TRUST LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

SERIAL 7—PARTS 25 TO 35

INCLUSIVE

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TRUST LEGISLATION.

SERIAL 7, PART 25.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, March 4, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

STATEMENT OF HON. THOMAS C. THACHER, REPRESENTATIVE IN CONGRESS FROM MASSACHUSETTS.

Mr. THACHER. Mr. Chairman and gentlemen of the committee, I wish to make a very brief statement in regard to the effect of the proposed interlocking director legislation upon the savings banks of Massachusetts and of New England.

I have had letters from my constituents in regard to the interlocking director legislation, and with your kind permission I would like to read a letter from Mr. Augustus L. Thorndike, who is a very efficient and able officer, the bank commissioner of Massachusetts. This letter is addressed to Mr. Oliver Prescott, New Bedford, Mass., a constituent of mine.

(The letter referred to is as follows:)

FEBRUARY 20, 1914.

OLIVER PRESCOTT, Esq.,
Masonic Building, New Bedford, Mass.

DEAR SIR: Your letter of February 16 is duly received. I have sent a copy of the last report of the bank commissioner to Congressman Thacher, as you desired.

I have considered the proposition you mention, that national bank directors would be ineligible for savings bank boards of investment if the new Federal law is passed, and I do not consider that it would be wise. They are not rival institutions. The savings bank trustees should be men of financial judgment and experience, and in many towns and in the smaller cities it might be impossible to get suitable men to act as trustees of savings banks should the national bank directors be ineligible, in my opinion.

Very truly, yours,

AUGUSTUS L. THORNDIKE,
Bank Commissioner.

I have also two letters from Mr. Oliver Prescott, of New Bedford. They were sent to me personally and were not intended for publication, but I asked his permission to present them, and there is no objection, though quite possibly he might have worded them in a different form if he had known they were to be submitted to this committee. They bear upon the matters before this committee. I will not take the time of the committee this morning to read them, but I should like to have them put into the record.

Mr. Oliver Prescott is an officer of the New Bedford Institution for Savings. He is also a partner of Hon. William W. Crapo, of the law firm of Crapo, Clifford & Prescott. Mr. Crapo was for many years a distinguished member of the House of Representatives. Mr. Crapo to-day is one of our most distinguished citizens in Massachusetts, a graduate of Yale College of the class of 1852, a very distinguished lawyer, and is president of the New Bedford Institution for Savings, and I presume that Mr. Prescott's letter voices his views.

The condition is this: Mr. Prescott states that it would be very difficult to find competent men to serve as directors in the savings banks in the small towns and cities if they were prohibited from serving on the boards of other financial institutions by this proposed legislation.

The deposits in the savings banks of Massachusetts on October 31, 1912, amounted to $838,635,098. This is from the bank commissioner's report of 1912. The number of depositors were 2,200,917, making an average for each depositor of $381; that is the total deposits for each depositor.

The amount which each person can deposit was formerly fixed at $1,000, or, including accrued interest, $1,600. I believe that the latter sum has recently been increased to $2,000. However, these accounts are all small accounts, for, as I have stated, the average amount of each depositor's account on October 31, 1912, was $381. These savings banks make a rule of taking small amounts for deposit.

The name "Five Cent Savings Bank," of New Bedford, for example, means that you can deposit 5 cents or more. We have banks in Massachusetts, in Boston, for instance, and New Bedford, the deposits of which are made up very largely of the deposits of domestic employees, seamen, mechanics, women, children, and small wage earners, and they leave this money on deposit where they know it will be safe, and the earnings of these mutual savings banks are divided among the depositors, after deducting expenses, and the investments are very carefully limited by law.

To show how economically their work is administered, I met a friend in the street here the other day, now living in Washington, who formerly lived in Massachusetts. He told me that recently he had a mortgage to effect in Washington that cost $90 to take out, in

expense of looking up the title and the charge for making the loan and other charges, whereas in Massachusetts for a mortgage of the same amount it cost him a little over a third of that, a little over $30.

The savings banks in Massachusetts loan very largely on real estate, in contrast with national banks.

They are essentially charitable institutions, and not run to make money for the stockholders, like the national banks and trust companies. The net profits of these savings banks are divided among the depositors.

The CHAIRMAN. I understand you desire to print some of these letters.

Mr. THACHER. I do, Mr. Chairman, with your kind permission.

The CHAIRMAN. You have that permission.

Mr. THACHER. Thank you.

(The letters referred to are as follows:)

[Crapo, Clifford & Prescott, counselors at law.]

NEW BEDFORD, MASS., *Febraury 11, 1914.*

Hon. THOMAS C. THACHER,
House of Representatives, Washington, D. C.

DEAR SIR: It has doubtless already been brought to your attention the effect that the interlocking-director bill may have on the Massachusetts savings banks. I wish to put before you, without going into any detail, the situation in New Bedford and the effect which the bill would have here.

In the first place, in the draft as printed in the newspapers, it is not entirely clear whether the bill would affect the members of the boards of trustees or only the members of the boards of investment. In either case the effect of the law applied in New Bedford would, in my judgment, be unfortunate. I may admit that I am, perhaps, prejudiced because I happen to be a national-bank director, as well as a member of the board of investment of our largest savings bank.

As you well know, the trustees and members of investment boards of our Massachusetts savings banks receive no salary as such and no compensation of any kind. They have no financial interest in the institution other than possibly bank deposits. They make no profit whatever out of the institution other than any other depositor. They give their services as a kind of public duty. My feeling is that our savings banks here are charitable institutions maintained chiefly for the benefit of people with small means, and I am willing to give my time and services to it as I give them to other philanthropic enterprises. I have been on the board of investment of a savings bank here for the last 14 or 15 years, and I can testify from experience of the difficulty of getting men who are capable and who are also willing to serve on the board.

We find it more and more difficult every year to fill vacancies which arise. As it happens, five of the seven members of the investment board of which I am a member are directors of national banks, and one is a director of a trust company. If the law prohibits national-bank directors from being trustees or members of the boards of investment of savings banks, I do not know where we can go in a community like this to get men who have any knowledge of the business at all and who are able and willing to give their time and services. It may be possible to get some one to serve, but it does not seem to me that it will be possible to get capable and satisfactory managers for the savings banks. Inasmuch as the managers of the banks are acting from the sense of public spirit and without any profit to themselves, it seems a pity to put more obstacles in the path of getting the best men for the positions. I have never heard any criticism of the misuse of savings banks' funds by the managers in connection with other enterprises in which they are interested. I do not recall, even in New York, that the savings banks figured as a part of the so-called Money Trust. The record of the savings banks in Massachusetts has been a splendid one, and I think I am safe in saying that a large proportion of the savings-bank managers have been connected with national banks. In fact, in a community no larger than New Bedford, the only people who are in a position to know what is going on in the banking world and are competent managers

are those who are filling positions on national-bank boards and through this connection gain information and knowledge which is of value to the savings banks.

I think I am also safe in saying that in most instances, as in New Bedford, the savings banks are large owners of national-bank stock. In New Bedford the bank that I am connected with is the largest owner by far in all three of the national banks. It has always been thought fitting that the savings bank, as the owner of a large block of stock, should have a representative on the board of directors of the national bank.

I do not know what the result of the passage of the bill would be if it made national bank directors ineligible for savings bank boards. The natural result would be for the men to give up the savings bank and confine their interests to the national banks in which they are stockholders and have pecuniary interests. They might be glad to be relieved of the duty of serving on the savings bank board as the result of Federal legislation which would give them an excuse for retiring.

I venture to ask if it is not possible to have the bill so drawn that it will not apply to the managers of our mutual Massachusetts savings banks, or at any rate that it will not apply in a community as small as New Bedford, where it is practically impossible to get satisfactory men for the savings banks who are not connected with other banks.

If you care for exact data as to the New Bedford situation, I should be glad to send it to you.

Yours, very truly,

OLIVER PRESCOTT.

[Crapo, Clifford & Prescott, counsellors at law.]

NEW BEDFORD, MASS., *February 14, 1914.*

Hon. THOMAS C. THACHER,
House of Representatives, Washington, D. C.

DEAR SIR: I received your telegram of last night late in the morning, as I was out of the office at a funeral. I have not at my command here for immediate use the data necessary to answer the questions you ask. I can give certain information, however, which may be of some use. I will try to get further data for you if you think it is desirable.

The savings bank commissioner's report for 1913 is not yet out. I have no data therefore of the total deposits of the Massachusetts savings banks later than October 31, 1912. At that date there were 194 savings banks in the State, with total deposits of $838,635,097. This is an average of a little more than $4,322,000 for each savings bank. I have no data from which I can give you any of the figure outside of Massachusetts. If it is material, they can of course be obtained.

In the October, 1912, list I find only five banks which had deposits of over $20,000,000. It is possible that I may have overlooked some, but to the best of my knowledge I am correct in stating the number of these large banks at five. These banks are the Provident Institution for Savings, of Boston, with $49,000,000; the Boston Five Cents Savings Bank, with $44,000,000; the Suffolk Savings Bank, of Boston, with $38,000,000; the Worcester County Institution for Savings with $23,000,000; and the Springfield Institution for Savings with $20,000,000. It is possible that in the year which ended October 31, 1913, there may have been other banks which reached the $20,000,000 mark.

Coming to New Bedford, the New Bedford Institution for Savings at the close of business yesterday had deposits of $18,376,000, and the New Bedford Five Cent Savings Bank deposits of $10,983,000. These are the only two savings banks in this city.

The New Bedford Institution for Savings has a board of 33 trustees, elected as all other boards of trustees are, under the State law, by the members of the corporation at an annual meeting in January. Of the 33 trustees, 13 are directors of national banks and 3 are directors of a State trust company located in New Bedford, which may or may not become a member of the Federal reserve association. Of the remaining trustees, 9 are directly or indirectly indebted to the bank and under the law are ineligible for election to the board of investment, which is the real managing body charged with the duty of loaning the funds of the bank. Should the trust company joint the Federal reserve and should the interlocking director bill pass, only 8 of the members of the present

board of trustees would be eligible for election to the investment board, assuming that the interlocking director bill applied only to boards of investment. Only 1 of the 8 is now a member of the board of investment. If the interlocking director bill applies to the boards of trustees as well as to the boards of investment, assuming that the trust company is in the Federal reserve, 15 of the present board would be ineligible.

Of the present investment board at the Institution for Savings, consisting of 7 members, 5 are national bank directors and 1 is a trust company director. In the judgment of the board of trustees these 7 men are the best men available to manage the affairs of the bank. Six of them would be rendered ineligible if the proposed law is passed.

The New Bedford Five Cents Savings Bank has 39 trustees. Of these, 7 are national-bank directors; 3, and possibly 4, are directors of the trust company; and of the remaining trustees, 11 are directly or indirectly indebted to the bank. There are 9 members of the board of investment, of whom 4 are national-bank directors, and 1, I think, is a director of the trust company.

As you are well aware, our savings banks are very rigidly controlled by the State commissioner and their transactions are guarded with great exactness by the provisions of the law. The requirement that no member of the board of investment shall be indebted to his bank directly or indirectly is, I understand, rigidly enforced, and it makes one other difficulty in getting men to take the place on the board.

Of the board of investment of the two New Bedford savings banks only 1 member, Mr. Crapo, is connected as a director with any banking institution in any other city. Mr. Crapo has been a director for many years of a Boston trust company, the International, but for several years has been seeking to retire, and takes no active part in its affairs. No member of the board of investment of either bank has any intimate connection whatever or is in any way controled by any of the financial institutions at the great centers, such as Boston and New York. The management of our banks here in New Bedford has been absolutely independent of all influences from outside. The State bank examiners have reported in high praise of the manner in which our banks here are managed. Whatever may be the evils in other communities, I do not believe that any claim can be made that any such evil exists in New Bedford. It would, it seems to me, be exceedingly unfortunate if because of the evils in other communities, general legislation was passed which would make it exceedingly difficult, if not impossible, to get competent managers for these charitable or philanthropic institutions in this community.

The situation in the smaller communities would be even worse.

If an examination of the management of the Boston savings banks should indicate that there was any basis for a claim that these banks are controlled by the same interest which control the large banks and trust companies, and that there is an evil which should be corrected there, I do not believe that any such argument can be made for this locality or the other smaller communities of the State. If a line must be drawn, based on population, it ought to be drawn so as to leave New Bedford, Fall River, Springfield, and other places of their description outside of the provision of the law which might be made to apply to Boston.

A limitation based on amount of deposits would be somewhat unfortunate. It would be very undesirable to have the law come into force whenever the deposits reached a certain amount regardless of other conditions.

Personally, I believe that the Massachusetts savings banks should be left out entirely from the consideration of this law because of their peculiar character as philanthropic institutions. If it is found necessary, however, to include some of them, it seems to me the law should apply only to those large communities where there is sufficient concentration of capital to make possible any real control of money.

Would it be of service if the savings banks throughout the State sent to Washington a statement of condition as to trustees and investment boards such as I have outlined above? If so, it might be possible for me to get our State Savings Bank Association to take the matter up and have the data furnished by each bank and sent on; it would take a little time, but it could be done. I have been surprised that the association has not taken action heretofore; they apparently are waiting for something to stir them up. If you think of anything that I can do to furnish information which would be of value please let me know.

Yours, very truly,

OLIVER PRESCOTT.

Mr. THACHER. I understand that representatives of the savings banks are to appear at a later date from Massachusetts, and they will be able to present the matter much more fully and more ably than I have the time or am able to do to-day; therefore, I will present the case to you and say that I indorse the views of Mr. Thorndike and Mr. Prescott, and I trust this matter will be considered very carefully, and that the savings banks will be kept distinct from the ordinary banking institutions, as we generally understand them.

Mr. MCGILLICUDDY. Have you made study enough in your own community to determine in your own mind where you would draw the line as to interlocking directors of banks?

Mr. THACHER. Mr. Prescott has mentioned that matter, I might say, Mr. McGillicuddy, in his letter, and as he is a lawyer and a member of the investment board, and also a member of a trust company, I am going to leave that letter here, which will explain itself.

Mr. MCGILLICUDDY. What did he suggest?

Mr. THACHER. He suggests that it might be possible to limit, if the committee wished to do so, the cities according to their population.

Mr. MCGILLICUDDY. Did he name any population?

Mr. THACHER. No; I do not think so. He gave me no figures. I have in mind savings banks located in Plymouth, Provincetown, Wellfleet, Harwich, Yarmouth, Falmouth, Nantucket, Middleboro, Cohasset, Wareham, Hingham, Marshfield, and other towns in my district, of which Plymouth is the only town with a population of over 10,000. These depositors are very largely farmers, wage earners, and women and children.

Mr. NELSON. From your observation you would say that 100,000 population would take care of that, would it not?

Mr. THACHER. It would not take care of New Bedford. New Bedford has over 100,000, and so have Worcester, Fall River, Cambridge, Lowell, New Haven, Hartford, Bridgeport, and Providence.

Mr. VOLSTEAD. There would not be any very great difficulty in finding suitable directors in a town of 100,000 population, would there?

Mr. THACHER. Possibly not; but you must remember that these men serve without pay, and while the investments are limited by law very strictly, it requires very considerable care to get the 3½ or 4 per cent to pay for the deposits that they get. It requires men of a great deal of judgment.

I should say, Mr. Chairman, that I am aware that a representative from Connecticut has appeared here.

The CHAIRMAN. He did make a very able argument, and you will find it in the printed hearings.

Mr. THACHER. I wish to say, too, that these officers of the savings banks in New England are quite conservative people, and I do not think have been awake to the realization as to how this legislation will affect them, and that is probably one reason why they have not been on before. As a rule men flock here on occasions such as this from the cities, bankers, manufacturers, and other parties, but these savings-bank directors living in the remote small country towns,

who serve without pay, do not always appear as promptly as perhaps they ought.

Mr. VOLSTEAD. Is not this going to be the situation: We have amended the national bank act now so as to permit national banks to loan on real estate.

Mr. THACHER. Yes.

Mr. VOLSTEAD. Of course these savings banks are also loaning on real estate?

Mr. THACHER. Yes.

Mr. VOLSTEAD. So there will be, hereafter, more or less competition between them?

Mr. THACHER. Yes.

Mr. VOLSTEAD. And of course the national banks might take the cream of that real estate business and turn the balance over to the savings banks, so that they really do not occupy the same position as they have in years past.

Mr. THACHER. I think very properly the new Federal national banks should loan on real estate as well as savings banks. Savings banks' investments are limited to bonds and other first-class securities.

Mr. VOLSTEAD. They do make loans on real estate?

Mr. THACHER. They do make loans on real estate, but there are other ways of investing their money. They sometimes take town notes and city notes.

Mr. VOLSTEAD. We have no savings banks. Our ordinary banks do that business. That is one reason, perhaps, why I am impressed with the thought that there may be a conflict between them. Outside of large cities I can not think of any savings banks in my State. Practically all of the savings business is done in the State banks and national banks. Of course national banks do practically the same business as the State banks.

Mr. THACHER. I do not think there would be any conflict between the Federal banks and savings banks seeking investment. I think there would be an outlet for both in their investments.

Mr. VOLSTEAD. The real object of this legislation, I take it, is to prohibit a person from dealing with himself, where he represents different interests—putting the same director on two institutions.

Mr. THACHER. I believe heartily in proper interlocking legislation, but the mutual savings banks occupy a unique position, and I believe that these savings banks should be carefully considered, and that they should receive fair and proper treatment, which I believe your committee will recommend. I would remind the members of your committee that it was decided very properly and wisely that mutual savings banks should be exempt from the income tax, and I believe that these savings banks should in like manner be exempt from the provisions of the bills before your committee as regards directors serving on some other financial institution.

Mr. FITZHENRY. I have received a couple of communications concerning the bills now under consideration, and I would like to have unanimous consent to have them read and printed in the record.

The CHAIRMAN. Without objection, the letters referred to by Mr. FitzHenry will be incorporated in the proceedings of to-day.

(The letters referred to are as follows:)

[W. A. Covey, attorney and counselor at law.]

Hon. LOUIS FITZHENRY, LINCOLN, ILL., *February 20, 1914.*
Bloomington, Ill.

MY DEAR MR. FITZHENRY: I am in receipt of short copies of certain bills called antitrust bills, now pending before Congress, and especially before the Judiciary Committee, of which, I am informed, you are one of the members.

I have read the bills presented and also the recommendation of President Wilson. It seems to me that if the President intends to enforce the law after it is passed and Congress has a similar intention as to the law proposed to be passed, if finally passed would simply lock the business of the country up so tight that it would be almost disastrous to the people at large in the transaction of their business.

There is no way, in my judgment, that the Government of the United States can enter into the commercial world and dictate to the owners of property who they shall sell their property to or at what price.

There is one thing manifestly bad about these bills. If you deprive the right of man to purchase other men's business, following similar occupations, or try to regulate the price at which men do their business, immediately you will find that the consumer, who constitutes the larger and greater percentage of persons interested in the business world, will greatly suffer.

There is, in my judgment, no decision ever rendered by a court of justice in our land to-day that has been more injurious to a larger per cent of citizens, to wit, the consumers, than the decision rendered in the Standard Oil Co. case, in which the Government won. By following this decision the price of oils produced by the Standard Oil Co. rose and has been higher ever since. That has been the effect where the decision of the court or an act of Congress has attempted to regulate the price of commodities, or the manner of doing business by the combination of capital. It is the consumer whose interests ought to be protected rather than the manufacturers. The manufacturers of the country as to number are insignificant compared to the number of the consumers of an article produced. I am radically opposed to all of these bills, which upon their face claim that they are intended to make more certain the antitrust laws of the United States.

In my judgment a strict construction of the Sherman antitrust bill would almost paralyze the business of the country. As to section 9 of this act proposed, wherein it says:

"That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase."

This section is evidently class legislation, granting rights in commerce to one set of business men and denying it to others; and furthermore, the act is bad in refusing the right to the mine operator to select his own trade. It seems to me that more mischief would arise by a provision of this kind than to allow him to select his own trade. In other words, it takes from the mine operator the right to run his own business and gives it over to another class of people who may engage in a secret agreement by which his own immediate territory, where he could sell his goods, would be deprived of the benefits of the mine.

Section 1 of tentative bill No. 2, in the second paragraph says: "To limit or reduce the production or increase the price of merchandise, produce, or any commodity," shall come within the meaning of the act.

