know is calculated to weary the attention of the Senate. My excuse is that the objects sought to be attained by the bill are of the greatest importance to the people of the United States. The wrongs perpetrated by these combinations inflict a deep wound upon the prosperity and welfare of the people. They demand redress. It is our duty to furnish the remedy. It is our duty, therefore, to scrutinize this bill in all its parts, to examine its force and effect, so that, if indeed it be, as I have shown it to be, wholly inadequate, a mere delusion, and not a real and efficient measure, its true character may be known, and that we may seek another remedy, if one can be found; and there is no doubt that it can be found.

The objection I now insist on is fundamental. It destroys the whole framework of the bill. If it be good, no part of the bill can stand, even if we separate from it those parts which on other grounds might be unconstitutional.

The bill is a proposition for the enactment of a penal or criminal statute. It does nothing but inflict penalties, either by civil or criminal procedure.

There are but few express powers granted by the Constitution for the enactment of criminal laws. They relate to punishing the counterfeiting of the coin and the securities of the United States and piracies and felonies on the high seas and offenses against the law of nations. These are all the express powers for enacting criminal and penal legislation by Congress found in the Constitution.

Every other exercise of the power must be as an incident to some express power. In the language of the Constitution it must "be necessary and proper for carrying into execution" an expressly granted power. Congress must first determine to execute an express power before it can consider the propriety and necessity of assuming the incidental power. If the express power is found, that does not authorize Congress to exercise a power which might of itself be necessary and proper to the execution of that express power, if in fact there be no attempt to exercise the express power. The express power in this case is the power to regulate commerce among the States and with foreign nations.

Is there such a regulation in the bill? This question is easily answered. Recurring to what has been said—that regulation is the prescribing a rule for the actual carrying on of this commerce; that is, prescribing a rule for doing the acts which constitute this commerce—we look in vain to the provisions of this bill to find such a regulation or rule.

Bearing in mind, Mr. President, that interstate commerce begins—so far as Federal jurisdiction over it comes from property, and not from the citizenship of the parties—with the beginning of transportation and ends with its completion, and that foreign commerce ends with the breaking of the original package or with a sale by the importer; that neither embraces production, manufacturing, or fitting articles for this commerce, with intent that they should be so afterwards employed, but that both relate only to articles already made and already actually embarked in interstate or foreign commerce, we see that there is not the slightest attempt in this bill to prescribe a rule by which such commerce shall be carried on.

Acts done with reference to the production of articles which are intended for such commerce—acts done with reference to articles which have been the subjects of such commerce—are by this bill made criminal, whilst that very commerce in these very articles which were so produced, brought into existence, or imported in violation of the provisions of the bill is wholly untouched. If the bill becomes a law, that commerce in these very articles will go on, or, as Chief-Justice Marshall expresses it, will be carried on exactly in the same way in all respects whatsoever as if this bill had never been passed, and without the slightest variation or change, as in all other articles. Can that be a regulation of interstate or foreign commerce which regulates nothing done in that commerce, but something else? The something else is production and selling in a State, which all agree can not be regulated by Congress. Being such a regulation and being as such undoubtedly beyond the power of Congress, the bill can not be made constitutional as an incident to a regulation of interstate or foreign commerce, which is not only not regulated at all, but is left wholly untouched.

The Constitution is a reasonable instrument, designed to specify powers delegated to a general government. So far as these powers are granted expressly or by necessary implication for the execution of express powers, they are full and complete, as well as supreme; but the Constitution neither authorizes nor tolerates the absurdity of the exercise of a power as a necessary incident to and in aid of the execution of an express power when no attempt is made to execute the express power. We can not, therefore, assume a power which would be proper in the execution of an express power, and then pervert it, so that it will not be an execution of the express power, but will be, as exercised, a regulation of something else not within the jurisdiction of the Federal Government. For no incidental power is given as a separate and substantive power, independent of the execution of an express power to be exercised by Congress whenever and wherever it may seem desirable.