If a person engaged in any large manufacturing enterprise is not permitted under the law to reduce the production or increase the price of the merchandise which he manufactures, then the law has taken from him all the property rights he ever possessed. It is a foregone conclusion that any man of any business sense or judgment, having money to invest in an enterprise, would never invest it in an enterprise which this law would affect, and if that were a logical conclusion, which is irresistable, then the minute this law becomes effective and is known to the commercial world, that moment the creation of new enterprises will cease, and many of the enterprises which have heretofore been in operation will go out of business.

By the fourth section of the same act it provides in substance as follows:

"To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity."

It will be seen from the specific words of this act in this particular section that one railroad company could not acquire the property of another railroad company that was in anywise in competition with the first railroad company. It seems to me that to cripple the industries of the country in that way is productive of more harm to the producers and consumers of this country than any law that has ever been brought into force to my knowledge.

There are many small railroads in the country that are not self-sustaining, that are in a measure in competition with a larger road, and to say that a larger road, should not take these under its protection and operate them would be to cut off all the feeders of the main railroad that are now operated by other independent railroad systems.

It will thus be seen that Congress ought not to legislate in a way that is proposed by this act to prevent such combinations of capital and such combinations of the great industrial interests of the country.

I do not want to enter into an extended discussion or bother you too much with a long letter, but it is a foregone conclusion that if Congress passes an act now, the Supreme Court of the United States will generally hold it constitutional. The same trouble is found in the State courts to-day. It seems to be a prevalent opinion that whatever act the legislature or Congress does ought to be sustained by the courts, and we all realize the fact that the judges are now holding them as constitutional, so that the primary responsibility rests with the representatives of the people, elected by the people to make such laws that will safeguard the best interest of the country and at the same time protect the larger and major portion of the population. These are the producers and the consumers.

It seems to me that under the act as it reads, no man could operate any honest industry having very large proportions without being guilty under this act and liable to the excessive fines and penalties imposed under this act. I am thoroughly opposed to it, and I believe that any of your constituents who will give these tentative acts a fair, square, consideration and of their application in daily life, will oppose these measures.

Yours, very truly,

W. A. COVEY.

[Stevens, Miller & Elliott, attorneys and counsellors.]

PEORIA, ILL., *February 28, 1914.*

MR. LOUIS FITZHENRY,
Member of Congress, Washington, D. C.

DEAR SIR: Our attention has just been called to three proposed amendments to the antitrust bill now pending before the joint Committee on the Judiciary and on Interstate and Foreign Commerce. We have read the proposed amendments with interest, and it seems to us that there are some vital objections which should receive consideration before the bills are reported out, either in their present or amended form. One of the bills is entitled "A bill to include within the meaning of every contract, combination in the form of trust or otherwise, conspiracy, and restraint of trade or commerce among the several States, or with foreign nations, and within the meaning of the word monopolize certain definite offenses and to prohibit the same." Under the provisions of this proposed bill it occurs to us that the acquisition of small railroads, which are so located as to be mere feeders or supplements of existing railroads, could not be acquired by the larger systems with any degree of safety. As you know, a great many of these smaller roads can only exist when they are connected with some of the larger systems. If operated alone they would neither give service to the public nor furnish anywhere near adequate revenue to pay expenses. The bill would also seem to prohibit the consolidation of any lines of business which in any sense may be engaged in interstate commerce, if there has been any evidence whatever of competition between them prior to the consolidation. It occurs to us that such a stringent law would work rather to the detriment of the public than for its interest.

Another provision of this bill seems to prohibit even conference between representatives of railways with a view of arranging through routes and rates. Under the interstate-commerce act through routes and rates must be established as between all points. If a reasonable conference can not be secured, it seems almost impossible to arrange through routes and rates.

Another bill proposed prevents the election of directors in one company when they are interested as directors, officers, agents, or employees in other companies. This bill would tend to retard a proper business arrangement rather than to work in the interest of the public generally.

We have understood that your committees, as well as the President, have asked a full consideration by all parties in interest of these bills. We trust the suggestions we have made will receive consideration at the hands of the committees having them in charge.

With best personal regards, we are, yours, truly.

STEVENS, MILLER & ELLIOTT,
By J. M. ELLIOTT.

Mr. MCGILLICUDDY. Just to what point are the letters?

Mr. FITZHENRY. They discuss all three of the bills.

STATEMENT OF MR. JULIUS GARST, WORCESTER, MASS.

Mr. GARST. Mr. Chairman and gentlemen, I appear here as a manufacturer. My only purpose in appearing before your committee on this subject is that I make an article which I should like to market. I have no particular interest in the protection of prices of trade-marks. I desire to market the goods that I manufacture, and if I can be informed how I can do that without the use of a trade-mark, the problem is solved for me. If you will concede that the use of a trade-mark or brand is necessary in the marketing of any article, other than a common commodity, why, then, I think I can convince you that trade-marks are inadequately protected under the present law; but I wish to emphasize the fact that my only interest in trade-marks is that I desire to market a certain line of goods. Last year I had two agents in New York handling this line of goods—or this article of goods.

The CHAIRMAN. What is the reason for not telling us what it is?

Mr. GARST. It is known as a porch curtain.

The CHAIRMAN. You need not be delicate about it. Tell us what it is.

Mr. GARST. Not at all. It is a porch shade that I sell under the name of "Shredwood curtain."

It was handled by two agencies in New York and one in Baltimore. I stipulated the jobbing price. The New York concern sold at less than the price stipulated by me. The Baltimore house wrote and said, "We will not handle your article for the reason that the concern in New York sells at a price less than we sell."

Now, as I said, that is not the primary object, the maintenance of the price, although I will confess that I have some sympathy and feeling that would, under any conditions, impel me to permit any one that handles goods to make a margin of profit. I have heard the expression used, "What difference does it make to you, so long as you get your price." On two scores it makes a difference. In the first place, I never desired to have anybody work for me for nothing; and in the second place, no one would work for me long for nothing. The second is the dominant factor in trade. Everybody must get a margin of profit, or he ceases to do business, and on

that score it is essential, in carrying on any business beyond the bounds of a man's own premises, where he can put out to his neighbors corn or potatoes from hand to hand, that it is necessary to have some fixed price. That does not apply to common commodities, and I wish to make that distinction. Flour, unbranded, is a common commodity. Flour, in my understanding, if it bears a brand, ceases to be a common commodity. Now, it is all right that there should be, perhaps, a law prohibiting the fixing of any price on a common commodity.

The CHAIRMAN. Well, is there any flour marketed at all that is not marketed under some brand?

Mr. GARST. I do not know of any.

The CHAIRMAN. I never heard of any. I think that every miller that turns out flour has some brand, and some mills have several brands of flour.

Mr. GARST. There is no objection to the removal of the brand and marketing it under no brand. Let us assume that there is a price that goes with the brand—that the retailer wants to sell that flour for a less price; let him remove the brand, put on another brand, or the manufacturer might send him flour without a brand that he can use, but if the manufacturer advertises his flour and claims for it certain superiority, it is necessary for his own protection that the flour should sell at the price he fixes.

Now, I repeat that the maintenance of the price is not the main consideration. It is the marketing of his flour. If it is an article that would sell to 100 dealers in a town, and one dealer in that town considers it to his interest to exploit that article and sell it at actual cost or less than cost, as is sometimes done, exploiting an article to draw trade to his store, he uses a name, a name that has obtained a value through the advertising or reputation of the superiority that it has acquired. It never is a common commodity. It makes no difference to the producer of coffee what the dealer sells it for. No one gains anything especially by selling coffee at a very greatly reduced price.

The CHAIRMAN. He may do so temporarily. Take that all for granted, do you use a trade-mark? What legislation is it that you want?

Mr. GARST. I operate as an individual. I want certain restrictive legislation repealed. I want distributors to distribute my goods. I want to market my goods. That is all I want. I want to be able to mark my goods economically. There is not sufficient profit on my goods to enable me to send out individual agents. I must use the agency of jobbers.

The CHAIRMAN. Do you not mark your goods now? I do not understand what you mean by marking your goods.

Mr. GARST. I have to use a trade-mark.

The CHAIRMAN. Do you want any act of Congress asking you to sell your goods? You certainly do not want to do that?

Mr. GARST. No. I want to use a trade-mark.

The CHAIRMAN. You do use it now.

Mr. GARST. Well, I want to be able to protect that trade-mark.

The CHAIRMAN. Oh, yes.

Mr. GARST (continuing). With a view of enabling me to market my goods.

Mr. NELSON. You want the right to fix the price to the consumer, do you?

Mr. GARST. I want the right to fix the price to the consumer. I can do that now, under certain conditions, so long as I retain ownership. These decisions in the Supreme Court do not touch upon the question of fixing the price as long as I retain ownership. If I consign my goods to the jobber, or if I consign my goods to the retailer, so long as they are consigned, I can save the price; but as soon as I part with ownership then I can say nothing about the price.

And under this recent decision, in which it is stated that the right to fix price does not follow beyond the ownership, I repeat that it is not a question of the goods—I am perfectly willing that the goods shall be sold at any price; but I do not want the abuse of my name to my disadvantage. I do not want that name exploited in a way which will alienate others, or take away the incentive from hundreds of others to handle my goods. It is a very simple case.

Mr. NELSON. How would you prevent it?

Mr. GARST. Give me the right to fix the price on my individual goods. As I have said, I can do that now as long as I can retain ownership in the goods, but it is difficult for me to retain ownership from myself to the consumer. I have to use the agency——

The CHAIRMAN (interposing). After you have parted with all title to the property, you want an act of Congress authorizing you to follow it into the hands of the owner of the property and allow you then and there to fix a price for the consumer to pay, is that your proposition?

Mr. GARST. Excuse me, I do not part with title to the name; I do part with title to the goods. He can do as he chooses with the goods, but I do not want him to sell below the price I stipulate, so long as my name is attached to it.

The CHAIRMAN. Well, nobody can use the name. The consumer does not use the name; he uses, for instance, your porch shade; he can tear the name off of it?

Mr. GARST. I am perfectly willing that he should do that; but I do not want him to advertise it in the papers as Shredwood curtain; he can advertise it in the paper as Jones's curtain, or the A B C curtain; that does me no harm. But when he sells Shredwood curtains at half price, there will be a dozen other dealers who will not want to handle Shredwood curtains. I have a further statement here which I will not undertake to read, but I would like to have the privilege of incorporating it in the record.

The CHAIRMAN. You will be given the privilege of printing it as a part of your remarks.

(The statement referred to is as follows:)

The fallacious phrase that competition is the life of trade has been almost a fetish in this country. Diversity in production is the life of trade.

It is a misnomer to call underselling competition. It is commercial war, unless the cost of production is lower in one case than in another. When a manufacturer finds it uneconomical to market his goods without the services of middlemen and is debarred from maintaining both the jobbing and retail prices by an agreement, he is placed at a disadvantage and may be obliged to close his shop or sell to a concern that can operate it in conjunction with another of the same kind or with one that differs in kind.

No manufacturer should be obliged to compete against himself to continue in business nor be limited in output to one store as the only practical way to maintain a uniform price.

If it is true that every man is entitled to the fruit of his labor so long as he does not unjustly injure another, it ought to be possible for him to maintain the price of goods of his make after parting with their possession. It surely ought not to be possible for anyone to adopt the policy of exploiting a trade-marked article under the trade-mark name of the owner if the owner of the trade-mark objects. If there were trade-marked products that could not be duplicated under other names, competition might be prevented to the detriment of the public.

In an able article by Theodore N. Vail, in the Atlantic Monthly of March 3, 1913, he says:

"Where competition in any field is carried on at a reasonable profit it may be the result of agreement expressed or implied, or it may be that observation or experience of the cost and destruction of aggressive competition, lead to the exercise of a reasonable restraint in the method and efforts of all to increase business and maintain profits. So long as business is above normal, or is even normal, it is easy for competitors to maintain prices or to observe agreements; but when business is subnormal and hard to obtain, while at the same time expenses are constant, charges are continuous, and business at or below cost is better than none, no agreement or understanding, expressed or implied, without penalty, will be long observed.

"Competition, so-called, in any enterprises carried on at unreasonable profits is, without question, always the result of some understanding or agreement implied or expressed. Unreasonable profits are bound sooner or later to introduce new conditions and new competitors in any field, whether stationary or growing. It is this that has given rise to the belief in the great virtues of competition.

"Competition is induced by many causes—by a desire to meet and share an increasing demand for, or consumption of, any commodity or service at normal profits; or to obtain a share of a business in which profits are very attractive and tempting; or to share in an increasing business with excessive profits. The object may be to create a permanent, continuing, and profitable business, and to obtain, at reasonable prices, a fair share of the going or growing business; or to create by destructive and aggressive tactics such a situation as will force a settlement by purchase, combination, or an understanding of some kind, with an established business; or to promote a business upon the reputation and success of others and sell it to innocent investors upon misleading statements, either willful or mistaken.

"The vicious acts associated with aggressive competition are responsible for much, if not all, of the present antagonism in the public mind to business, particularly to large business. These vices are the necessary accompaniment of the methods of destructive competition. The reason for the public's encouragement of such competition lies in the belief that from it they will derive some benefit. In the long run, however, the public, as a whole, has never benefited by destructive competition.

"No business can be conducted permanently without some margin over and above the operating expenses, which must include ample maintenance of its plant at the highest 'going-concern' standard, while any business can be conducted for an indefinite period at an an apparent profit at the cost of its plant or its capital depreciation, so long as they last, and after that for some time on receivers' certificates. There may be temporary benefit to the consumer from unprofitable prices, but in the end prices must necessarily be restored or increased to recoup the losses of the cut prices and to pay the charges on capital invested in unnecessary duplication, if such capital is not to be absolutely lost to the investor.

"It must not be forgotten that, in competition of this kind, whether in the field of industrials or of utilities, the start is with small business and between small businesses; the big combination or the big business is a combination for offensive and defensive purposes, and it is to be likened to the survival of the strongest, if not the fittest. Business and production must be on a large scale commensurate with the consumption and the new methods of production, which to produce at all must produce by the thousands. Large business or large production means a large aggregate profit from a small percentage of profit, while small business or small production must mean a large percentage of profit or small and unsatisfactory compensation to the producer, or both.

"There is not one act, good or bad, wrong or wright, that is charged to big business that did not originate with and does not still exist in small business, while big business has one weakness inherent in its condition which small business has not, and that is notoriety and publicity. Big business is in the glare of

sunlight while the smaller business is more or less in the shade. Big business is more impersonal as to it proprietorship or its ownership or is centered about a few of those prominently connected with it, while its widespread body of small proprietors or partners—that is, the shareholders—have no association with it in the minds of the public and, as a rule, are indifferent to all that is going on so long as dividends are maintained.

"The settlements of competitive wars always affect the public unfavorably, not only toward the ones engaged, but toward all other industrial or utility enterprises. When prices are restored even to a normal and reasonable basis they are in constant contrast with the cut price of competitive war, and the consumer is constantly reminded of the differences and resents them: why, it is hard to say, for there is no reason why the public should suspect that some individuals of the public engage in this aggressive competition for any other than a selfish purpose or for any other benefit than their own, nor is there any reason why it should be expected that these disastrous competitions would be carried on beyond the point which the competitors believed best for their own interests or beyond the point where the purpose of the competition has been accomplished.

"When those engaged in the competitive warfare end it with profit, that profit is more or less flaunted in the face of the public and is a constant offense; on the other hand, the losses made in the unsuccessful competitions are soon forgotten. If the losses of the unsuccessful promoters of enterprises worthy, and unworthy, or of competitive wars or the losses made by speculators and gamblers were as much talked about and as well known or as much in evidence as the occasional gains the speculator or undesirable promoter would find fewer contributors or followers, and competition would be confined to rational and commendable ends and governed by a decent self-restraint; or if those who did benefit temporarily by aggressive competition also felt the resultant losses there would be less encouragement of that kind of competition and a better feeling on the part of the public toward those industries or utilities which were trying to operate a business in a legitimate manner and at a reasonable profit.

"Another popular belief is that it is due to competition that prices and charges have been permanently reduced. Competition may have been a slight stimulant, but permanently reduced prices are brought about by the protection which encourages the inventor to create and develop labor and time saving machines and new and improved methods and devices; by the desire to gain the profits which reward the study of the wishes, needs, comforts, and luxuries of the world, for the purpose of bettering the existing ones or creating new ones; by the initiative and enterprise which introduced the improved processes and methods; by the introduction of machinery operated by ordinary labor at high wages and to take the place of highly skilled labor at comparatively low wages; but the great increase in the number of purchasers or consumers and by the increase in the average purchasing power of each individual; by the development of markets of such magnitude that large sums could be devoted to the introduction of machinery, processes, and methods which cut producing cost and enabled a large aggregate profit to be realized on large production and large scales at low prices and small percentage of profit. Whether the consumers created the producers or the producers the consumers, whether the developing market produced the improvements which increased production or whether the improvements produced the market is difficult to determine, but one thing is sure—that the business organization of any community is so dependent upon the community that sooner or later any effect, whether for good or for bad, is bound to be felt over the whole."

Competitive struggles should be carried on in efforts to excel in workmanship and in inventions and not along the lines of lessening of wages and increasing of hours of labor. To this end the cooperation of jobbers and retailers is essential in the marketing of goods economically. Such cooperation does not prevent rival concerns from selling their outputs at whatever prices they may see fit.

Speaking of Walter Bagehot's Darwinian ideas, President Hadley, of Yale, said:

"In these twentieth century days, when competition is regarded not as an axiom or postulate of political economy, but simply as an important incident in its development, it is difficult for us to understand the courage that was involved 40 years ago in publishing two critical essays in which competition was regarded not as a standard to which all things must conform, but as one among several alternative phases or modes of social service, whose relative

claims were to be investigated and relative merits judged by their applicability to given conditions."

To a manufacturer who seeks a market beyond the limits of his own shop and to that end requires the cooperation of jobbers and retailers, it is disheartening to find that, if it is necessary to expend time and money to create a demand for his article and he does so, he is debarred from protecting it against the despoilation of aggressive cut-rate stores, whose policy is to exploit regardless of the injury to others.

Untrade-marked goods may under certain conditions be exploited without injustice to any one and to the advantage of the public, especially so when through an agreement prices are unduly raised. The antitrust law may well be invoked against combinations. To apply it to a single individual and the output of individual factories, especially to classes of goods that can not be profitably marketed without advertising, is a radically different proposition.

Prior to the enforcement of the antitrust law a court said: "A proprietor has a right to maintain a fixed price, and it would not comport with the dignity of the court to declare a policy valid and then deprive it of the essential weapon necessary for the enforcement."

Mr. GARST (continuing). And there are some other matters here also that I have that I should like to include as a part of my remarks. I have a decision of the courts in England in the case of Kodak, Limited, against Gamage, in which the position taken by the Kodak Co. was sustained by the high court of England.

Mr. MCCOY. What position; on price fixing?

Mr. GARST. Yes; on price fixing. The goods were sold with certain conditions of sale, and the goods were accepted on those conditions.

The CHAIRMAN. The decision to which you refer may be inserted in the record at this point.

(The decision referred to is as follows:)

1900. K. No. 1095. In the high court of justice. King's Bench division. Writ issued the 12th of December, 1900. Between Kodak, Limited, plaintiffs, and A. W. Gamage, Limited, and F. Wade, defendants.

STATEMENT OF CLAIM.

1. The plaintiffs are manufacturers of and dealers by wholesale and retail in photographic materials. The defendants Gamage are dealers by retail in (among other things) photographic materials

2. It is and was at all material times, as the defendants well knew, the practice of the plaintiffs to sell their goods to dealers at a discount from their list prices upon the conditions set forth in their discount sheet, as follows:

CONDITIONS OF SALE.

Our goods are sold to the trade and discount allowed thereon on condition that they are resold on the following terms:

(1) Only retail or to the profession on the following conditions:

(*a*) Retail: Not under the prices published in our current price list.

(*b*) To the profession: For their own use only and at not more than 10 per cent discount off list prices.

(2) That films and papers shall be sold only in original sealed packages.

Dealers desiring to resell wholesale will be required to enter into a special agreement with us.

By "the profession" in the said conditions of sale is meant professional photographers.

3. Since the month of June, 1899, the defendants Gamage have made persistent efforts to induce dealers who have purchased the plaintiffs' goods on the conditions aforesaid to resell same to the said defendants, in breach of the said conditions; that is to say, either retail below the said list prices or wholesale, without having entered into any such special agreement as aforesaid; and in

some instances they have succeeded in inducing such dealers to break their said contracts with the plaintiffs by reselling the said goods as aforesaid.

4. In particular the defendants Gamage induced the persons following at or about the dates mentioned to resell goods of the plaintiffs as aforesaid, viz:

September, Banks and Graves.
November, 1899, Dale.
October, 1899, Elliott.
September and October, 1899, the defendant Wade.

Until after discovery, the plaintiffs are unable to give better particulars of the matters alleged.

5. In or about the months of September and October, 1900, the defendant Wade purchased certain goods of the plaintiffs on the condition aforesaid, and he resold or parted with the same to the defendants Gamage in breach of his contract as aforesaid, as the defendants Gamage well knew. In the month of October the defendants Gamage offered the said goods for sale, and resold some of the same by retail under the said list prices.

6. Alternatively the defendant Wade purchased the said goods last referred to, as agent for himself and the defendants Gamage, and as such agent fraudulently pretended that he intended to observe the said conditions, while in fact neither he or they intended to observe the said conditions, but intended that the said goods should be taken possession of by the defendants Gamage and resold by retail under the said list prices; and also fraudulently pretended that he was a dealer by retail in photographic materials while in fact he was not a dealer in the said goods at all.

7. The defendants have fraudulently conspired to obtain goods, and have obtained goods, of the plaintiffs, namely, the goods referred to in paragraphs 5 and 6 hereof, by the false pretenses aforesaid.

8. The defendants Gamage have obtained possession of goods sold by the plaintiffs upon and subject to the conditions aforesaid, namely, the goods respectively referred to in paragraphs 4 to 6 hereof, inclusive, with notice that such goods were so sold and have unlawfully dealt with the same by reselling them by retail under the said list prices in breach of the said conditions.

9. By reason of the wrongful acts of the defendants aforesaid, the plaintiffs have suffered damage.

The plaintiffs' claim is for: (1) Damages for breach of contract, (2) damages for fraud and conspiracy, (3) an injunction to restrain the defendants and each of them and his servants and agents from selling or offering for sale or otherwise dealing with goods obtained from the plaintiffs in breach of the conditions upon which the same were obtained from the plaintiffs. (4) An injunction to restrain the defendants A. W. Gamage (Ltd.) from inducing, or seeking to induce, purchasers of the goods of the plaintiffs to sell or otherwise dispose of such goods in breach of the conditions upon which the same were sold by the plaintiffs to such purchasers. (5) Damages for wrongfully inducing such last-mentioned purchasers to break their contracts with the plaintiffs.

D. M. KERLY.

Delivered the 8th day of February, 1901, by Kerly, Son & Verden, of 14 Great Winchester Street, London, E. C., solicitors for the above-named plaintiffs.

1900 K. No. 1095. In the High Court of Justice, Kings Bench Division, the Hon. Mr. Justice Day, Judge in Chambers. Between Kodak (Ltd.), plaintiffs, and A. W. Gamage (Ltd.) and F. Wade, defendants.

Upon hearing the solicitors for the plaintiffs and for the defendants and upon reading the statement of claim delivered on the 8th day of February, 1901, it is ordered that A. W. Gamage (Ltd.) and F. Wade, the defendants, and each of them and their and his servants and agents be perpetually restrained from selling or offering for sale or otherwise dealing with goods obtained from the plaintiffs' Kodak (Ltd.) in breach of the conditions upon which the same were obtained from the plaintiffs and that the defendants A. W. Gamage (Ltd.) be perpetually restrained from inducing or seeking to induce purchasers of the goods of the plaintiffs to sell or otherwise dispose of such goods in breach of the conditions upon which the same were sold by the plaintiffs to such purchasers and that the defendants do pay the plaintiffs' costs of this action and that all further proceedings in this action be stayed.

Dated the 27th day of March, 1901.

Mr. GARST. I have here also two articles from the press which I would like to have inserted in the record. The first is from the Outlook of January 7, 1914, and is entitled "Unfair competition," and the second is from the Pharmaceutical Era, and is entitled "Court upholds one price for all."

(The papers referred to are as follows:)

UNFAIR COMPETITION.

The two evil extremes of commerce are unrighteous monopoly and unfair competition.

The second is almost as bad as the first—almost, but not quite. In laboring, as it has labored for the last 10 years, to correct the first evil the country has lost sight of the second. Perhaps this is partly due to the fact that unfair competition is one of the elements of unrighteous monopoly. Take the question of railway rebates. When the railways gave your competitor a rebate on his freight bills and did not give the same rebate to you, it promoted unfair competition; it enabled him to compete unfairly with you.

Public opinion has so developed during the last 10 years that rich man, poor man, consumer, producer, manufacturer, and financier are now unanimously agreed that unrighteous monopoly is an individual and social evil to be forbidden and suppressed by the Government. This is an admirable achievement. But in the warfare—for it has been warfare which has produced this achievement—there has been used a shibboleth which has had a confusing effect even upon men of intelligence and the best intentions. "Free competition" is this shibboleth. It has been used even by men of the best intentions to defend commercial practices which constitute unfair competition. In an article on another page a New York lawyer who has made a special study of the subject defines unfair competition and shows what has been the attitude toward it of the courts and governments of other nations. Among those who have been the first to feel the harmful effects of unfair competition are the manufacturers of nationally advertised goods. They claim that cut prices of these nationally advertised articles is an injustice to them, and is harmful to the consumer. We think they are right. As a definite and practical illustration let us take The Outlook.

After many years' labor with such talents, energy, and capital as they possessed, the publishers of The Outlook have created for it a national name The retail price of The Outlook is 10 cents. Any dealer who sells it for less than 10 cents is doing an injustice to the publishers, because he creates the impression in his community that the article is really not worth 10 cents, a fact which The Outlook has been advertising and insisting upon. Second, he does an injustice to the community. If Mr. A pays 10 cents for The Outlook and Mr. B pays 8 cents for The Outlook, there is the same principle of rebates which was involved in the railway cases. It is a distinct advantage to the people of the United States to know that an article with a national reputation can be bought only at one price, and in any shop or store in any town or city in the country. The man who argues aghinst this proposition and says it is advantageous to him to buy The Outlook for 8 cents, if he can get it at 8 cents instead of the advertised price, 10 cents, is using the same selfish appeal that the supporters of rebates in the railway cases used.

To prohibit unfair retail prices of nationally advertised articles is not a violation of free competition. If The Outlook maintains its retail price everywhere of 10 cents, and the paper is not worth 10 cents, some other publisher will come along with either a better paper at the same price or an equally good paper at a less price. That is the principle of free competition. What unrighteous monopoly has done is to prevent or to endeavor to prevent the other publisher from his free opportunity to compete.

Judging frm the bills to regulate business which have been introduced into Congress by the administration, we think the administration is itself suffering from this confusion of thought. It does not distinguish unfair competition from free competition. How can the two things be distinguished? How can you forbid one without throttling the other?

The problem seems to us to be a simple one. We would have no prohibitory legislation forbidding "cut prices," but we would have permissive legislation

allowing the manufacturer and advertiser to make a contract under the common law with the dealer that the dealer will not cut the advertised price. If the dealer breaks this contract, the manufacturer is to be permitted to refuse to do business with him exactly as he is permitted to refuse to do business with the retailer who declines to pay his bills. This was the situation 10, 15, 25 years ago. One of the great collar manufacturing firms of Troy was, we believe, the first to introduce this relation between the manufacturer and the retailer in the United States. It worked well and satisfactorily until some of the extreme advocates of free competition conceived the notion that a contract between a manufacturer of a specific article and the retailer of that article was unrighteous monopoly. The way to promote free competition is to prevent a manufacturer from obtaining an artificial monopoly of all the goods in his field, at the same time permitting him to make his free agreement with the individual retailer. If it were conceivable that one manufacturer could obtain a monopoly of producing all the watches in the United States, it would, of course, be unwise and unjust to allow him to fix the retail price of a watch through the dealer. If, however, Messrs. A & Co. fix the retail price of their watch at $50, when it is worth only $25, the remedy is not to permit the retailer to cut the price, but to permit another manufacturer to come in with a $25 watch.

We repeat, no intelligent man asks the Government to prohibit "cut prices"; but we think the intelligence of the country does demand that the Government shall permit the private manufacturer to fix by private contract the resale price of the article which his genius has created.

COURT UPHOLDS ONE PRICE FOR ALL.

In the maze of decisions rendered during the past two years by the United States court of appeals and by the United States Supreme Court in the now famous Sanatogen case, the Gillette Safety Razor case, and other suits in which the right of the manufacturer to fix the retail sales price was the issue, there has been no pronouncement of such really sensational import as that just given in the Fisher Flouring Mills case. In view of the attitude of President Wilson in urging antitrust legislation this decision is held by constitutional lawyers to be one of the most important in recent years.

The case itself was a replica of similar suits—a manufacturer of flour brought suit against a retail dealer who cut the price of the article contrary to agreement. The dealer's right to cut prices was upheld by the lower courts, but when an appeal was made to the supreme tribunal the lower court decisions were reversed, and by a vote of eight to one the milling company was granted an injunction and damages.

The advocates of a "one-price-for-all" policy in merchandising are given more real encouragement in the concluding paragraph of the court's findings than in all similar decisions during the past decade:

"The true competition is between rival articles—a competition in excellence—which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at or above their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability in the face of cut prices to maintain the excellence of his product. Fixing the price on all brands of high-grade flour is a very different thing from fixing the price on one brand of high-grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has not interests to protect by contract in goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement."

Mr. GARST. I also desire to have inserted an article by Mr. Louis D. Brandeis, entitled "Cutthroat prices," which appeared in Harper's Weekly for November 15, 1913.

The CHAIRMAN. That may be inserted at this point:

(The article referred to is as follows):

CUTTHROAT PRICES.

[By Louis D. Brandeis.]

THE COMPETITION THAT KILLS.

"I can not believe," said Mr. Justice Holmes, "that in the long run the public will profit by this course, permitting knaves to cut reasonable prices for mere ulterior purposes of their own, and thus to impair, if not destroy, the production and the sale of articles which it is assumed to be desirable the people should be able to get."

Such was the dissent registered by this forward-looking judge when, two years ago, the Supreme Court of the United States declared invalid contracts by which a manufacturer of trade-marked goods sought to prevent retailers from cutting the price he had established.[1] Shortly before the court had held that mere possession of a copyright did not give the maker of an article power to fix by notice the price at which it should be sold to the consumer.[2] And now the court, by a five-to-four decision, has applied the same rule to patented articles, thus dealing a third blow at the practice of retailing nationally advertised goods at a uniform price throughout the country.[3]

Primitive barter was a contest of wits, instead of an exchange of ascertained values. It was, indeed, an equation of two unknown quantities.

Trading took its first great advance when money was adopted as the medium of exchange. That removed one-half of the uncertainty incident to a trade—but only one-half. The transaction of buying and selling remained still a contest of wits. The seller still gave as little in value and got as much in money as he could. And the law looked on at the contest, declaring solemnly and ominously: "Let the buyer beware." Within ample limits the seller might legally lie with impunity; and, almost without limits, he might legally deceive by silence. The law gave no redress because it deemed reliance upon sellers' talk unreasonable; and not to discover for oneself the defects in an article purchased was ordinarily proof of negligence. A good bargain meant a transaction in which one person got the better of another. Trading in the "good old days" imposed upon the seller no obligation either to tell the truth, or to give value, or to treat all customers alike. But in the last generation trade morals have made great strides. New methods essential to doing business on a large scale were introduced. They are timesaving and labor-saving, and have proved also conscience-saving devices.

The greatest progress in this respect has been made in the retail trade, and the first important step was the introduction of the one-price store. That eliminated the constant haggling about prices and the unjust discrimination among customers. But it did far more. It tended to secure fair prices; for it compelled the dealer to make, deliberately, prices by which he was prepared to stand or fall. It involved a publicity of prices which invited a comparison in detail with those of competitors, and it subjected all his prices to the criticism of all his customers. But while the one-price store marked a great advance, it did not bring the full assurance that the seller was giving value. The day's price of the article offered was fixed, and every customer was treated alike; but there was still no adequate guaranty of value, both because there was ordinarily no recognized standard of quality for the particular article and because there was no standard price even for the article of standard quality.

Under such conditions the purchaser had still to rely for protection on his own acumen or on the character and judgment of the retailer, and the individual producer had little encouragement to establish or to maintain a reputation. The unscrupulous or unskillful dealer might be led to abandon his goods for cheaper and inferior substitutes. This ever present danger led to an ever widening use of trade-marks. Thereby the producer secured the reward for well doing, and the consumer the desired guaranty of quality. Later the sale of trade-marked goods at retail in original packages supplied a further assurance of quality, and also the assurance that the proper quan-

[1] Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S., 409.
[2] Bobbs Merrill Co. v. Straus, 210 U. S., 339.
[3] Bauer v. O'Donnell, 229 U. S., 1.

tity was delivered. The enactment of the Federal pure-food law and similar State legislation strengthened these guaranties.

But the standard of value in retail trade was not fully secured until a method was devised by which a uniform retail selling price was established for trade-marked articles sold in the original package. In that way, widely extended use of a trade-marked article fostered by national advertising could create both a reputation for the article and a common knowledge of its established selling price or value. With the introduction of that device the evolution of the modern purchase became complete. The ordinary retail sale—the transaction which had once been an equation of two unknown quantities—became an equation of two known quantities. Uncertainty in trade is eliminated by "A dollar and the Ingersoll watch" or "Five cents and the Uneeda Biscuits."

THE COURT'S PROHIBITION.

Such is the one-price system to which the United States Supreme Court denied its sanction. The courts of Great Britain had recognized this method of marketing goods as legal. The Supreme Court of Massachusetts had approved it. The Supreme Court of California has wholly approved it. The system was introduced into America many years ago and has become widely extended. To abandon it now would disturb many lines of business and seriously impair the prosperity of many concerns.

When the United States Supreme Court denied to makers of copyrighted or patented goods the power to fix by notice the prices at which the goods should be retailed, the court merely interpreted the patent and copyright acts and declared that they do not confer any such special privilege. But when the court denied the validity of contracts for price maintenance of trade-marked goods, it decided a very different matter. It did not rest its decision upon the interpretation of a statute; for there is no statute which in terms prohibits price maintenance, or, indeed, deals directly with the subject. It did not refuse to grant a special privilege to certain manufacturers, it denied a common right to all producers. Nor does the decision of the court proceed upon any fundamental or technical rule of law. The decision rests upon general reasoning as to public policy, and that reasoning is largely from analogy.

THE DEMANDS OF PUBLIC POLICY.

When a court decides a case upon grounds of public policy the judges become, in effect, legislators. The question then involved is no longer one for lawyers only. It seems fitting, therefore, to inquire whether this judicial legislation is sound—whether the common trade practice of maintaining the price of trade-marked articles has been justly condemned. And when making that inquiry we may well bear in mind this admonition of Sir George Jessel, a very wise English judge:

"If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

THE COURT'S OBJECTION.

The Supreme Court says that a contract by which a producer binds a retailer to maintain the established selling price of his trade-marked product is void, because it prevents competition between retailers of the article and restrains trade.

Such a contract does, in a way, limit competition; but no man is bound to compete with himself. And when the same trade-marked article is sold in the same market by one dealer at a less price than by another, the producer, in effect, competes with himself. To avoid such competition the producer of a trade-marked article often sells it to but a single dealer in a city or town, or he establishes an exclusive sales agency. No one has questioned the legal right of an independent producer to create such exclusive outlets for his product. But if exclusive selling agencies are legal, why should the individual manufacturer of a trade-marked article be prevented from establishing a marketing system

under which his several agencies for distribution will sell at the same price? There is no difference, in substance, between an agent who retails the article and a dealer who retails it.

For many business concerns the policy of maintaining a standard price for a standard article is simple. The village baker readily maintained the quality and price of his product, by sale and delivery over his own counter. The great Standard Oil monopoly maintains quality and price (when it desires so to do) by selling throughout the world to the individual customer from its own tank wagons. But for most producers the jobber and the retailer are the necessary means of distribution—as necessary as the railroad, the express, or the parcel post. The Standard Oil Co. can without entering into contracts with dealers maintain the price through its dominant power. Shall the law discriminate against the lesser concerns which have not that power, and deny them the legal right to contract with dealers to accomplish a like result? For in order to insure to the small producer the ability to maintain the price of his product the law must afford him contract protection when he deals through the middleman.

But the Supreme Court says that a contract which prevents a dealer of trade-marked articles from cutting the established selling price, restrains trade. In a sense every contract restrains trade; for after one has entered into a contract he is not as free in trading as he was before he bound himself. But the right to bind oneself is essential to trade development. And it is not every contract in restraint of trade, but only contracts unreasonably in restraint of trade which are invalid. Whether a contract does unreasonably restrain trade is not to be determined by abstract reasoning. Facts only can be safely relied upon to teach us whether a trade practice is consistent with the general welfare. And abundant experience establishes that the one-price system which marks so important an advance in the ethics of trade, has also greatly increased the efficiency of merchandising not only for the producer but for the dealer and the consumer as well.

THE PRODUCERS' PLEA.

If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer. Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price cutting which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

CUT PRICES—THE "MISLEADER."

When a trade-marked article is advertised to be sold at less than the standard price it is generally done to attract persons to the particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a "leader." But the cut-price article would more appropriately be termed a "misleader"; because ordinarily the very purpose of the cut price is to create a false impression.

The dealer who sells the dollar Ingersoll watch for 67 cents necessarily loses money in that particular transaction. He has no desire to sell any article on which he must lose money. He advertises the sale partly to attract customers to his store; but mainly to create in the minds of those customers the false impression that other articles in which he deals and which are not of a standard or known value will be sold upon like favorable terms. The customer is expected to believe that if an Ingersoll watch is sold at 33⅓ per cent less than others charge for it, a ready-to-wear suit or a gold ring will be sold as cheap. The more successful the individual producer of a trade-marked article has been in creating for it a recognized value as well as a wide sale, the greater is the temptation to the unscrupulous to cut the price. Indeed, a cut-price article can ordinarily be effective as a "misleader" only when both the merits and the established selling price are widely known.

HOW CUT PRICES HURT.

The evil results of price cutting are far-reaching. It is sometimes urged that price cutting of a trade-marked article injures no one; that the producer is not injured, since he received his full price in the original sale to jobber or retailer; and indeed may be benefited by increased sales, since lower prices ordinarily stimulate trade; that the retailer can not be harmed, since he has cut the price voluntarily to advance his own interests; that the consumer is surely benefited because he gets the article cheaper. But this reasoning is most superficial and misleading.

To sell a dollar Ingersoll watch for 67 cents injures both the manufacturer and the regular dealer, because it tends to make the public believe that either the manufacturer's or the dealer's profits are ordinarily exorbitant; or, in other words, that the watch is not worth a dollar. Such a cut necessarily impairs the reputation of the article and, by impairing reputation, lessens the demand. It may even destroy the manufacturer's market. A few conspicuous "cut-price sales" in any market will demoralize the trade of the regular dealers in that article. They can not sell it at cut prices without losing money. They might be able to sell a few of the articles at the established price; but they would do so at the risk to their own reputation. The cut by others, if known, would create the impression on their own customers of having been overcharged. It is better policy for the regular dealer to drop the line altogether. On the other hand, the demand for the article from the irregular dealer who cuts the price is short lived. The cut-price article can not long remain his "leader." His use for it is sporadic and temporary. One "leader" is soon discarded for another. Then the cut-price outlet is closed to the producer; and, meanwhile, the regular trade has been lost. Thus a single prominent price cutter can ruin a market for both the producer and the regular retailer. And the loss to the retailer is serious.

On the other hand, the consumer's gain from price cutting is only sporadic and temporary. The few who buy a standard article for less than its value do benefit—unless they have, at the same time, been misled into buying some other article at more than its value. But the public generally is the loser; and the losses are often permanent. If the price cutting is not stayed, and the manufacturer reduces the price to his regular customers in order to enable them to retain their market, he is tempted to deteriorate the article in order to preserve his own profits. If the manufacturer can not or will not reduce his price to the dealer, and the regular retailers abandon the line, the consumer suffers at least the inconvenience of not being able to buy the article.

PRICE MAINTENANCE IS NOT PRICE FIXING.