Such a power is always subordinate and conditioned for its existence on the necessity for its exercise for the proper execution of an express power; that is, for making effectual the actual exercise by Congress of the express power. All incidental powers are dormant, even non-existent, except in the promise of possible life to begin when their exercise is necessary to do their proper work in the actual execution of an express power. If the express power is not executed or not executed on the point to which an assumed incidental power is directed, then the alleged incidental power can not be evoked, for it can be constitutionally evoked only for execution, and only when its exercise is necessary and proper for executing the express power, and not for something else.

The bill regulates, not interstate or foreign commerce, but regulates, by penalties, contracts and agreements etc., that are conspiracies of a certain character with the intent to do something else. That something else, or the end sought by the conspiracy, is not regulated at all. It remains perfectly lawful; lawful not only as a principal end, but lawful in the methods by which it is sought to be attained; lawful notwithstanding the criminal conspiracy. There is, be it remembered, no prohibition of the importation or transportation or sale of the articles imported, produced, manufactured, or sold by the conspiracy. Interstate and foreign traffic transportation and full and free commerce in them are wholly unregulated, but remain perfectly lawful and unrestrained. They remain not only unprohibited, but even meritorious—things fostered and promoted by our laws.

A criminal conspiracy is a combination or agreement of two or more to do an unlawful act or to do a lawful act in an unlawful manner. But here in this bill we have a criminal conspiracy made out of an agreement to do a thing, with the intent that it shall result in another thing, which is not only not unlawful but meritorious, not only as to the act to be done, but as to the methods named in the bill as the gist of the crime. In other words, Congress usurps, as an incident to the power to regulate interstate and foreign commerce, the power to punish a thing, a conspiracy, over which it has *per se* no jurisdiction, and, at the same time and by the same law, the results of this conspiracy, when they become a part of that commerce and thereby become for the first time subject to the jurisdiction of Congress, are not only not criminal, but are encouraged and protected by our laws. Can such a usurpation stand?

The States may punish the conspiracy denounced in the bill without going further and declaring that commerce in the articles so produced shall be unlawful, because the States have full jurisdiction over the main or principal thing, the production, without reference to any subsequent commerce in them.

Mr. President, what I have just said in relation to the powers of Congress is fully sustained by the Supreme Court in United States *vs.* Fox, 95 United States Reports, 692, wherein the court declares unconstitutional an act of Congress passed under the power to enact a bankrupt law, which act made criminal the doing of an act which Congress might have embraced, but did not, in the purview of the act. On this point the court say:

Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation may properly be made an offense against the United States. But—

Continues the court—

an act committed within a State—

As the act condemned in this bill is—

whether with an honest or criminal intent, can not be made an offense against

the United States, unless it has some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States.

Mr. President, I have shown that this bill is utterly unconstitutional, and, even if constitutional, utterly worthless. If we pass it we do not only a vain and useless thing; we do a wicked thing. We give to a suffering people, as a remedy for a great wrong, that which will not only prove utterly inefficient, but will prove an aggravation of the evils. There is, however, a power we can exercise: the power to reduce or abolish duties on the foreign competing articles. At the proper time I shall offer as a substitute for this bill an amendment looking to the exercise of that power.

Mr. REAGAN. Mr. President, I wish to give notice of an amendment which I shall offer when this bill comes up for final action. I shall move to strike out all after the enacting clause of the bill reported by the Committee on Finance and to insert in place of the matter stricken out the following:

That all persons engaged in the creation of any trust, or as owner or part owner, agent, or manager of any trust, employed in any business carried on with any foreign country, or between the States, or between any State and the District of Columbia, or between any State and any Territory of the United States, or any owner or part owner, agent, or manager of any corporation using its powers for either of the purposes specified in the second section of this act, shall be deemed guilty of a high misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding $10,000, or imprisonment at hard labor in the penitentiary not exceeding five years, or by both of said penalties, in the discretion of the court trying the same.