The independent producer of an article which bears his name or trade-mark—be he manufacturer or grower—seeks no special privilege when he makes contracts to prevent retailers from cutting his established selling price. The producer says in effect: "That which I create, in which I embody my experience, to which I give my reputation, is my property. By my own effort I have created a product valuable not only to myself, but to the consumer; for I have endowed this specific article with qualities which the consumer desires, and which the consumer should be able to rely confidently upon receiving when he purchases my article in the original package. To be able to buy my article with the assurance that it possesses the desired qualities, is quite as much of value to the consumer who purchases it as it is of value to the maker who is seeking to find customers for it. It is essential that the consumer should have confidence not only in the quality of my product, but in the fairness of the price he pays. And to accomplish a proper and adequate distribution of product guaranteed both as to quality and price, I must provide by contract against the retail price being 'cut.'"

The position of the independent producer who establishes the price at which his own trade-marked article shall be sold to the consumer must not be confused with that of a combination or trust which, controlling the market, fixes the price of a staple article. The independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is nevertheless popular, the high profits will invite even more competition. The consumer who pays the price established by an independent producer in a com-

petitive line of business does so voluntarily; he pays the price asked, because he deems the article worth that price as compared with the cost of other competing articles. But when a trust fixes, through its monopoly power, the price of a staple article in common use, the consumer does not pay the price voluntarily. He pays under compulsion. There being no competitor he must pay the price fixed by the trust, or be deprived of the use of the article.

Price cutting has, naturally, played a prominent part in the history of nearly every American industrial monopoly.

Commissioner Herbert Knox Smith found after the elaborate investigation undertaken by the Federal Bureau of Corporations that:

"One of the most effective means employed by the Standard Oil Co. to secure and maintain the large degree of monopoly which it possesses is the cut in prices to the particular customers, or in the particular markets of its competitors, while maintaining them at a higher level elsewhere."

And Chief Justice White, in delivering the opinion of the United States Supreme Court in the Tobacco Trust case, said:

"* * * The intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued."

Therefore, recent legislative attempts to stay monopoly commonly include in some form prohibition against the making of cut-throat prices, with a view to suppressing competition. Such provisions will be found in the bills proposed by Senator La Follette, Congressman Stanley, and Senator Cummins to supplement the Sherman antitrust law; and statutes dealing with the subject have been enacted in several States.

President Wilson urged most wisely that instead of sanctioning and regulating private monopoly, we should regulate competition. Undoubtedly statutes must be enacted to secure adequate and effective regulation; but shall our courts prohibit voluntary regulation of competition by those engaged in business? And is not the one-price system for trade-marked articles a most desirable form of regulation?

PRICE CUTTING—THE ROAD TO MONOPOLY.

The competition attained by prohibiting the producer of a trade-marked article from maintaining his established price offers nothing substantial. Such competition is superficial merely. It is sporadic, temporary, delusive. It fails to protect the public where protection is needed. It is powerless to prevent the trust from fixing extortionate prices for its product. The great corporation with ample capital, a perfected organization, and a large volume of business can establish its own agencies or sell direct to the consumer, and is in no danger of having its business destroyed by price cutting among retailers. But the prohibition of price maintenance imposes upon the small and independent producers a serious handicap. Some avenue of escape must be sought by them, and it may be found in combination. Independent manufacturers without the capital or the volume of business requisite for engaging alone in the retail trade will be apt to combine with existing chains of stores, or to join with other manufacturers similarly situated in establishing new chains of retail stores through which to market their products direct to the consumer. The process of exterminating the small independent retailer, already hard pressed by capitalistic combinations—the mail-order houses, existing chains of stores, and the large department stores—would be greatly accelerated by such a movement. Already the displacement of the small independent business man by the huge corporation, with its myriad of employees, its absentee ownership, and its financier control, presents a grave danger to our democracy. The social loss is great, and there is no economic gain. But the process of capitalizing free Americans is not an inevitable one. It is not even in accord with the natural law of business. It is largely the result of unwise, man-made, privilege-creating law, which has stimulated existing tendencies to inequality instead of discouraging them. Shall we, under the guise of protecting competition, further foster monopoly by creating immunity for the price cutters?

MONOPOLY'S EASIEST WAY.

Americans should be under no illusions as to the value or effect of price cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Farseeing organized capital secures by this means the cooperation of the shortsighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and selling his birthright for a mess of pottage becomes himself an instrument of monopoly.

Mr. NELSON. How long have you been in the business, Mr. Garst?

Mr. GARST. This business that I have referred to? I started out in the manufacture of a loom for making what is called short-weft goods; primarily I started in making matting.

Mr. NELSON. I mean how long have you been in the business of handling this article, the porch curtain?

Mr. GARST. This is the third year that I have been manufacturing that article.

Mr. NELSON. Have you tried the system of fixing the price to the jobber and the retailer?

Mr. GARST. I have.

Mr. NELSON. And you operated in that way until the recent decision of the Supreme Court?

Mr. GARST. It was the Miles case, was it not?

Mr. NELSON. Well, the case that denied you that privilege.

Mr. GARST. I have been connected with another business for 25 years—a proprietary business—in which I have for 20 years undertaken to control retail prices.

Mr. NELSON. On trade-marked goods?

Mr. GARST. Yes; on trade-marked goods.

Mr. NELSON. And what you want is the privilege of going along in the same way?

Mr. GARST. I beg your pardon?

Mr. NELSON. You want Congress to amend the law so that you can go along in the same way, do you?

Mr. GARST. Yes, sir.

Mr. NELSON. And that is all you want?

Mr. GARST. I want to market my goods, that is the primary object; and I do not know of any other way to adequately protect myself and protect the retailer, and in the last analysis the consumer.

The CHAIRMAN. Well, after you have parted with all property rights in your goods, how can you control the disposition of those goods?

Mr. GARST. Well, I would like to have the law so amended that I would not entirely part with the property right in the name. I am perfectly willing to part with the property right in the shade and let anybody sell it as he chooses—remove the brand; but when I advertise I must attach some name to my goods.

The CHAIRMAN. Well, the purchaser can not wear the name; he can not eat it; he can not use it. He does not do that; the name does not shade anything. Take your porch shade; the name does not shade anything; he uses the shade itself, and not the name.

Mr. GARST. Well, let me state this: I want to advertise to create a market. Now, if I should go out and advertise porch shades—there are half a dozen, and there may be 15 or 20 manufacturers making

porch shades. Could I afford to spend $5,000 or $1,000 to advertise porch shades? They would say, "What porch shade?" and the answer would have to be, "Why, any porch shade you want." To advertise porch shades in that way to any advantage there should be a combination. Every manufacturer should pool his interests with the others, the same as automobiles. Suppose a man says, "I am an automobile manufacturer"; and you ask, "What is the name of your automobile?" and he says, "Why, it is just an automobile." A man could not go out and advertise an automobile and spend his money and have the benefits distributed around in that way. He must mention some specific name as his automobile.

Mr. NELSON. May I inquire as to this—just to get your view as a practical business man: Suppose Congress gives this right to persons who have articles that are trade-marked or copyrighted, of fixing the price to the jobber and to the retailer; would not that be a very great privilege which every manufacturer would try to get for himself, and would not that tend, therefore, to make them seek to obtain trade-marks and copyrights on nearly everything that went into the trades?

Mr. GARST. In answer to that, I would say that when one man is doing a successful business there are many others ready to step in and establish a similar business, as soon as they see that he is doing a profitable business. Now, if I have a fixed price on my shade—in fact, my trade came into existence somewhat along that line, as I have stated—it started out as the manufacture of matting first. The same mechanism was applicable to the manufacture of a shade.

Another concern in this country and a concern in Germany were making shades. My type of shade was an improvement on the German type primarily. The margin was so close that I did not meet expenses last year. There is quite a little waste. It is made of basswood, and basswood costs $45 a thousand, and is about 33⅓ per cent waste; and there was no profit in it. The only thing to do was to make a different type of shade. There is already a different type of shade on the market. My type of shade is very much like the one that is on the market. There are three others, at least, making a similar type of shade. Mine, I think, is better than any of the others. And the competition is not in cutting the price; the competition is in making a superior article. Now, we figure that we make 30 cents on a shade; if we make 40,000 shades and sell them at an expense of from 15 to 20 per cent for the marketing we will make a nice little profit.

Mr. NELSON. Perhaps it is my dullness, but I do not quite follow you. I want to get your answer to my question; is it likely that others would get the names of their shades trade-marked, or get copyrights, and that they would go into competition with you, and that that would take care of the consumer?

Mr. GARST. To a very large extent.

Mr. NELSON. And they could fix a price, too?

Mr. GARST. They could fix a price on their shade.

Mr. NELSON. And they would gage their price very largely by what you would do?

Mr. GARST. Very likely.

Mr. NELSON. Then where is the competition?

Mr. GARST. There is competition in the question of excellency and in getting orders.

Mr. NELSON. In quality?

Mr. GARST. Yes; they are trying to reach the same market that I am trying to reach. Now, for me to undersell them would be the height of folly, because they would meet my price again.

Mr. NELSON. Yes.

Mr. GARST. That is not competition. You may consider that competition; I consider it commercial war.

Mr. NELSON. The practical result would be that the leading man in the market would fix the price, and the others would reach that price, and the consumer would pay the same price, and would only get the difference in quality?

Mr. GARST. Practically so. The man who has an established trade—when another man comes into the field if he is a man of experience he does not come in and reduce the price. Take two men who are dealing in coal. I do not suppose there is any city in the United States where the price of coal is not uniform. How can it be otherwise? Take Washington, for example; if a man in the coal business here advertises coal for 25 cents a ton less than the other dealers sell it for, the only thing for the other dealers to do is to reduce their price 25 cents; and then the other man will reduce it 25 cents more, and so on; and sooner or later it is the survival of the strongest, and one or the other is driven out of business.

Mr. NELSON. But if you have a common price, and you find that a good thing in keeping up prices, would you not find it a good thing not to compete in quality?

Mr. GARST. Well, that might be possible, but is not probable.

Mr. NELSON. Would you not then reach a state of stagnation, and absolutely noncompetitive conditions?

Mr. GARST. You are still independent dealers; you are competitors even if the quality is the same. Take the men who are selling granulated sugar, for instance. There may be a difference in granulated sugar. I have heard that cane sugar is better than beet sugar, but I have only heard it within a year, and I do not actually know it now. But here are two men going out and selling granulated sugar, and it is of the same quality; but there is competition just the same. They are not underselling each other in price. I think that is a mistake to consider underselling as competition. I consider that it is commercial war, and the survival of the strongest.

Mr. DUPRÉ. Does the English decision, to which you have referred, include a discussion of a statute that gives the right to the man owning a trade-mark or a copyright to follow his property to the ultimate consumer?

Mr. GARST. I think so. The same principle is in use in Germany. There is an excellent book published on the subject by Frank Koester, entitled "The Cost of Inefficiency." He is a German, and quite conversant with conditions in Germany, although I think he is living in America. In that book he states that the price of inefficiency is about 40 per cent. That is not as high as it is in some other utilities. I understand that in electricity there is but little of the real force conserved, and it is the same with steam; but it ought not to apply in commercial affairs. And the present status would tend to drive

business to department stores and mail-order houses. I quote from that book:

> Competition in America is a cutthroat thing which ruins business men by hundreds of thousands to the ultimate disadvantage of the consumer. While competition is held up as a panacea for trusts, it is in reality the cause of trusts. Business men in seeking to escape destruction from unbridled competition, as well as to procure greater gains, were drawn into combinations, which in turn crushed the more independent business men or forced them to join the combinations, sacrificing their own business identity. Had competition been properly regulated and unfair methods prevented by law, trusts could not have arisen. In Germany, for example, a competitor is not allowed to cut prices simply for the sake of killing a rival. No such industrial wars are allowed, as the public realizes that this is the seed of monopoly. Consequently the trusts, as we know them, do not sprout so readily, and all the turmoil and the shouting are nipped in the bud. The fetich of free competition has cost the American public dearly, for free competition includes unfair competition and leads directly to monopoly (p. 216).

I met a gentleman coming here on the train, and he asked me "Why do you not correspond with Sears, Roebuck & Co. or Montgomery Ward & Co., the mail-order houses? They would take your entire output." This has been suggested to me before.

Mr. DUPRÉ. How would the consumer be hurt by that? How would he be helped by you limiting the price to him?

Mr. GARST. Well, I do not know how to explain. If he—the mail-order house—would continue the business forever and take the entire output at my price, that might be so. But let us assume that they find this year that it is a very good thing, and next year the mail-order house finds that somebody would make the goods cheaper, and to that end reduce quality. That might put me out of business.

I have always acted on the belief that it is an advantage to both producers and consumers to have many distributing agencies. I think there is more probability of a business being long continued if many jobbers and retailers cooperate with a given manufacturer than to have the entire output go through one mail-order house. A change in the personnel of one house may be more disturbing than a few annual changes in many concerns.

Mr. NELSON. In other words, you can not rely on one jobbing customer?

Mr. GARST. I do not think so. It may be for the public interest to drive me out of business; but I am arguing on the assumption——

Mr. NELSON (interposing). Let me interrupt you there. We legislators must legislate for the producers and the jobbers and retailers and consumers and everybody. My idea, as a member of this committee is, What am I doing to the consumer if a permit the manufacturers and jobbers to fix prices down to the consumer? How do we protect him by doing such a thing as that?

Mr. GARST. Well, in the first place, this does not apply to common commodities; it applies to articles for which there is an artificial demand. Let me cite, as an illustration, Chase & Sanborn's coffee. I think it is put up in Boston. There is a demand for coffee. Let us call it an artificial demand. But there is not any great demand for Chase & Sanborn's coffee until it is known as Chase & Sanborn's coffee, and that it has a certain blend that the people like.

Now, what harm does that do to the consumer to have Chase & Sanborn fix the price on Chase & Sanborn's coffee? It does not deter

the consumer from buying other coffee. It is the same way with sugar and it is the same way with flour.

Mr. NELSON. But you are losing sight of the fact that we can not give a special favor to the man who produces that kind of coffee without giving the other man the chance to fix his prices.

Mr. GARST. Why, he has that.

Mr. NELSON. And then we come to the other situation, that you admitted that there would not be any competition, except as to quality, and you admitted that even as to quality it might fail.

Mr. GARST. There would still be the competition. I would want to sell my goods just the same; and the other manufacturer would want to sell his; that is competition.

Mr. MORGAN. What is your idea about this: You think that a Supreme Court decision has been rendered prohibiting a manufacturer from controlling the retail price; suppose we do not amend the law and give you the privilege that you ask for, is it your idea that that will discourage enterprise and business and trade and individual effort?

Mr. GARST. Very decidedly.

Mr. MORGAN. And really then, as a matter of fact, it is not particularly your individual business that you are interested in, but you think that it is an unwise public policy——

Mr. GARST. I do.

Mr. MORGAN. To attempt to restrict a man who gets up a special article and manufactures it—that that would tend to discourage enterprise and development and growth of business?

Mr. GARST. Very decidedly. It is essential that the manufacturer should be able to protect his article and maintain the price of his article while it is sold under the trade-mark name. I make a distinction between being sold under the trade-mark name and under another name. Now, if Congress should want to make it so that every manufacturer had to put up his article so that the trade-mark could be erased, if the purchaser wanted to, I should imagine a lot of manufacturers would not object to that?

Mr. MORGAN. In other words, if something of this kind is not done a great many articles would not be manufactured that would be manufactured if the old policy were pursued?

Mr. GARST. I think that is true. Of course I can not state that from facts. Now, I am having difficulty in marketing my goods, because of this trouble that I speak of.

Mr. MORGAN. Yes. Then, if you can not market your goods you surely will not manufacture them?

Mr. GARST. There is not enough margin for me to send out agents of my own. I must use agencies already in existence—the wholesalers and the jobbers.

Mr. MORGAN. Well, it is to the benefit of the consumer that you should use the agencies already existing, because if you send out special agents you simply have to add more to the price.

Mr. GARST. That is correct. This proposition is based on the assumption that every man is entitled to the fruits of his own labor, so long as he does not unjustly injure another person.

Mr. MORGAN. Do you think that this could be applied to the farmer or gardener? For instance, if he was growing strawberries

or cabbage or lettuce, that he would have a right, if it was called "Jones's lettuce" and sold under that name—do you think he would have a right to come in and sell it to a grocer and require the grocer to sell it at the price that he, Jones, fixed?

Mr. GARST. Yes, sir; when the grocer wanted to sell it at another price, just let him remove the wrapper and sell it as cabbage or lettuce, but not as "Jones's cabbage or lettuce." Then he can sell it at any price he wants to, so long as he does not abuse the reputation made by Jones.

The same principle applies to oranges and apples. Oranges and apples are shipped very often with wrappers containing the name of the individual who shipped them. Now, the dealer should have the right to sell those apples at any price he chooses, upon removing the wrapper; but if the man that produced the apples wants them sold at a certain price—in one of the bills introduced here in Congress, H. R. 13303, by Mr. Stevens of New Hampshire, it is provided that if the purchaser does not want to sell at the price established, or attempted to be established by the producer, he must notify the producer, and give the producer a chance to buy the fruit back before he sells at a lower price; and in case of bankruptcy sale, or the discontinuance of the handling of a certain article, the purchaser has got to give the first chance to the producer to buy the article back at the price paid. This bill would correct the evils I complain of.

Mr. MCCOY. How much advertising do you do, Mr. Garst?

Mr. GARST. Well, up to the present time, I have not advertised a great deal on this "Shreadwood Curtain" proposition. I have a proprietary article that I have advertised to the extent of many thousand of dollars.

Mr. MCCOY. I did not mean how much in amount. You say you have advertised this screen considerably?

Mr. GARST. No, sir; I have tried to sell it through jobbers and agents, without entering into an advertising campaign. Advertising is very expensive, and I have not set aside any sum of money for that purpose.

Mr. MCCOY. Well, usually the people who have appeared before the committee here, urging the right of fixing retail prices have been those who have advertised very largely; and they say it is their advertising which permits the cut-rate man to use that article as a bait to get people in.

Mr. GARST. That is true. That is absolutely true. But in this case I have difficulty in getting the jobber to handle the goods, merely because one other jobber cut the price. The jobbers said, "We are willing to sell at any price you wish, but we want our retail customers to realize that we are delivering the goods to them, or selling the goods to them just as cheaply as anybody else; and it hurts our reputation if that is not so. The price must be uniform; otherwise we do not want to handle your goods." That is the attitude taken by a good many jobbers.

Gentlemen, I thank you for your attention.

(Thereupon, at 1.10 o'clock p. m., the committee adjourned until to-morrow, Thursday, March 5, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, March 6, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman), presiding.

The CHAIRMAN. There is a delegation of gentlemen here who represent the Retail Dry Goods Association of New York, and if it is the pleasure of the committee we will hear them now. I believe Mr. Bloomingdale is the chairman of that delegation. We will be glad to hear you at this time, Mr. Bloomingdale.

STATEMENT OF MR. E. W. BLOOMINGDALE, OF NEW YORK, N. Y., REPRESENTING THE RETAIL DRY GOODS ASSOCIATION OF NEW YORK.

Mr. BLOOMINGDALE. Mr. Chairman, my name is E. W. Bloomingdale, and I represent the Retail Dry Goods Association of New York, and am chairman of the delegation representing that organization before your committee to-day, and I want to express the thanks of our association for the opportunity you have given us to be heard.

I believe that last Friday was the date originally set for our hearing, but by reason of the fact that we were not able to be here at that time, you, very graciously, in order to suit our personal convenience postponed the hearing until to-day.

The reason we are here is that we have gathered from the newspapers that there has been injected into the discussion of the bills before this committee the proposition to clothe the proposed trades commission with power to fix the retail prices on commodities, and it is to that point I wish to address myself.

The CHAIRMAN. I may say for your information, not desiring to in any way affect your remarks, that the trade-commission bill is before the Committee on Interstate and Foreign Commerce, and not before this committee.

Mr. BLOOMINGDALE. I know that, Mr. Chairman, but the matter of trust legislation is before this committee, and I understand that that matter has been projected into the discussion before this committee.

That question—that point—I believe, has only been brought out in definite form by bills introduced since these hearings have been going on, and I understand they have been referred to this committee. I do not know whether the committee will take cognizance of them or not.

The effort to control the retailer in the fixing of his selling price is not a new idea born of present conditions.

Before the coming of the department store the custom was to mark the prices of all goods in cipher and to get from each purchaser as much as possible. No dealer advertised the prices of his merchandise. The careful shopper was compelled to go from store to store and endeavor to keep qualities and prices in her mind, if she wanted to be sure she was doing the best that could be done. Practically the only goods that were sold at a standard price were patent medicines, and these usually bore a price so much above cost that the cupidity of even the most avaricious dealer was satisfied with it.

The advent of the department store revolutionized these methods, and to-day the universal rule of the retailer is to mark all goods in plain figures and charge the same to everyone.

The next step in the evolution of retail merchandising was to gather into one establishment various classes of goods. It had been found that the overhead charges in the usual store made a large percentage of profit necessary to cover expenses. To include other lines of goods would reduce this burden, by increasing the volume without a corresponding increase in the overhead charges, and thus permit the lowering of prices with consequent increased sales on the entire stock.

The establishment of the marked-price system made it unnecessary to ask a higher price from the easy customer in order to average up with the hard trader. All goods could be marked at a reasonable advance over cost, the percentage of profit varying with the character of the merchandise. On goods that were perishable, seasonal, or subject to capricious changes in fashion, or on articles that required greater capability in selling, or consumed more time in introducing the rate of profit was larger to cover the greater risk or loss of time, while upon goods that were staple or that "sold on sight" the dealer could afford to take a smaller rate of profit, the principal concern of the merchant being to so balance his prices that the total profits on the entire enterprise would be satisfactory.

The conducting of a retail establishment thereby became more complex than it had been when each dealer handled only one class of merchandise and a natural evolution brought about the department store, where all classes of articles have been brought together. The object in view was not the gross profit on the individual items thus added, but an average return on the increased volume of business done. If we are to judge by results there was and is a public demand for establishments of this character, for they have found favor, and every considerable town or city in the United States has its department store.

It is against these establishments that the so-called American Fair Trade League is directing its energies, in attempting to have incorporated into the bill now pending the right of the proposed trade commission to fix retail prices.

It is true that department stores do frequently cut prices, not only on proprietary articles, but on general merchandise as well. Usually these cuts are advertised in the newspapers and millions of householders scan these advertisements, compare the offerings of the different establishments, and take advantage of the opportunity thus offered. It has been left for the American Fair Trade League to discover that in practicing these economies the public is being injured. To sustain this view it is urged that the purchaser may be tempted, by a cut price, to purchase some other article at a higher percentage of profit than is charged on the advertised article. It even has been suggested feebly that the dealer raises his prices on other articles to counterbalance the cut on proprietary articles. In these days of sharp competition such an expedient would be apparent to the most inexperienced shopper. It is just as usual to sell what one might call anonymous merchandise at a special price as it is to offer thusly an advertised article. Advertisements in the daily newspapers will prove this assertion. It is always the public

that gets the benefit of price reductions and to deprive them of it would be to place a burden on the entire community.

Who is it that asks for this legislation. There are 45 names of individuals printed on the letter head of the American Fair Trade League, and their occupations are given. With two exceptions they are all persons whose business interests would be subserved if the measures they propose were to be enacted into law. I find no representative of the public at large among them.

Let us see whether those who invoke the aid of the lawmaking power have any real grievance.

The chief advocate of the proposed law advertises and sells the watch that made the dollar famous. He sells it in quantities of three dozen at 71 cents, and many of the wicked price cutters have advertised to sell at 79 cents. According to the mercantile agency reports the corporation seems to have commenced business in 1888 and at that time claimed a surplus of $8,207.39 over liabilities of $894.50. On December 31, 1911, they claim a surplus of $1,627,786.21 over liabilities. Their liabilities are given at $522,974.39, which amount includes $200,000 capital stock, so it doesn't look as though they had been impaled on either horn of the dilemma. This same progression is shown by the reports I have obtained with regard to other proprietary articles.

Welch's Grape Juice Co., for example, shows 1906, net worth, $179,874; 1912, net worth, $900,147.17.

Kellogg Toasted Corn Flake Co. shows 1903, net worth, $523,680.25; 1912, net worth, $910,042.05.

Robert Reis & Co., owners of B. V. D products, show 1887, surplus over capital stock, $22,000; 1912, surplus, $517,854.79.

All of the above are on the executive committee of the American Fair Trade League.

I give these figures, showing the phenomenal growth of these enterprises, to show that the claim that cutting prices is unfair to the manufacturer is not well founded.

It is contended that price cutting forces the so-called regular dealer to discontinue the sale of an article on which he can not make a certain percentage of profit, and that after the cut-price campaign is over the cutter discontinues the sale of the article for the same reason, the injury being twofold, first, to the proprietor, who thus loses an outlet for his goods, and second, to the general public, which is deprived of its facilities for obtaining them.

I have not quoted these figures because I complain that the manufacturer's profits have been exorbitant, but only to show that his output has not been diminished and that the public has not been denied the privilege of obtaining his goods, while, on the other hand, in buying these articles the public has been saved a large amount of money.

Mr. Louis Brandeis, in an article in Harper's Weekly for November 15, 1913, makes the statement that through the advertising of a cut price both the manufacturer and the so-called regular dealer are injured, because it tends to make the public believe that either the manufacturers' or the dealers' profits are ordinarily exorbitant. Both propositions are true. I shall present only one illustration to demonstrate this fact, although it applies to practically every successful proprietary article.

The Ingersoll Watch Co. doesn't make a single one of the dollar watches sold under their name. They are all made for them by the Waterbury Clock Co., and they cost the Ingersoll Co. 26 cents apiece. Incidentally the Waterbury Clock Co. is said to declare dividends of $800,000 per year, so that the 26 cents at which they supply the watches already includes a fair profit.

The public is thus required to pay a dollar for a watch that is worth 26 cents, so the manufacturer and the dealer divide up between them a profit of 300 per cent plus the Waterbury profit. Mr. Brandeis's misgivings are well founded.

Another of the fallacies of the claim for this special privilege to the manufacturer to fix the retail price lies in the assumption that the article is commercially worth the price sought to be put upon it. An extensive advertising campaign may acquaint a large number of people with the fact that they can get a good watch for a dollar, but that alone does not make the watch intrinsically worth a dollar. The same measure of quality may be contained in a watch selling at 75 cents, the reason being that in the former the expense of advertising is incorporated in the price, while in the latter it is not. The retailer having an expert knowledge of qualities and wishing to put articles of like merit on an equal basis may well believe that in charging a dollar for the advertised watch he is really asking the customer to pay for an element which is of no value to him; that both watches are of equal value as watches, and that fair dealing compels him to charge the same price for one as for the other.

But a one-price standard is not maintained, even by a producer. In nearly every instance his selling list is subject to a sliding scale of discounts, according to the quantity purchased, so that the proprietor of a big department store, who can buy in maximum units, owns his goods at a lower figure than the smaller dealer, for whom the manufacturer now shows such great commiseration.

It seems strange that with the general acceptance of the principles of the Sherman law, and the travail we have gone through to have those principles established, that the proposition should be advanced now to nullify it. Give to the manufacturer the right to restrict the price to be paid by the consumer and gentlemen's agreements will no longer be necessary.

The very purpose of the Sherman law was to prevent the fixing of prices, either by combination or by a temporary reduction, which would drive out competition and create a monopoly and thus permit an ultimate advance in price through a market control. Excepting with the last-mentioned purpose in view, it can hardly be said that the public is injured by being able to buy at a reduced price, even though, as has been charged, such reduction be but temporary. The broad distinction must always be borne in mind that the producer absolutely controls the supply, while the retailer controls nothing.

If the manufacturer is sincere in his effort to protect the public from getting his goods at too low a price, let him change his methods. Instead of selling for cash and letting the dealer make the investment and take all the risks, let him consign his goods, making the distributor his agent, and then wait for his returns until the merchandise has been disposed of. This is the course now followed by

some of the manufacturers of proprietary articles, who thereby relieve themselves from all concern about price cutting; but when a manufacturer receives his price and parts with his title, making no provision for the redemption of goods unsold, he ought not to be provided with any legal means to control that which he no longer owns.

With that statement, Mr. Chairman, I want to say that I have with me to-day—assuming that the members of the committee would desire to know more in detail in regard to the points they will probably cover by their questions—I have with me to-day Mr. Strauss, of the firm of R. H. Macy & Co.; Mr. Rothschild, of the firm of Abram & Strauss, of Brooklyn; Mr. Edmond E. Wise, who is counsel in the case against the American Publishers' Association, which was carried to the Supreme Court of the United States, and also on the Bobbs-Merrill case. I have also with me Mr. Kean and his counsel, Mr. Rosenfelt, who successfully carried to the Supreme Court the Waltham watch case, which was recently decided; and these gentlemen will give you very intimate details of the practical side of the question, so far as it affects the relations between the manufacturers of proprietary articles and the retailer. I think Mr. Rosenfelt and Mr. Kean particularly will be able to give you information that will be extremely interesting and which will be of much help to you in considering the merits of the proposition.

The CHAIRMAN. We will be glad to hear from those gentlemen.

Mr. VOLSTEAD. What organization do you represent?

Mr. BLOOMINGDALE. I represent the Retail Dry Goods Association, which is a voluntary association, practically, composed of the department stores of New York City and Brooklyn.

Mr. VOLSTEAD. Does it include the smaller retail stores?

Mr. BLOOMINGDALE. It does not.

Mr. MCCOY. When was it organized?

Mr. BLOOMINGDALE. It was organized 15 years ago.

Mr. MCCOY. Are you counsel for the organization, Mr. Bloomingdale.

Mr. BLOOMINGDALE. I am, in a sense, its manager.

Mr. MCCOY. Manager of the association?

Mr. BLOOMINGDALE. Yes, sir.

Mr. MCCOY. Are you interested in the firm of Bloomingdale Bros. there?

Mr. BLOOMINGDALE. I was some years ago, but I have not been engaged in mercantile business for some years.

Mr. MCCOY. Are any of your relatives interested in that concern?

Mr. BLOOMINGDALE. Yes, sir.

Mr. MCCOY. You spoke about the large profits that apparently were made by Mr. Ingersoll and some of the others. What about the profits of Bloomingdale Bros. during that same period of time?

Mr. BLOOMINGDALE. I think they have not been as large as some of the others. I am not interested in that firm.

Mr. MCCOY. Is there anybody here who knows how much profits they have made?

Mr. BLOOMINGDALE. I do not suppose so.

Mr. MCCOY. You think that the profits——

Mr. BLOOMINGDALE. I am not complaining of the profits made by any of these concerns. I quoted those figures only to negative the proposition that the cutting of prices has hurt their business. The

increase in their profits shows that there has been an increasingly large output of their merchandise.

Mr. McCoy. But they actually did fix prices, did they not?

Mr. Bloomingdale. Not successfully.

Mr. McCoy. How unsuccessful have they been, do you think?

Mr. Bloomingdale. Very generally merchandise has been sold at cut prices for a great many years.

Mr. McCoy. Now, take the Ingersoll watch, for instance, has it been the practice up to the time of the Sanatogen case and other cases—had it been the general practice to sell that at cut prices?

Mr. Bloomingdale. I do not wish to defend the general practice at all of selling at cut prices.

Mr. McCoy. That is rather indefinite in view of the point that you make, that they had not been prevented from cutting prices, and that there was a lot of cutting going on. Now, I would like to have some information as to how large in volume the cutting of the price in Ingersoll watches has been.

Mr. Bloomingdale. That could hardly be made the basis of any specific knowledge. I do know, as a matter of personal knowledge, that Ingersoll watches have been cut in price for a long time, but to what extent or by how many people has never been made the subject of any inquiry that would show that as the specific object.

Mr. McCoy. Very well, then, if you do not know to what extent it has been cut, how can you argue anything as to their profits? Your contention is that they have been making a lot of money notwithstanding the cutting. If you do not know to what extent the cutting is going on, how can you make any argument on that basis?

Mr. Bloomingdale. I am afraid I did not make myself clear on that point. I was not discussing the amount of money they made; I was simply giving those figures to show there has been an increasing output of their product in spite of the cutting of prices, and that if they are cutting the price, it has not interfered with the manufacture of watches.

Mr. McCoy. I understand; you do not put it up as a reason to suppose that there has not been much cutting. The actual fact has not been—if that fact is the fact—that they have been making money by the reason of cutting, but they have been making it because there has not been any cutting.

Mr. Bloomingdale. I think I have stated this, as a matter of personal observation, that, from time to time, the price of Ingersoll watches has been cut. They have been offered for less than a dollar, but I would not like to say that is the reason why the Ingersoll Co. is so active in this campaign.

Mr. McCoy. I have no doubt that that is the reason.

Mr. Bloomingdale. I think that is a fair assumption, and this is practically a statement to the effect that he says these things have been cut and he would like to stop it.

Mr. McCoy. I think the objection, if he has any, is due to the effect on his business, and it is on account of the recent decision, I infer, that he is so much interested in the matter.

Mr. Bloomingdale. Mr. Ingersoll's activities long antedated the recent decision.

Mr. McCoy. You say they have been endeavoring to stop people from breaking their contracts as to resale prices. Now, you say they

have their watches all made by the Waterbury Co. Assuming that to be the fact—and I do not know about that except your statement of it—you went on to say that a watch that was worth 26 cents was being sold for a certain price. Is it your understanding that the Ingersoll Co. pays 26 cents to the Waterbury Co. for that watch?

Mr. BLOOMINGDALE. That is my information.

Mr. McCOY. Then, assuming that that watch is worth 26 cents, what are the other expenses?

Mr. BLOOMINGDALE. Twenty-six cents includes the profit to the Waterbury Watch & Clock Co., and the only element that Ingersoll puts into it is the advertising element and his name.

Mr. McCOY. What would be the difference between the situation as it now is and the situation if the Ingersoll Co. should set up a factory and manufacture those watches themselves?

Mr. BLOOMINGDALE. They could probably make watches for less money and sell them at the same price. Now, do not misunderstand me. I did not say that Ingersoll does not make other watches or that the Waterbury Co. makes all of their watches. The Ingersoll Co. does make watches, but they do not make dollar watches.

Mr. McCOY. I am taking the illustration of the dollar watch. You mean to say that you think that if they manufactured those watches themselves they would be more efficient than if the Waterbury Co. manufactured them?

Mr. BLOOMINGDALE. I think they could perhaps manufacture them as cheaply as the Waterbury Co. makes them and make themselves the profit that the Waterbury Co. now makes.

Mr. McCOY. Their profits, then, would be still in the 26 cents?

Mr. BLOOMINGDALE. I am expecting that the cost would be less than 26 cents, as it is now.

Mr. McCOY. Less than 26 cents?

Mr. BLOOMINGDALE. Yes. They cost the Waterbury Co. less than 26 cents, and if the Ingersoll Co. can make them as cheaply as the Waterbury Co., they must cost the Ingersoll Co. less than 26 cents. The Waterbury Co. must make a profit out of it, because they could not manufacture them for nothing, and the Ingersoll Co. would save that profit.

Mr. McCOY. If the Ingersoll Co. made it they would have to have a profit on it just the same.

Mr. BLOOMINGDALE. But he has already had that profit when he saves this 26 cents. The Ingersoll profit, the manufacturer's profit, would go into his own gross profit, instead of going to the Waterbury Clock Co. The only difference it would make is, that the Ingersoll Co. would make more, and the Waterbury Co. would lose a customer.

Mr. McCOY. Now, what is the profit on goods sold in retail drug stores? The average profit?

Mr. BLOOMINGDALE. The average profit is between 25 and 30 per cent.

Mr. McCOY. Is that net profit, or gross?

Mr. BLOOMINGDALE. That is gross profit.

Mr. McCOY. Does that include the expenses?

Mr. BLOOMINGDALE. That includes every element of expense.

Mr. McCOY. You mentioned the fact that other watches which were as good as the Ingersoll watch sold for about 75 cents?

Mr. BLOOMINGDALE. Yes.

Mr. McCOY. What reason does that offer for arguing that Ingersoll should not fix his price?

Mr. BLOOMINGDALE. It argues that fixing the price at a dollar when as good a watch can be bought for 79 cents, calls upon the public to pay 21 cents more than they can get as good an article for.

Mr. McCOY. They do not need to buy the dollar watch, do they?

Mr. BLOOMINGDALE. They would not if they knew they were the same quality, but the public does buy very largely. The Ingersoll watch, the old model, that was a larger watch than the present vogue calls for, was originally their dollar watch. When the style changed, and people wanted a flat or smaller watch, the Ingersoll Co. changed their dollar watch to a flatter watch, and the old watch that was originally the dollar watch is now being sold under another name for 79 cents.

Mr. WISE. There are big improvements being made all the time in watches.

Mr. McCOY. The fact is, that Ingersoll has been able to do a large business, fixing his price at $1. That is the fact, is it not?

Mr. BLOOMINGDALE. That is not his selling price—that $1.

Mr. McCOY. You think, as you have also stated, that there are other watches which are equally as good which people can get for 75 cents?

Mr. BLOOMINGDALE. Yes.

Mr. McCOY. Then where is the public harmed by permitting Ingersoll to require that this watch be sold for a dollar?

Mr. BLOOMINGDALE. I claim, in the first place, that Ingersoll has no right to fix any such exaction after having passed the title in his merchandise to some one else.

Mr. McCOY. Admitting, for the sake of argument, that the law should give him the right by statute—that it could do so and did do so—where would the public be harmed?

Mr. BLOOMINGDALE. By being compelled to pay $1 for that watch when they can get as good a one for 75 or 79 cents.

Mr. McCOY. Then, why not buy the 75-cent watch?

Mr. BLOOMINGDALE. They do.

Mr. McCOY. Then, where is the harm to the public? They do not have to buy the Ingersoll watch.

Mr. BLOOMINGDALE. The Ingersoll watch is a largely advertised watch. People take it up because it is advertised so much. It is advertised in the magazines and in the daily press, and the people ask for it readily because that is the fame of that character of watch.

Mr. McCOY. Where do they ask for this readily?

Mr. BLOOMINGDALE. At all places where watches are sold.

Mr. McCOY. In some of the retail stores, where they are selling it at cut prices?

Mr. BLOOMINGDALE. Yes.

Mr. McCOY. What is it that brings them there to get the Ingersoll watch?

Mr. BLOOMINGDALE. They are coming there to get a cheap watch. They know they can get a good watch for a dollar, and they go and buy it.

Mr. McCOY. They know they can get what good watch for a dollar?

Mr. BLOOMINGDALE. They know they can get a number of good watches for a dollar. But they buy it because they have seen it advertised.

Mr. McCOY. Advertised as what?

Mr. BLOOMINGDALE. As the Ingersoll watch.

Mr. McCOY. Now, Mr. Ingersoll, I presume, spends a great deal of money in advertising?

Mr. BLOOMINGDALE. Yes, sir.

Mr. McCOY. And all that a retailer needs to do when he wants to sell an Ingersoll watch is to say, "Ingersoll watches at 79 cents," is it not?

Mr. BLOOMINGDALE. No; the retailer has to do his share of advertising to make people go in there.

Mr. McCOY. What advertising?

Mr. BLOOMINGDALE. General advertising.

Mr. McCOY. But he does not have to advertise the Ingersoll watch, any more than to say that he has Ingersoll watches for sale?

Mr. BLOOMINGDALE. But if he wants to bring them in to buy Ingersoll watches, he has to advertise that watch.

Mr. McCOY. He simply advertises by saying, "Ingersoll watches, 79 cents," does he not?

Mr. BLOOMINGDALE. Yes.

Mr. McCOY. The difference is, that in his other advertising he has to elaborate a great deal, does he not?

Mr. BLOOMINGDALE. No; not in every case.

Mr. McCOY. Is it not the practice, in large cities, to do a very extensive lot of advertising of articles that are for sale in retail stores?

Mr. BLOMINGDALE. You advertise all articles that are for sale in retail stores, of course.

Mr. McCOY. I say extensive.

Mr. BLOOMINGDALE. Not all proprietary articles.

Mr. McCOY. I am not talking about proprietary articles. The advertising of the retailer is done quite elaborately, isn't it?

Mr. BLOOMINGDALE. Yes, sir.

Mr. McCOY. With quite elaborate descriptions of goods?

Mr. BLOOMINGDALE. At times.

Mr. McCOY. Generally, isn't it?

Mr. BLOOMINGDALE. At times it is.

Mr. McCOY. You do not mean to say that it is not generally done?

Mr. BLOOMINGDALE. Some are elaborate, and some are not. Some are simply plain statements and prices.

Mr. McCOY. Well, now, take the advertising in the Sunday papers, for instance, that is very elaborate, is it not?