SEC. 2. That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of any two or more of them for either, any, or all of the following purposes:

First. To create or carry out any restrictions in trade.

Second. To limit or reduce the production or to increase or reduce the price of merchandise or commodities.

Third. To prevent competition in the manufacture, making, purchase, sale, or transportation of merchandise, produce, or commodities.

Fourth. To fix a standard or figure whereby the price to the public shall be in any manner controlled or established of any article, commodity, merchandise, produce, or commerce intended for sale, use, or consumption.

Fifth. To create a monopoly in the making, manufacture, purchase, sale, or transportation of any merchandise, article, produce, or commodity.

Sixth. To make or enter into or execute or carry out any contract, obligation, or agreement, of any kind or description, by which they shall bind or shall have bound themselves not to manufacture, sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure; or by which they shall in any manner establish or settle the price of any article, commodity, or transportation between themselves or between themselves and others so as to preclude free and unrestricted competition among themselves and others in the sale and transportation of any such article or commodity; or by which they shall agree to pool, combine, or unite in any interest they may have in connection with the sale or transportation of any such article or commodity that its price may in any manner be so affected.

SEC. 3. That each day any of the persons, associations, or corporations aforesaid shall be engaged in violating the provisions of this act shall be held to be a separate offense.

I shall desire to offer that amendment when the bill comes up for consideration again, and I shall hope to have the opportunity of expressing some views upon the subject.

Mr. SHERMAN. The Senator's amendment is printed, is it not?

Mr. REAGAN. I will mention that what I propose to offer as an amendment is in the terms of the bill introduced by me on this subject on the 4th of December last, and which has been printed.

Mr. SHERMAN. All right. I move that the Senate proceed to the consideration of executive business.

The motion was agreed to.

EXECUTIVE SESSION.

The Senate proceeded to the consideration of executive business. After twenty-three minutes spent in executive session the doors were reopened, and (at 4 o'clock and 46 minutes p. m.) the Senate adjourned until to-morrow, Friday, February 28, 1890, at 12 o'clock m.

NOMINATIONS.

Executive nominations received by the Senate the 27th day of February, 1890.

UNITED STATES CIRCUIT JUDGE.

Henry C. Caldwell, of Arkansas, to be United States circuit judge for the eighth circuit, *vice* David J. Brewer, resigned.

SUPERVISOR OF CENSUS.

Peyton C. Smithson, of Lewisburgh, Tenn., to be supervisor of census for the third census district of Tennessee.

PROMOTION IN THE REVENUE SERVICE.

First Lieut. Thomas S. Smyth, of New York, to be a captain in the revenue service of the United States, to succeed Capt. James H. Merryman, deceased.

POSTMASTERS.

Ira C. Haight, to be postmaster at Redlands, in the county of San Bernardino and State of California; the appointment of a postmaster for the said office having, by law, become vested in the President from and after January 1, 1890, and J. P. Squires, whose nomination was confirmed by the Senate January 9, 1890, having died before the issuance of his commission.

Ingram Fletcher, to be postmaster at Orlando, in the county of Orange and State of Florida, in the place of James De Laney, removed.

Jacob M. Alexander, to be postmaster at Dawson, in the county of Terrell and State of Georgia; the appointment of a postmaster for the said office having, by law, become vested in the President on and after April 1, 1889.

Albert W. Swalm, to be postmaster at Oskaloosa, in the county of Mahaska and State of Iowa, in the place of William T. Smith, whose commission expires March 18, 1890.

Nathan Welch, to be postmaster at Farmer City, in the county of De Witt and State of Illinois, in the place of Laura H. Webb, whose commission expired February 19, 1890.

Preston S. Abbett, to be postmaster at Greensburgh, in the county of Kiowa and State of Kansas, in the place of Seneca B. Sproule, removed.

Solomon R. Washer, to be postmaster at Atchison, in the county of Atchison and State of Kansas, in the place of H. Clay Park, whose commission expires March 30, 1890.