Mr. BLOOMINGDALE. Let me show you yesterday's advertising in this paper.

Mr. McCOY. Well, I will simply assume, then, that it is very elaborate. Let us assumme, for the present, that it is very elaborate.

Mr. BLOOMINGDALE. It is very extensive—perhaps we do not agree on the meaning of the word "elaborate"—but here is last evening's paper, which I just happened to have, and I am going to take the advertisement of Mr. Wannamaker, who has been largely quoted—I want to see if we mean the same thing by elaboration. Take this heading here [indicating], this caption of a couple of inches is a general description of an American rug. Then comes the rest of the

advertisement, with the prices and sizes. Now, that does show several inches of advertising of rugs. Is that what you mean by elaborate advertising?

Mr. McCoy. No; I do not mean that. If you are going to refer to Wanamaker, I would mean for him a two-page advertisement that he would put into the New York papers. Now, do you mean to say that advertisers do not elaborate to a considerable extent?

Mr. Bloomingdale. At times they elaborate, certainly.

Mr. McCoy. Now, why is it necessary for him to go into elaboration about a given article?

Mr. Bloomingdale. To attract attention.

Mr. McCoy. Now, isn't it a fact that when he advertises an Ingersoll watch for 79 cents, that attention to that sale is attracted, not by his own advertising, but Ingersoll's advertising?

Mr. Bloomingdale. Then you would have to assume that in this advertisement that the reference to the Ingersoll watch of a single line is not elaborated at all. I do not assume that.

Mr. McCoy. Is it not the very ordinary practice of advertisers of retail goods to put in a very small advertisement of a well-known article which has a trade-mark or name that has been advertised?

Mr. Bloomingdale. Sometimes they put out a very large advertisement of the same thing.

Mr. McCoy. Can you produce, for instance, a very large advertisement of a retail dealer advertising such articles as Gillette safety razors, Ingersoll watches, Kodaks and Kodak films?

Mr. Bloomingdale. I think Kodaks and Kodak films are things that have not been cut in price.

Mr. McCoy. I am only referring to a well-known line of articles, such as are represented by these men who head this list of names. Would it be your contention that the retailers, in advertising such a well-known article as the Ingersoll watch and the Gillette razor, and things of that kind, do not advertise it with less display than they do an ordinary commercial article like silks, for instance?

Mr. Bloomingdale. I think at times the merchant gives such articles greater advertising than he would ordinary merchandise.

Mr. McCoy. Can you produce instances of that kind in actual advertising?

Mr. Bloomingdale. I think so.

Mr. McCoy. I should like to see them, if you can send them to us.

Mr. Wells. I can produce them, if you want them—200 of them.

Mr. McCoy. I should just like to see some of them. Now, I noticed on an advertisement appearing in a New York paper—I think it was last Sunday—advertising a well-known article, in fact three or four of them—I do not remember just what they were, but the makes are well known, and down at the bottom was a statement that no mail orders would be received, no requests by mail, and no telephone orders would be received; that no C. O. D. orders would be sent out, and the customer could buy only one box, or one of the articles. What is the purpose of that?

Mr. Bloomingdale. The purpose of that is that perhaps there is a limited supply, and a customer coming to the store and finding the supply preempted by those who did not come, but had sent their orders by telephone or by mail, would be dissatisfied by having been brought down to the store and finding the supply gone. It is to give

preference to those who come there in person, to those who have taken the trouble to come to the store personally.

Mr. McCoy. Is the purpose of it to induce customers to come into the store and buy other articles as well?

Mr. Bloomingdale. I believe that every retailer would very much prefer to have customers come into the store for their purchases, and I believe the customer who comes to the store is regarded with greater favor and gets greater consideration than the one who does not.

Now, these questions with regard to the specific operations of these stores, if you will permit me to say so, I think Mr. Rothschild or Mr. Strauss can answer from personal information much more satisfactorily than I. I do not know that I could give the information as straight and to the point as they would be able to give it, and inasmuch as I know you want to get a picture of it just as it is, I suggest that these questions of the actual working of the department store be asked of those gentlemen, who are engaged in that business and will be able to give you much more authoritative information than I can.

Mr. McCoy. I think that is a good suggestion.

Mr. Nelson. If by advertising one man gets a certain right in a certain article, to control it by advertising, no other man may have the right to sell it as he pleases, if it is all a matter of right by advertising.

Mr. Bloomingdale. I think the statements made this morning that these enterprises have found that the only way they can do business is through these distributing points in an admission that the proprietor himself is not able to market his merchandise and bring results, and that these stores are a necessary element in that marketing, and that they do as large a part in bringing his product before the people and supplying it to the people as he does by merely advertising it.

Mr. McCoy. Mr. Bloomingdale, do you know of any instances in which there has been fraudulent advertising by the so-called cut-rate stores?

Mr. Bloomingdale. I do not think so.

Mr. McCoy. Was there not a case or an arrest recently made in Newark, N. J., on account of violation of some statute of New Jersey?

Mr. Bloomingdale. I think there was an arrest made in the State of New Jersey of a fly-by-night concern that had been advertising and claiming to have bankrupt stock for sale; a concern that opened and closed shortly afterwards. But my impression is that it was not an established business at all that was involved, but simply a concern which opened up a temporary business and put up sensational signs and used sensational advertisements.

Mr. McCoy. How about New York City? Have there not been some prosecutions in New York City for fraudulent advertising, if you please?

Mr. Bloomingdale. There has been a law on the statute books in New York State for the last 10 years, and during that time I know of no prosecutions under it.

Mr. McCoy. Do you know of any indictments under the law at all?

Mr. Bloomingdale. I know of no indictments under that law.

Mr. McCoy. Was not one of the Siegel concerns at least investigated under this, or something of that kind?

Mr. BLOOMINGDALE. The Siegel concern is being investigated at the present moment by the Federal Government to see whether or not in their advertising they have violated the Federal statutes.

Mr. McCOY. What Federal statutes do you refer to?

Mr. BLOOMINGDALE. Fraudulent use of the mails.

Mr. McCOY. But not under the New York statutes?

Mr. BLOOMINGDALE. I think not.

Mr. McCOY. And with the exception of the one instance I referred to in New Jersey you do not know of any other case of prosecution of any of these cases?

Mr. BLOOMINGDALE. I do not know of any other, and I think I have kept track of them.

Mr. MORGAN. If I understood you, you admitted that if the merchants were made agents and did not purchase the goods outright, that then the manufacturer would have a right to fix the price at which they should sell?

Mr. BLOOMINGDALE. I said that in that case there would be some moral right on the part of the manufacturer to fix the price.

Mr. MORGAN. The public would suffer just as much that way as they would under the present conditions, would they not?

Mr. BLOOMINGDALE. I think the public would lose the advantage of the cut price, but I was speaking then of the question of equities between the retail dealer and the manufacturer. It is not fair for the manufacturer to set his price for the retailer if they assume all the risk of deterioration, the risk of bad debts, and the risk of merchandising. It may be that the exigencies of business will compel him to sacrifice and raise more cash, and I say that in view of these things it would not be right on the part of the manufacturer to regulate conditions under which the retailer should sell those goods.

Mr. MORGAN. Now, these large department houses—why is it they are contending for this right to cut the price? Is that for the public good or because they can use that for their own advantage?

Mr. BLOOMINGDALE. It would be idle to say that there is no personal interest in their taking the trouble to come down here and contend for this principle. In their business they have largely cut prices, but they also feel—and I would not mention that except I believe it is necessary to throw light on this question—we feel that the large retail merchants more nearly represent the general public—I will not say the large retail merchant—I will say the retail merchant more nearly represents the general public than any other industry we have. We are the people that come in contact with the general public. But there is hardly an individual who has sufficient interest in a question of this kind to justify him in taking the time and trouble and expense, pro bono publico, to maintain a proposition of this kind. The people who would come here in that way are publicists, people who take a general interest and are students of public affairs. But the man in the store has no particular motive in coming before you and arguing these questions, and we feel that we represent, more than anyone else, the common interest of the public in this question.

Mr. MORGAN. Now, most of the concerns you represent are really very large concerns, are they not?

Mr. BLOOMINGDALE. Yes.

Mr. MORGAN. How much capital do they generally represent?

Mr. BLOOMINGDALE. It runs into many millions. I think that perhaps the 18 firms belonging to this association probably represent an investment of seventy-five or a hundred million dollars.

Mr. MORGAN. What were their average sales during the year?

Mr. BLOOMINGDALE. I should say, on an average, $150,000,000.

Mr. MORGAN. For the 18 concerns?

Mr. BLOOMINGDALE. Yes.

Mr. MORGAN. Are those all New York City concerns?

Mr. BLOOMINGDALE. New York City and Brooklyn.

Mr. MORGAN. Those, of course, are practically all corporations?

Mr. BLOOMINGDALE. No; some of them are corporations and some of them are individual firms.

Mr. MORGAN. Now, you say they have an organization among themselves?

Mr. BLOOMINGDALE. Yes.

Mr. MORGAN. What kind of an organization is that?

Mr. BLOOMINGDALE. It is purely an organization to consider those things that do not enter into the sale of merchandise. There is nothing in the organization that touches in the slightest degree the question of competition between them. It is in such questions as matters of legislation here, or in Albany, where they have a common interest and where they get together for the purpose of considering and discussing and presenting a solid opposition or favor, as the case may be, to any matter in which they are interested.

Mr. MORGAN. Those large concerns naturally tend to crowd out smaller concerns, do they not?

Mr. BLOOMINGDALE. I do not think the retail part of our city shows that, for I think there is a very fair proportion of smaller concerns. I think in the retail district of New York there are as few vacancies as you will find anywhere. And I think the small store supplying its neighborhood has its function just as well as the larger store has. I do not think that it can be successfully maintained that the smaller stores are crowded out by the larger ones.

Mr. MORGAN. Those 18 concerns are all dry-goods concerns, are they?

Mr. BLOOMINGDALE. They are practically all department stores.

Mr. MORGAN. They all follow practically the same methods of business, do they not?

Mr. BLOOMINGDALE. In a general way; yes.

Mr. MORGAN. Now, what is the real purpose for which they are contending? Why do they want this privilege of cutting prices of manufactured articles?

Mr. BLOOMINGDALE. Their purpose is that they believe that it is to their advantage to be free in the fixing of prices of merchandise that they have for sale; that while sometimes the profits on special merchandise may be larger, they think that it is an attraction to the public sometimes to mark them down. They frequently do that as an inducement to bring people into the store, and in the handling of a stock of merchandise made up of a great variety of articles they believe that they ought to be free to fix the prices for the general benefit of the entire enterprise, and not be obliged to maintain particular prices on special articles.

Mr. MORGAN. There are only a few articles on which there is an attempt made to fix prices?

Mr. BLOOMINGDALE. No; there are very many.

Mr. MORGAN. What is the proportion of those articles?

Mr. BLOOMINGDALE. I could not begin to tell you, but there are hundreds of them.

Mr. MORGAN. Suppose there are hundreds. Take a big store like the one you represent, how many articles do they have in that store?

Mr. BLOOMINGDALE. I could not begin to tell you.

Mr. MORGAN. There are thousands, aren't there, so that these articles really form a very small proportion?

Mr. BLOOMINGDALE. They represent a very large percentage. If you called proprietary articles only those that are advertised, you fall very far short of recognizing all proprietary articles. There are a great many things that are purely proprietary articles that are not advertised articles. Much of the merchandise we have comes under the name of the manufacturer. That may not be a factor in the marketing of the article, but to a certain extent it is a proprietary article, and if this measure were incorporated into law, it would be just as possible for a man who makes muslin cloth, or the man that sells anything on which he may put his name, to restrict the price at which it shall be sold.

Mr. NELSON. What is the tendency, if you have noticed it, toward increasing proprietary articles? Is it increasing or not?

Mr. BLOOMINGDALE. I am not able to answer that.

Mr. NELSON. Let me ask you this question, then: If the law gave the manufacturer of the proprietary article the right to fix its own price to the consumer, would there not be a very great tendency to increase the number of proprietary articles?

Mr. BLOOMINGDALE. I think that would be the inevitable result. After the market had been established that restriction would not be of any very great avail, because, having made the market, he could advance his price without regard to the market or the retailer.

Mr. VOLSTEAD. If the producer could fix the retail price, would that not greatly facilitate agreements between the producers to also fix the wholesale price?

Mr. BLOOMINGDALE. I think that each producer would probably fix his wholesale price according to the success he had in introducing his article.

Mr. VOLSTEAD. If he could fix the retail price it would have a tendency to fix the wholesale price, would it not?

Mr. BLOOMINGDALE. If he could fix the retail price, of course it would be easy to fix the price to the wholesaler.

Mr. VOLSTEAD. If, on the other hand, there is competition in the sale at retail, that would necessarily force him to base his wholesale price somewhat with reference to the retail price?

Mr. BLOOMINGDALE. The main purpose of the producer of the proprietary article, after first having advertised his article so as to create a demand for it, is to leave enough margin to induce the retailer to add the thing to his stock. If this advertising is extensive enough to create a demand, the retailer has got to take the thing in whether he feels like dealing in it or not, because we have to handle the things the consumer asks for.

Mr. NELSON. In these proprietary articles, is the chief element advertising, or is it some superior excellence in the article itself?

Mr. BLOOMINGDALE. It is purely advertising.

Mr. MCCOY. I want to ask one more question, and then I am through. You claim that the retailer ought to be able to make any price on these goods that he sees fit to, because he takes all the risk. Now, I want to call your attention to H. R. 13304, introduced by Mr. Stevens of New Hampshire, found at page 385 of this print of bills, and immediately before the sectional paragraph there lettered "D," in which after going into detailed provisions, practically forces the manufacturer who has sold with a retail-price agreement, to take back the goods.

Mr. BLOOMINGDALE. No; it simply give him the privilege of taking back the goods.

Mr. MCCOY. It give him the privilege?

Mr. BLOOMINGDALE. Yes.

Mr. MCCOY. And if he does not exercise the privilege, then the man who has bought with the retail agreement, can sell them at any price he pleases?

Mr. BLOOMINGDALE. No; only in the event of his discontinuing business, or going into the hands of a receiver.

Mr. MCCOY. Oh, yes, I see; that is farther on here.

Mr. BLOOMINGDALE. There is nothing to compel the manufacturer to exercise the option, and the dealer can not call upon him to exercise it except under these two contingencies.

Mr. MCCOY. Yes; I guess that you are right about that.

Mr. BLOOMINGDALE. He could not get rid of it in any way, he could not realize on that stock at all; he could not go to his banker and borrow anything on it as security.

Mr. MORGAN. Would you be willing for this arrangement, if the merchant bought these goods and then could not dispose of them, that he would make the manufacturer agree to take them back and give him what he paid for them, or if he did not do that, then give the retail merchant the right to sell them at any price?

Mr. BLOOMINGDALE. The weak point in that would be that you could bankrupt the proprietor, if a man should engage in business and hold his merchandise until the market was pretty well saturated with it. And then there are dull times when they would all come back at once, and that would be the same as going to the merchant and asking him to take up all of his obligations at one time. I do not think it would be possible for him, anyway, to make an agreement to take in all the goods.

Mr. MORGAN. Then he would have to give the merchant the right to sell at any price he wished.

Mr. BLOOMINGDALE. Then you might have two merchants alongside of each other, one of whom had the right to cut the price and the other did not, and of course the one who did not have the right could not sell his article.

Mr. MORGAN. Ordinarily a business man would try, in good faith, to carry out his contract agreement. It would only be in the exceptional cases that he would want to cut prices.

Mr. BLOOMINGDALE. I do not think that would work in practice. I do not think it could be carried out successfully.

Mr. Strauss would like to address you now.

STATEMENT OF PERCY STRAUSS, REPRESENTING MACY & CO., OF NEW YORK CITY.

Mr. STRAUSS. I come here as the representative of the Retail Dry Goods Association. My firm is R. H. Macy & Co., of New York City. I stand for the principle for which my firm has contended for for about 13 years; that is, to be permitted to pursue its business legitimately, unhampered by those whose interests are claimed to be antagonistic to mine.

I believe that one of the great requirements of present-day commerce is to reduce the cost of distribution as much as possible. I believe that is one purpose that we should all try to accomplish; that the increase in price between the producer and the consumer should be as little as possible. Up to the present time the agencies which seem to have been most successful in producing that result have been department stores and mail-order houses, because of economies in both directions. By saving in labor and buying in large quantities they have succeeded in reducing the cost of doing business very materially.

My firm is one of the first to stand up against the attempt of the producer to regulate retail prices without regard to the desire of the distributer to reduce that price to the consumer. The first attempt, I believe, was made by the publishers of books. We had been selling books for some years at 98 cents; they were supposed to be published at $1.50, were generally sold at $1.08, and we sold them for 98 cents. Our reason was that we sold entirely for cash, and having no accounts we claimed the right to give our customers practically the cash discount.

The book publishers came back at us and asked us to raise the price to $1.08. We refused. Disobedience to the dictates of organized publishers and book sellers led to our being sued under the copyright law. This litigation lasted for 11 years, and finally resulted in the declaration of the Supreme Court that we were strictly within our rights in disposing of merchandise that we bought at a profit satisfactory to us. Our success and that of others in selling merchandise at prices at which we saw fit has led the defeated litigants to come to Congress and ask more privileges that the courts have declared to be contrary to public policy. That is why you gentlemen are asked to enact this legislation allowing them to fix the prices at retail. I have gone rather carefully over the testimony of those who have been here——

Mr. FLOYD (interposing). What Supreme Court decision was that? Will you give us the decision?

Mr. STRAUSS. There are two of them—the Bobbs, Merrill Co. *v.* Strauss (210 U. S.); and Strauss *v.* American Publishers' Association. That decision was by the Supreme Court on December 1, 1913. The Bobbs-Merrill case, I may say, is the foundation case of all subsequent decisions of the United States Supreme Court, which resulted in the denial of the right on the part of the producer to control in the hands of the ultimate purchasers the retail price of the article produced.

Mr. NELSON. In that book case, did the publishers attempt to fix the price of books for schools, also, to the retailer?

Mr. STRAUSS. That is a different organization. That was attempted, but we were not interested in that.

Mr. NELSON. The books you mention were novels and things of that kind, were they not?

Mr. STRAUSS. We dealt in all kinds of books, but it was on account of the copyright that they brought this action against us.

Mr. NELSON. Did the publishers attempt to fix the price of school books?

Mr. WELLS. There was an organization that did that, but it did not come under the control of the organization with which we were dealing.

Mr. NELSON. To your own knowledge, do you know whether that was so?

Mr. STRAUSS. I understand it was so. I may say that it was not only school books, with which we were not affected, but Bibles, which certainly were not copyrighted, and books of Shakespeare and Dickens, which were not copyrighted books. The beginning of the war was when we reduced the price of a novel which had been copyrighted in 1835. An introductory remark had been prepared by some noted man and the book was to be sold for $1.40, and we sold it for $1.24 and thereupon the war was declared. The result was that we were blacklisted by the publishers of all copyrighted books, and the dealers at wholesale and retail were warned not to furnish R. H. Macy & Co. with books of any kind. We were thus deprived of purchasing books all over the United States, and the result of that was we had to purchase through small dealers, and when the association found that out they put these small dealers on the blacklist, and eventually drove them out of business.

Mr. NELSON. To what extent did the publishers' association control the dealers in books?

Mr. STRAUSS. The publishers' association is an association of publishers which organized what was called the Retail Book Dealers' Association. These associations worked together harmoniously for the purpose of establishing and fixing prices. They controlled on the one side about 75 per cent of all the publishers in the United States and on the other side between 80 and 90 per cent of all the retail dealers in books. I am speaking now not from assumption, but from the proofs produced in court and found by the court.

Mr. GRAHAM. Was that because of the restrictions that arose through combinations?

Mr. STRAUSS. Through combinations, through the association for the benefit of the members of the combinations, to protect prices.

I want to refer now to the attack that has been made by some who have come down here, and I wish to read from page 714 of the hearing, on February 17 of this year, before this committee:

> It has been common practice for dealers to sell well-known articles at prices sometimes below cost, and to use them as leaders to attract prospective buyers to their fraudulent bargain counters, where, upon the strength of the reduced price of the leader, they succeed in selling them something that repays them several times the amount they lost on the leader.