J. Cécile Legaré, to be postmaster at Donaldsonville, in the county of Ascension and State of Louisiana, in the place of Richard T. Hanson, removed.

John H. Fellows, to be postmaster at Richmond, in the county of Sagadahoc and State of Maine, in the place of William S. Hagar, whose commission expired February 10, 1890.

Willard H. Pike, to be postmaster at Calais, in the county of Washington and State of Maine, in the place of William W. Brown, whose commission expires March 26, 1890.

George E. Sharrer, to be postmaster at Westminster, in the county of Carroll and State of Maryland, in the place of Joseph B. Boyle, whose commission expired February 19, 1890.

Alvin W. Gilbert, to be postmaster at North Brookfield, in the county of Worcester and State of Massachusetts, in the place of George C. Lincoln, whose commission expired February 10, 1890.

John E. Sawyer, to be postmaster at Methuen, in the county of Essex and State of Massachusetts, in the place of James T. Wall, whose commission expires March 29, 1890.

Paron C. Young, to be postmaster at Provincetown, in the county of Barnstable and State of Massachusetts, whose commission expired February 10, 1890.

George D. Fisher, to be postmaster at Republic, in the county of Marquette and State of Michigan, in the place of John Maguire, removed.

James G. McBride, to be postmaster at Canton, in the county of Madison and State of Mississippi, in the place of Guston W. Thomas, whose commission expired January 13, 1890.

Elias S. Bedford, to be postmaster at Huntsville, in the county of Randolph and State of Missouri, in the place of Isaac P. Bibb, removed.

William D. Cummins, to be postmaster at Clarksville, in the county of Pike and State of Missouri, in the place of John A. Reneau, resigned.

Harry C. Demuth, to be postmaster at Sedalia, in the county of Pettis and State of Missouri, in the place of John D. Russell, whose commission expired February 15, 1890.

Joseph Stampfli, to be postmaster at Jefferson City, in the county of Cole and State of Missouri, in the place of William G. McCarty, whose commission expired February 23, 1890.

Albert W. Mock, to be postmaster at Nelson, in the county of Nuckoll and State of Nebraska, in the place of Jacob Galley, resigned.

Richard S. Rodman, to be postmaster at Carson City, in the county of Ormsby and State of Nevada, in the place of Gardner C. White, deceased.

James W. Allen, to be postmaster at Bordentown, in the county of Burlington and State of New Jersey, in the place of F. G. Wiese, whose commission expired February 10, 1890.

Charles A. Jones, to be postmaster at Tompkinsville, in the county of Richmond and State of New York, in the place of J. H. Browne, removed.

George McCabe, to be postmaster at Cold Spring, in the county of Putnam and State of New York, in the place of Wright E. Perry, removed.

Erskine Carson, to be postmaster at Hillsborough, in the county of Highland and State of Ohio, in the place of Cary T. Pope, whose commission expires March 12, 1890.

Charles S. Warren, to be postmaster at Cardington, in the county of Morrow and State of Ohio, in the place of Thomas W. Long, whose commission expired February 8, 1890.

William M. Williams, to be postmaster at West Liberty, in the county of Logan and State of Ohio, in the place of Riveroak J. Piatt, whose commission expired January 20, 1890.

Cyrus K. Campbell, to be postmaster at Pittston, in the county of Luzerne and State of Pennsylvania, in the place of S. B. Bennett, whose commission expired February 10, 1890.

John P. Fletcher, to be postmaster at Troy, in the county of Bradford and State of Pennsylvania, in the place of Alvin K. Linderman, whose commission expires March 1, 1890.

William E. Mohr, to be postmaster at Muncy, in the county of Lycoming and State of Pennsylvania, in the place of Perry M. Trumbower, removed.

William M. Moss, to be postmaster at Jackson, in the county of Madison and State of Tennessee, in the place of Richard R. Dashiell, whose commission expired January 13, 1890.