My own firm seldom, if ever—with the exception of books—uses these restricted-price articles for advertising purposes. We sell them at prices which gives a satisfactory profit, but we do not use them for advertising purposes, and I want strongly to resent the insinuations

of that kind, because I believe we are usually picked out as shining marks among the price cutters.

Mr. McCoy. Nobody has mentioned your firm, Mr. Strauss.

Mr. Strauss. No; but I am perfectly willing to defend the attack in this matter.

Now, in distribution there are usually three parties. There are always three parties, except by the introduction of another unnecessary one. They are the manufacturer, the distributor, and the consumer. By the cutting of prices and the increasing of sales thereby the manufacturer is certainly not harmed, but he gets his profit out of his sale to the wholesaler. The consumer can not be harmed because he gets his merchandise at a lower price. We are the third party, and we come here and we ask you not to restrict the prices. The three parties are represented, and there can not be any harm at all by this so-called cutting of prices.

Mr. Nelson. Have you ever noticed any proprietary business being conserved by the cutting of prices?

Mr. Strauss. No; I have not. The Ingersoll watch is one article, a copyrighted article on which I believe the price has been cut for years. I do not think it has been injured by any cutting of the price.

Mr. Nelson. You know of no business which has a copyrighted article, which has been demoralized because of any cutting of prices, do you?

Mr. Strauss. Absolutely none. I have heard it mentioned that they would be hurt, but I have never heard of anyone being hurt by such prices. For instance, Lyon's tooth powder and listerine have been sold for years at cut prices, and there has been no attempt by the owners of these articles to regulate prices. They seem to be perfectly content to take advantage of all the advertising that the dealers give them. The public gets the benefit of these prices, and the dealer seems to be satisfied with them. There is no antagonism between the department store and the small local dealer. Each has his own function and the former in almost every case has developed from the latter. For even the small or large local dealer there are certain functions which no central store can perform. In New York the small stores, I am informed, are increasing in number, and districts are growing up around the city, small communities which those stores serve. All of the large stores in New York, without exception, have grown originally from small stores. Some have come from other cities where they have grown to considerable size, but all the large stores in New York City started originally as small stores. My own store started in 1858 on Fourteenth Street, when we had only one room.

Mr. McCoy. Now, take it right in the case you mention, like Lyon's tooth powder, listerine, etc. Have you had any experience as to whether or not it is hard to get those things in these small stores that you speak about throughout the city?

Mr. Strauss. I really never tried. I should not think it would be, because I think they get the same price as we do.

Mr. McCoy. I was not referring so much to drug stores in that connection, but to concerns like Riker Hegeman. Isn't the necessary effect, if they are cutting prices on these goods after the prices have been fixed, they are selling at these very low prices to make busi-

ness come to them and away from these little stores. So that while you can buy tooth powder in a little drug store up on Seventh Avenue, it is 20 to 1 that 50 people, wanting 50 different kinds of tooth powder, would not be satisfied at these little stores.

Mr. STRAUSS. I think to a certain extent all commerce is a conflict between stores, whether in proprietary articles, or other articles.

Mr. MCCOY. Yes, that is so; and nobody can stop it, that I can see. But suppose Lyon's tooth powder, and all the other kinds of tooth powder, had a fixed resale price which could be upheld legally. Would not that fact make it possible to go away up on Two hundred and seventeeth or Two hundred and sixteenth Street in New York, away from any place—away from where Riker Hegeman has a store—and get that article when you wanted it? Of course, that man could afford to carry it, knowing that nobody else could sell it for less than he could.

Mr. STRAUSS. Yes; but I am not taking the side entirely of the small retail store. He is only one of the elements. There is a fixed price on Lyon's tooth powder, and there is one on listerine. It is printed right on the box, but nobody expects—possibly at out-of-the-town places they might get that price—but generally nobody expects it to be sold at that exact price. My contention is simply this, that if you could establish a level of price all over the country, without regard to anybody, you might succeed in getting your Lyon's tooth powder, and listerine, and so on, distributed through a lot of country stores, but you would not accomplish the greatest good for the greatest number. Our contention is that those organizations which, through development of modern commerce, have been able to reduce the cost of doing business should not be hampered in getting their share of business simply in order to satisfy a few manufacturers and a few dealers. In the long run the manufacturer is not going to suffer. He is going to sell more goods, but the small, inefficient dealers are going to fall out.

Mr. MCCOY. Right there. I was not so much concerned, for the moment, with the consumer as I was with the condition of the retail stores, not only in large cities, but throughout the United States. Of course, the lower price in the case of the mail-order house is an analogous question. Now, then, if the consumer in the city goes to the big drug store, because he can get lower prices, and if the people throughout the United States in the smaller towns of the country all go to the mail-order house, because they can get goods cheaper, what becomes of the retailer of small-financial ability?

Mr. STRAUSS. I should say he either wakes up or goes to sleep.

Mr. MCCOY. He goes permanently to sleep, doesn't he?

Mr. STRAUSS. If he is inefficient he does; yes. The inefficient retail dealer ought never to have been in business at all.

Mr. MCCOY. Suppose you took the dealer a couple of hundred miles from Chicago in a small town of 500 inhabitants, will he not be put to sleep by the mail-order house in Chicago if there is any competition?

Mr. STRAUSS. Absolutely no; because there are many things that the mail-order houses can not provide—things that they can not provide at any less than he can; but those things they can provide at the best price, I think they will provide.

Mr. NELSON. Will you name any article of merchandise that mail-order houses do not handle?

Mr. STRAUSS. All sorts of perishable articles. There are certain requirements of local stores which they meet and which mail-order houses can not meet at all. For instance, if a man needs an article of wearing apparel he can not write to the mail-order house and wait for it. He goes to the local store and gets it, and the small merchant will be able to compete with the larger house when he eliminates his inefficient neighbor.

Mr. NELSON. Will he be able to compete with the mail-order house on those articles that the mail-order house handles?

Mr. STRAUSS. I am not able to say about that, because I have lived in the city most of the time, and I can simply judge from what I have seen. The smaller store in the city does live and does prosper right next to the big store. We have no antagonism to the small store whatever; they both serve their purpose.

Mr. VOLSTEAD. The small stores that survive are largely grocery stores, aren't they?

Mr. STRAUSS. No; you will find lots of small stores in New York that cater to neighborhood trade.

Mr. FLOYD. Let me ask you this question: If there is a retail dealer who is handling 100 articles, or 50 articles, that are handled by the mail-order house, and the mail-order house is cutting prices in order to make a profit, and you tie the hands of the retail dealer so that he can not cut prices and compete, will not that tend very strongly to drive him out of business more than any competition you speak of against him?

Mr. STRAUSS. I think most assuredly if he can not compete he must be driven out of business. He will be able to compete if he is given a free hand. Of course, the inefficient will have to drop out always.

Mr. FLOYD. If the manufacturer is given the privilege of fixing the price and you lower that particular price 10 cents, or 2 cents, or anything below that price, it will induce the purchaser to send to the mail-order house to buy it, and will not that tend more effectually to drive him out of business than any competition you could set up against him?

Mr. STRAUSS. I think so. That is the worst point of the competition. But it seems to me that to a certain extent we are wasting sympathy on the small dealers trying to bolster up the inefficient. The efficient dealer does not require any help.

Mr. MCCOY. Do you reckon that the conditions of getting what you want is of any advantage to the consumer—getting it conveniently and quickly?

Mr. STRAUSS. Do I reckon that it is an advantage?

Mr. MCCOY. That it is an economic advantage for the consumer to be able to get it conveniently?

Mr. STRAUSS. Most anything that he wants, I suppose, it is an economy to him to get easily.

Mr. MCCOY. I mean the advantage to him of getting it efficiently and quickly. Is that an advantage to the consumer?

Mr. STRAUSS. I think so, without any question.

Mr. McCoy. Then if you centralize the retail trade largely in the big stores or mail-order houses, do you not deprive the consumer of that which you admit is an economic advantage to him?

Mr. Strauss. But my contention is that you will not better it, except within this limitation. I do not think you will ever center it in certain articles. There is a certain function which these small stores must perform.

Mr. McCoy. Take it on articles of food, which the manufacturer might want to sell at a fixed retail price.

Mr. Strauss. For instance, what?

Mr. McCoy. I do not know that I know of any just now—the Washburn-Crosby flour, for instance. I do not know whether they fix a retail price on that.

Mr. Strauss. No; I do not think they do.

Mr. McCoy. How about the breakfast foods?

Mr. Strauss. No; they have tried to do that, but have never succeeded.

Mr. McCoy. You say they have not succeeded. Now, then, suppose I wanted to get Smith's corn flakes, and I lived in some inaccessible part of the city or out in the country, and I should go to the little store. I could not get them. Why? Because it can not afford to carry them?

Mr. Strauss. He can afford to carry it, simply because there are a certain number of people in his neighborhood willing to pay 10 per cent more for being able to get them immediately.

Mr. McCoy. You just give him that advantage?

Mr. Strauss. I do not give him any advantage. I do not claim any particular advantage, except the advantage of natural conditions. There is a definite function for the small dealer, no matter how large the department stores or mail-order houses may grow. As a matter of fact, the general store more nearly competes with him than does the department store or mail-order house. For instance, in New York there are chains of grocery stores. They go right into a neighborhood, and to a certain extent they do a neighborhood business, and everybody in that neighborhood has the benefit because they can buy merchandise cheaper.

Mr. McCoy. It provides a neighborhood store all over the city?

Mr. Strauss. Yes; and if they are able to provide stores in all the neighborhoods I suppose the small man will have to go by the board.

I merely want to make one point more, and that is that legislation of the kind asked for does not benefit the consumer and does not benefit the distributor, and the benefits which it may give to the manufacturer it gives to him by merely fastening on him the elements of monopoly, which, I think, are extremely dangerous. If the manufacturer of any article is able to create a demand for it—suppose, for instance, Armour's ham. Armour makes what is called the "Red Star ham," and under this bill if he were able to advertise that largely and restrict the price on it, he could create a demand for Armour's ham and absolutely prevent anybody else from coming in, because he can control the source of supply and method of distribution, and I think it would force a monopoly almost impossible to overcome. I do not think there is any danger in safety razors, or things of that kind, because if he can not buy the safety razor, he can buy the ordinary kind.

Mr. McCoy. If there was any danger in the safety razor it would not be sold.

Mr. Strauss. I think the danger is in having it include many articles which are in common use and in which a monopoly might be established.

Mr. McCoy. There was a Mr. Garst, I think his name was, yesterday, who was contending for the right to fix a retail price on a porch shade. He said that all he was contending for was the right to say at what price his "name" should be sold. He said, "If they will take my name off of that porch shade, I do not care at what price they sell it." Do you think there is anything in that contention?

Mr. Strauss. They do not all feel that way, because I know at different times different people have tried to compel us to uphold the selling price—not of their name—and we have taken the name off and that would make them particularly angry. In a patent case we were charged with that very thing.

Mr. Wells. That was considered the crime—removing the name from the bottle.

Mr. McCoy. What is the relative cost, if you can estimate it at all, of doing business in a large way, such as your concern does it in the heart of the retail district—we will say in New York City—and away from the big centers? Have you any figures on that?

Mr. Strauss. No. I suppose I could guess just as well as you could on that, but I could not give you any distinct figures. The cost of doing business varies considerably, even as between stores of like nature, and in the city of New York, within the past two years, we have seen a good many failures in department stores. I do not think the department stores, however, should come here to ask for special legislation to improve their present condition.

Mr. Nelson. Can the department stores sell goods at less profit per item than the small ordinary retail store?

Mr. Strauss. I think they can without any question.

Mr. Nelson. It has been contended here that the cost of distributing goods by the mail-order house and the department store was larger than in the ordinary store, the ordinary small retail store. What have you to say about that?

Mr. Strauss. I can tell you simply this: Take the item, for instance, of rent. The large store estimates 2½ to 3 per cent for rent. Now, no small store can begin to do business on that basis. And in buying such things as Gillette safety razors, Ingersoll watches, etc., we will save from 25 to 30 per cent over the smaller store. When bicycles were all the rage, for instance, and were selling for $125, we entered into the manufacture of bicycles, and we turned out a bicycle in every way as good as the standard bicycle and sold it for $29.74 and made a good, satisfactory profit.

Mr. Nelson. Isn't your ability to sell cheaper than the retailer due to the fact that you buy in very large quantities and get a better price?

Mr. Strauss. In part. There are economies all along the line, economies in management, economies in delivery, economies in advertising; and, also, one department helps the other. In a store which has 90 to 100 departments, it is not the actual profits made by the individual department that counts, it is, to a certain extent, how much that department helps the whole store. For instance, there are many

stores in New York City that have restaurants, and I think a few of them have restaurants that actually pay. But it is an advantage to the customers to be able to take their meals there and continue their purchases after lunch. They consider that as advertising, and in that way this department helps the others.

It has been contended here that in order to make up for the very small profits which they make on the articles on which they cut the price, the department stores increase prices on other things. But that is obviously not true, because the small neighborhood store would certainly undersell them if they did.

Mr. NELSON. What influence on your per cent of profits has the parcel-post law made?

Mr. STRAUSS. I could not tell you that. We are looking into the parcel-post matter now. The parcel post, to a very large extent, is not helping us as much as it might, owing to the inherent difficulty in conducting a new business such as this has taken over just now.

Mr. NELSON. You mean that you have increased your business so much now?

Mr. STRAUSS. No; they have increased their business so much, and they are not able to handle it—the Post Office Department, I mean. During the late blizzard in New York our automobiles were tied up, and we sent out everything that we could by parcel post. Those packages that went out paid we heard nothing further about, and I suppose they were received in good condition. But the merchandise that we sent C. O. D.—of course there was a certain proportion of it that was not accepted by the customers, and what came back to us for that reason came back in such condition that it was absolutely unsalable. So, to a certain extent, we are not able to use the parcel post, but I think those things will be overcome in time.

Mr VOLSTEAD. Are you using it now, to a certain extent?

Mr. STRAUSS. We are using it now, to a considerable extent, but I can not tell you just how much. Still, we are doing an express business very largely. It is very hard to overcome the prejudice among those who have the handling of that business. They have a prejudice against the mails in favor of the express companies; so not through any dishonest intention on their part at all. It is merely that they feel that the post office is not able to handle the merchandise as well as the express company.

Mr. VOLSTEAD. Do your stores sell to the retail trade?

Mr. STRAUSS. No; only to the consumer.

The CHAIRMAN. We will take a recess at this point for 30 minutes.

AFTER RECESS.

The committee reassembled pursuant to the taking of recess.

The CHAIRMAN. We will hear first this afternoon from Mr. Parkman and Mr. Brock, of Boston. You may proceed, Mr. Parkman.

STATEMENT OF MR. HENRY PARKMAN, TREASURER OF THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON.

Mr. PARKMAN. Mr. Chairman and gentlemen of the committee, my name is Henry Parkman; I am treasurer and executive officer of the Provident Institution for Savings in the Town of Boston.

We are very proud of the last part of that title, because it was founded before Boston became a city, in 1816, and it is the oldest incorporated mutual savings bank in the United States.

I am here with my friend Mr. Brock, of the Home Savings Bank of Boston, as a committee here representing the 193 mutual savings banks of Massachusetts, assuming that this committee, in its final draft will amend the tentative bill No. 3, which is now before the committee, and I assume from the fact that it is described as a tentative bill, that it is the desire of the committee to receive suggestions, and it is their desire to right the wrongs, which I would agree to as much as anybody, not to interfere with well-established institutions which are not doing any wrong.

I understand that there have already been hearings before the committee with regard to mutual savings banks, and therefore I will not go into the question in detail at all as to what a mutual savings bank is and how it is distinguished from the other savings banks, except to say that the mutual savings banks are purely charitable institutions. They have no stock, no shares, as a great many of the savings banks which have been founded in the West have had. A great many of those institutions have stock and are a money-making institution for somebody, but the only money making of these mutual savings banks is for the depositors themselves—that is, the people who put their money into the savings banks. There are no shareholders to take our money.

All moneys after the semiannual dividends are declared on the pass books, if there is sufficient to declare dividends, go either to the guarantee fund or for extra dividends to the depositors, when there are enough funds to do that. I want to bring that home to you as strongly as I can, that these are charitable institutions for the benefit of the wage earners, the laboring classes, and that class of people in the community who can not take care of their money as well as those who are more thoroughly acquainted with financial matters.

If I may read from the little pamphlet which we give with all our pass books, and which is sent to every person who desires to make a deposit, I think this will show you our object as clearly as anything else can. It says:

> This institution was incorporated December 13, 1816, and the charitable object of its founders and its present design is to afford to those who are desirous of saving their money, and who have not acquired sufficient to enable them to avail themselves of the usual modes of safe investment, the means of employing their money to advantage, without running the risk of losing it, as they are too frequently exposed to do, by lending it to individuals. It is intended to encourage the industrious and prudent and to induce those who have not hitherto been such to lessen their unnecessary expenses, and to save and lay by something for a period of life when they will be less able to earn a support.
>
> The trustees will take no emolument or pay for their service, having undertaken it solely to promote the interest of the class of persons above described who may deposit their money with the institution.

The trustees will perhaps correspond somewhat with the directors of other banks. They will take no pay for their services, having undertaken to take care of the interests of the persons above described.

By the laws of Massachusetts no one can make a deposit in a mutual savings bank of over $1,000. This can accumulate, by the addition of dividends, up to $2,000, but beyond that sum no person can have

a deposit in any one savings bank. My friend, Mr. Brock, will give you some statistics on that subject.

The Congress of the United States has already recognized the fact that these mutual savings banks are charitable institutions by incorporating them by special name with other charitable institutions—Knights or Pythias and such organizations—in the income-tax bill and exempting them from the payment of any tax on the income which they receive and which is distributed to their depositors. So that, as I say, Congress having already recognized the fact that these are charitable institutions, we come to you and ask that you also recognize that fact more especially in bill No. 3, which is before your committee, and in lines 14, 15, 16, 17, and 18, on page 2 of that bill, in the second section of bill No. 3, where it says:

> And a private banker and a person who is a director in any State bank or trust company, not operating under the provisions of the said act, shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid act.

So, Mr. Chairman, we ask you to adopt an amendment which will be suggested later by Mr. Brock. We ask you to do that because of the fact that the trustees of the savings banks and the boards of investment, who invest the funds in the securities in which they are allowed to invest by the different States, try to be selected from persons having financial knowledge, and therefore a great many of them are already directors in national banks or directors in trust companies. Such persons, with their financial knowledge, are most valuable members of our boards of trustees and boards of investment, and therefore it would hurt the mutual savings very much if by any act of Congress we should be deprived of their services, which are voluntary services, charitable services, giving to the institution as they would give to a hospital or any other generally recognized charitable institution. We would lose very much if we were deprived of the services of such persons.

Mr. VOLSTEAD. Do you believe that would be true in the large cities?

Mr. PARKMAN. I think it would be true in the large cities as well as in the small places.

Mr. VOLSTEAD. We amended the banking and currency act so as to allow national banks to loan money on real estate, and is it not true that with that amendment the savings banks are, in a measure at least, competing with the national banks in reference to that class of loans, and would it be the proper thing to have an officer or director in one institution who is also an officer or director in another, when there might be a temptation to play one against the other?

Mr. PARKMAN. I think the practice is, generally, that there should be one or two men on the saving-banks boards who are especially acquainted with real estate. They might also be in the national-bank boards, but I will say as at first organized I should not fear the competition of national banks in relation to mortgages, but because as at present constituted they do not know so much as the savings banks do, which have had so many long years' experience as to what is safe to take.

Mr. VOLSTEAD. I think one thing which has been in the minds of those who drew these bills is to prevent men from serving two masters, as we sometimes use the expression.

Do you not believe that that policy ought to be embodied in some form in the law? Would you suggest any other way by which we might prevent one person from acting in a double capacity where his interests might be greater in one than in another bank?

Mr. PARKMAN. Of course I understand it is the desire or the purpose of the legislation to prevent one man from serving two masters, but I want to call your attention to the fact that in the history of the savings banks of Massachusetts, with which I have been familiar for the past 30 years, I have never heard, so far as the character of the gentlemen who are connected with the savings banks are concerned, any suggestion in the public or private prints——

Mr. VOLSTEAD (interposing). But is it not true that there has practically been no competition, because they could not invest in the same kind of securities?

Mr. PARKMAN. There has been great competition with the savings banks with regard to mortgages, between trust companies, who have been allowed to take them. There has been some competition for a long time, but I have never heard of any case in any of the hearings before the Legislature of Massachusetts in which the integrity of the trustees of a savings bank, who may have also been connected with the other banks, has been called into question.

Mr. VOLSTEAD. Do the savings banks keep deposits in the national banks?

Mr. PARKMAN. Yes, sir; they have to keep a deposit in the national banks, of course, to meet the current payments which may be called for day by day. The total amount of the deposits of the savings banks of Massachusetts in the national banks and trust companies of Massachusetts, according to the latest statistics, is only 1.30 per cent of their total investments. That is only what they keep for their running calls, which they have to use from time to time. The habit of the Massachusetts savings banks is to pay on demand. We are allowed a 90-day call, but it is the habit of the Massachusetts savings banks to pay on call, and therefore a certain amount of cash has to be kept in the till, and also in the national banks, where it can be had readily to meet that call, but that is only 1.3 per cent of the total deposits.

Mr. VOLSTEAD. Of course, where a savings bank and a national bank have a common director, or several common directors, the chances are that the deposits will be made in that particular national bank; is that not true?

Mr. PARKMAN. Yes, sir; there would be a chance of that kind, of course. I want to meet that question perfectly fairly, but, as I say, I do not know of any case where it has been abused.

In Massachusetts the savings banks have been allowed to invest in bank stocks, and therefore their deposits are very largely kept in the banks where they own stock themselves, because that is for their advantage. But interest is paid on these deposits.

Mr. MCCOY. It has been suggested, Mr. Parkman, that an abuse might exist in having a common directorate in the way of giving

undue preference to certain securities—to the purchase of certain securities which the saving banks are allowed to invest in.

Mr. PARKMAN. I can not say that I have noticed anything of that kind in my experience, and I have not known of it in any other bank. The securities in which the savings banks are allowed to invest are pretty firmly fixed by law; that is, as to what we can invest in. The bank commissioner of Massachusetts sends out every year a little pamphlet showing what railroad or municipal bonds and what other securities are allowed by the law of Massachusetts, and the number of those is very limited.

Mr. MCCOY. And those are never, I take it, securities which are involved in any flotation scheme?

Mr. PARKMAN. No; they are all, generally, first mortgages and railroads, but nothing of the kind to which you refer.

One of the features is that they must have paid the dividends on their stock for 10 years at the rate of 4 per cent before we are allowed to invest in any of the bonds.

Mr. VOLSTEAD. Are you allowed to invest in any stock except bank stock?

Mr. PARKMAN. No, sir; that is all. That is somewhat historical, if you may say so, because that comes down to the early days of the institution of savings banks. I think Massachusetts is the only State which has allowed them to do so.

Mr. VOLSTEAD. Have you any record of losses in those savings banks?

Mr. PARKMAN. Of what?

Mr. VOLSTEAD. Of losses that have occurred.

Mr. PARKMAN. I think that can be furnished. You mean on any special line of securities?

Mr. VOLSTEAD. Yes.

Mr. PARKMAN. It can be furnished very readily. It will take a little time to make it up, but I will be glad to have it furnished to you.

Mr. MITCHELL. Your chief argument is against this proposition, which would mean the loss of the services of these valuable men in your bank?

Mr. PARKMAN. Yes. In order to show you the nature of these institutions I am going to give a specific instance in regard to the organization of a savings bank which I know about, which was organized five years ago in the town of Milton, a town quite close to Boston.

There were one or two big factories there, and the people living there in that old town of Milton made up their minds that the operatives of the factories had no place to save their money, and they were 3 or 4 miles away from the nearest savings bank. Those people got together and they subscribed to a fund to pay expenses of rent and other things for three years, strictly as a charitable proposition, until the savings bank could get on its feet. I merely mention that as an instance in order to show how almost all the savings banks were started. Almost all of them were started in that way, and if I may be allowed now, I would like to read a letter from the banking commissioner of the State of Massachusetts, Mr. Augustus L. Thorndike, who was appointed bank commissioner two years ago

by Gov. Foss, and I wrote him asking his opinion on the bill which I am just discussing. In reference to that he says:

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE BANK COMMISSIONER,
Boston, March 4, 1914.

HENRY PARKMAN, Esq.,
Treasurer, Provident Institution for Savings
in the Town of Boston, Boston, Mass.

DEAR SIR: I have received your letter of February 28, asking my opinion regarding the proposed "interlocking directors" bill now before the United States Congress.

In reply I would say that in my opinion it would be an injury to the savings banks of Massachusetts if the proposed bill should be enacted. It appears to me that our mutual savings banks and national banks are not competitors, but are the complement of each other. Should directors of national banks be unable to act as trustees or members of the board of investment for savings banks, it would practically deprive our savings banks of the only practical and efficient financial judgment that would be available to them in very many communities.

The people of Massachusetts have nearly a billion of dollars invested in savings bank deposits in this Commonwealth.

No harm, to my knowledge, has ever come to the savings banks by reason of directors of national banks serving in the management of savings banks. I believe it is for the benefit of both institutions that financial men should have to do with the affairs of each. I certainly believe that so great interests as the people have in our savings banks should not be jeopardized by depriving them of the benefit of the services of the only men who have the financial judgment to serve them.

Very truly, yours,

AUGUSTUS L. THORNDIKE,
Bank Commissioner.

Mr. FITZHENRY. Is your concern incorporated under a special law?

Mr. PARKMAN. Our bank was the first savings bank started in this country, and the law under which we were incorporated was a special law at that time.

Mr. FITZHENRY. A special act of the legislature?

Mr. PARKMAN. Yes.

Mr. FITZHENRY. Are all similar institutions incorporated in the same way, or have you a general law under which they can be incorporated?

Mr. PARKMAN. We have a general law now under which they can be incorporated. Anybody who wants to incorporate a savings bank has to make application to the commission consisting of the bank commissioner of the State, the treasurer of the Commonwealth, and the tax commissioner. They have a hearing on that question, and then the commission decides whether or not they shall be allowed to incorporate.

Mr. FITZHENRY. How many trustees have you?

Mr. PARKMAN. We have 36.

Mr. FITZHENRY. How many are provided for in each institution under the general law?

Mr. PARKMAN. They vary.

Mr. FITZHENRY. That is optional with the incorporators?

Mr. PARKMAN. I think they must have 12, and they can have as many more as they want.

Mr. FITZHENRY. How are they elected?

Mr. PARKMAN. There is a body of incorporators. The incorporators are a self-perpetuating body.

In my institution—I am more familiar with the details of that institution than any other—we had 136 incorporators. Those incorporators have an annual meeting. They elect from their own number a president and 36 trustees. Those trustees have a subsequent meeting and they elect 8 members of the board of investment, and that board meets every week and invests the funds of the institution.

Mr. FITZHENRY. How are those incorporated selected, and how are their successors provided for? I suppose the incorporators were originally the men who incorporated the bank. How are their successors provided for?

Mr. PARKMAN. I think the practice varies in different banks. Our practice is this: As the incorporators died somebody would look over the lists to see who was the best person to be added to the incorporators to carry on the ideas on which the institution was founded.

Mr. FITZHENRY. You mean somebody representing the surviving incorporators, or somebody representing the depositors?

Mr. PARKMAN. The surviving incorporators.

Mr. FITZHENRY. Do the depositors ever have anything to say about the management of the bank?

Mr. PARKMAN. No.

Mr. FITZHENRY. That is limited entirely to the incorporators and the successors of the incorporators who are selected by the surviving incorporators?

Mr. PARKMAN. Yes.

Mr. FITZHENRY. Whenever there is a vacancy certain persons are invited to fill the vacancies?

Mr. PARKMAN. Yes, sir.

Mr. FITZHENRY. And they elect the trustees?

Mr. PARKMAN. Yes.

Mr. FITZHENRY. And the trustees elect the investment committee?

Mr. PARKMAN. Yes, sir.

Mr. FITZHENRY. And nobody received any compensation?

Mr. PARKMAN. No, sir; that is, excepting the working force of the bank. The treasurer, for instance, receives compensation.

The CHAIRMAN. Those who constitute the clerical working force, you mean?

Mr. PARKMAN. Of course we have to have a working force, and the working force has to receive compensation. We have 30 clerks in our bank.

Mr. FITZHENRY. You have a salaried manager of some character?

Mr. PARKMAN. I am the salaried manager.

Mr. NELSON. Is there anything in the articles of incorporation which restrains the incorporators from voting compensation to themselves?

Mr. PARKMAN. Pride in our organization restrains them. The trustees take no remuneration, and we have always followed that principle.

Mr. VOLSTEAD. Is there any responsibility on the part of the incorporators for the amount that is being deposited—any personal liability on the part of the incorporators?

Mr. PARKMAN. You mean personal responsibility?

Mr. VOLSTEAD. Yes, sir.

Mr. PARKMAN. No, sir.

Mr. VOLSTEAD. Is there any personal responsibility on the part of the directors?

Mr. PARKMAN. You mean the trustees?

Mr. VOLSTEAD. Yes.

Mr. PARKMAN. There is no personal responsibility, but there is plenty of law to cover the case, if they do not do their duty properly and honestly.

Mr. VOLSTEAD. The same responsibility which would rest upon anybody who went in and stole the funds?

Mr. PARKMAN. There has been only one case in the more than 30 years, during which time I have been connected with the bank where the treasurer of the concern went to jail.

Mr. NELSON. These banks you speak of are in the city of Boston?

Mr. PARKMAN. They are all over the State of Massachusetts; there are 193 of them.

Mr. NELSON. Are they in cities of over 100,000 population?

Mr. PARKMAN. Cities of over 100,000 population, and in towns of over a thousand population.

Mr. NELSON. Have you suggested any amendment to this bill?

Mr. PARKMAN. Mr. Brock will suggest an amendment.

Mr. FITZHENRY. Did I understand you to say that a man can not deposit more than $1,000 at any one time in your savings bank?

Mr. PARKMAN. In any one bank.

Mr. FITZHENRY. Nobody can have more than a thousand dollars deposited in your bank?

Mr. PARKMAN. No, sir; of course, it can accumulate up to $2,000.

Mr. MORGAN. What rate of interest do these banks generally pay?

Mr. PARKMAN. They are paying now about 4 per cent. We pay a heavy tax to the State of Massachusetts, but the average dividends are about 4 per cent, which is free from any other tax under the Massachusetts law; under our law the savings-bank depositor is free from any tax.

Mr. MORGAN. Have you any savings banks in your State which are not mutual savings banks?

Mr. PARKMAN. No, sir: there are none at all. Some of the trust companies have savings departments, and there are so-called savings banks which are not mutual. The mutual savings bank has been an institution in which the State of Massachusetts has taken a great deal of pride.

Mr. NELSON. Do you invest the funds in railroad stocks and bonds very extensively?

Mr. PARKMAN. The average investment is about 50 per cent in mortgages in the State of Massachusetts.

Mr. MITCHELL. Those are mortgages of all kinds?

Mr. PARKMAN. Yes. The average mortgage in Massachusetts runs about $3,500. We have some in our bank for $500, and we also have some for $500,000. That is to say, mortgages on real estate.

Mr. NELSON. Railroad mortgages?

Mr. PARKMAN. If I remember correctly, we have about 20 per cent in railroad bonds and about 25 per cent in State, city, and town bonds.

Mr. MORGAN. What is the amount of your deposits?

Mr. PARKMAN. Our deposits amount to $51,000,000. We have 105,000 different depositors.

I would like the committee now to hear Mr. Brock.

The CHAIRMAN. We will be very glad to hear Mr. Brock at this time.

STATEMENT OF MR. GEORGE E. BROCK, PRESIDENT OF THE HOME SAVINGS BANK, BOSTON, MASS.

The CHAIRMAN. Will you please give your name, your occupation, and your address to the reporter, Mr. Brock.

Mr. BROCK. My name is George E. Brock; I am president of the Home Savings Bank of Boston, and its executive officer.

If my memory serves me correctly, there are about 600 of these mutual savings banks in the entire country. The greater portion of them are East of the Allegheny Mountains. Massachusetts has about one-third of the total number.

The CHAIRMAN. You are speaking now of the mutual savings banks?

Mr. BROCK. Yes; banks which have no capital stock. There are open accounts in the Massachusetts savings banks of 2,266,261; that is, there are that number of individual depositors in the mutual savings banks of the State, and they have on deposit $870,000,000, or an average per depositor of $381.

This vast sum of money is in charge of about 3,500 people who are known as trustees. Of that number about 750 or 800 constitute what is called the board of investment.

Now, if this bill goes into operation, it will throw off of our board of trustees about one-third of the members, off the boards of investment about 45 per cent.

It should be understood that the boards of investment in these savings banks constitute what might well be termed the bone and the sinew of the savings banks of our Commonwealth. They are men who are carefully selected, and from the nature of things, naturally, they are men who are connected with other financial institutions. Right along with this I think it is well worth knowing that the laws of our Commonwealth already tried to protect the savings institutions from just such a thing as you are trying to protect them from. The laws provide that no executive officer of a savings bank in the Commonwealth of Massachusetts can be an executive officer of a trust company or a national bank. The laws also provide that our banking business must be carried in rooms apart from a national bank or trust company.

Now, you are trying to correct abuses. I want to repeat what Mr. Parkman has said. In almost 25 years of experience in the savings-bank work, I have never yet heard a complaint made of the board of trustees or the boards of investment, any complaint that they have been guilty of attempting to carry on that institution for the benefit of any particular national bank or trust company.

As indicating that they have not done that, of this vast sum of money only one and three-quarters per cent is deposited in the national banks.

There is the only spot where these men might or would probably use the savings-bank business to fatten up their deposits of their

particular institutions. But the national banks only carry about one and three-quarters per cent which is not an excessive amount to carry when you bear in mind, as Mr. Parkman has told you, that we endeavor to pay everybody on demand, even in the case of a panic. Even in the case of panics I think most of the savings banks in the Commonwealth of Massachusetts have been able to pay their depositors when they demanded the money.

Mr. NELSON. Do they surrender their interest then?

Mr. BROCK. The interest is paid once in six months, and the money which is drawn out in the intermediate periods forfeits interest, but as a matter of fact most of the people wait until the interest is declared and then come in and draw out their money. Now, it has been pointed out what these institutions are. We have come down here to tell you what we would like to have you do for us. This is the suggestion that we make, that you put in the bill this paragraph:

Nothing herein contained shall apply to directors and trustees of mutual savings banks not having a capital stock represented by shares.

I believe something similar to that was incorporated in the currency bill. If there are no questions which you desire to ask me, I will be glad to say "amen" at this time.

Mr. FITZHENRY. That would limit the exemption to mutual savings banks?

Mr. BROCK. Yes, sir.

Mr. FITZHENRY. Do you not think in States where they do not have mutual savings banks, but where the national banks are required to organize State trust and savings banks for the accommodation of their patrons and operate them in connection with their national banks, that they ought to have some consideration?

Mr. BROCK. The difference, I think, between the two institutions is this, that the profits of these mutual savings banks go wholly to the depositors. I think in the case of the stock banks, all that is made over and above the amount the bank pays goes to the stockholders of that bank. I think that is a distinction.

Mr. VOLSTEAD. In one instance you are acting entirely for the benefit of the depositors and in the other instance you are acting partly for yourself and partly for others?

Mr. BROCK. That is the idea.

Mr. VOLSTEAD. Is this not true, that these savings banks purchase bonds from national banks?

Mr. BROCK. Those bonds in Massachusetts are purchased almost entirely from private bankers. Now, to what extent private bankers sit on boards of investment I can not tell you. I know we have none on our board. Men who are on our boards of investment are directors in national banks and trust companies, but they do not sell those securities. I do not remember in all my experience of ever having bought a bond of a national bank or trust company. There are regular bond houses in our part of the country which deal in those securities.

Mr. VOLSTEAD. Are those bond houses organized as corporations?

Mr. BROCK. I do not think, as a rule, that they are. I think they are partnerships.

Mr. VOLSTEAD. Do you know whether any of these bond houses have directors or trustees in those mutual savings banks?

Mr. BROCK. I tried to answer that by saying that at the present time I have not the information. I will be glad to furnish that information to the committee. I can say so far as the bank with which I am connected that we have not.

Mr. VOLSTEAD. There would be no objection, I presume, to a provision that would bar that class of bankers from having any representation on the boards of trustees of savings banks?

Mr. BROCK. So far as I am concerned there would be no objection.

The CHAIRMAN. We will now hear further from representatives of the retail dry goods association of New York, and I believe Mr. Rothschild desires to address the committee.

STATEMENT OF MR. SIMON F. ROTHSCHILD, REPRESENTING ABRAHAM & STRAUS, OF BROOKLYN, N. Y.

Mr. ROTHSCHILD. Mr. Chairman, there is one very disastrous feature which would be very disastrous if put into operation, which is now in this proposed legislation and which, I believe, has not been brought to your attention. I think all the other points with which we are especially concerned have been covered. To-day there are thousands of manufacturers in the United States making articles for wholesale use, articles of consumption and the table and other articles of that sort, who have not asked for any price restriction. If a law were enacted to the effect that trade-marked and patented articles could be restricted in price, you would find that a manufacturer of a lamp for the table or the manufacturer of a shoe or the manufacturer of a garment would, for instance, call his garment by a particular name and call his lamp by a particular name, or call a shirt waist the Constitution shirt waist and attempt this price restriction. What the result of that would be you can readily imagine. It would lead to an increased price to the consumer all along the line. If you throw the door open for this thing it will do that as naturally as the day follows the night.

Mr. NELSON. May I interrupt you there?

Mr. ROTHSCHILD. Yes, sir.

Mr. NELSON. I asked a gentleman advocating that proposition how the consumer would fare where a man had the right, for instance, to sell his shade as a trade-marked article—I think that was the case—and he said there would be others who would sell shades, trade-marked shades, and there would be competition in that article. What do you say to that?

Mr. ROTHSCHILD. No doubt that would be the case in some degree, but I think the permittance of a restriction in price, as far as the trade-marked goods goes, would result in the public paying a higher price.

Mr. NELSON. You think they would get together on a common price by some one following a leader in that particular field?

Mr. ROTHSCHILD. There will be some influence exerted that way, naturally. Some of the price-restricted articles at the present time have been very successful, and each man would probably want to make his business successful by attempting the same thing.

Mr. NELSON. Have you thought that that would lead to the elimination entirely of competition as to price?

Mr. ROTHSCHILD. It would lead to some of it, and I do not believe in a hothouse system of business. I think there should be the survival of the fittest.

Mr. McCOY. I should like to ask you one question right there. Suppose a man uses his name as an identification of his goods. Do you think there would be any objection to the giving to him of the right to fix the price at which an article bearing his name could be sold.

Mr. ROTHSCHILD. I would think that would be along the line of a hot-house system of business, and I do not believe in that. A man is entitled to sell the goods at any price he wishes, after they are his.

Mr. McCOY. Assuming that he contracts not to sell them.

Mr. ROTHSCHILD. A man should live up to his contracts.

Mr. McCOY. So that if he has a contract——

Mr. ROTHSCHILD. If he puts himself on record, and says that he will not sell a chair, for instance, under $5, I think that should be followed by him.

Mr. McCOY. Then, do you see any economic evil in permitting that to be done?

Mr. ROTHSCHILD. Yes; I do. I think that free and open competition in all kinds of merchandise is most desirable.

Mr. McCOY. Can you not conceive that the permission to do that sort of thing, if successful in the instance of one man, would be imitated by so many others as to make the sort of competition we are looking for?

Mr. ROTHSCHILD. I doubt that.

Mr. McCOY. And lead them to compete on the quality of the goods?

Mr. ROTHSCHILD. It would naturally mean a restricted price on all the more successful manufactured articles of a certain line.

Mr. McCOY. Do you not think that the manufacturers are successful largely because of the great amount of advertising they do?

Mr. ROTHSCHILD. In some instances; yes; and I think in some instances the merits of the article will account for their success, and is the reason for their success.

Mr. McCOY. Do you think that the average article is purchased largely because of its inherent merit without being pushed by a great deal of advertising?

Mr. ROTHSCHILD. That is rather hard to say. I think there is an average there. An article of inferior grade could hardly be successfully exploited for a great length of time.

Mr. McCOY. I agree with you on that. What I mean is that if you leave an article to find a market simply because it is good, the chances are that it will not be sold in the same quantity as though it was advertised extensively?

Mr. ROTHSCHILD. There is something in that. Judicious advertising will certainly tell its tale in some way.

Mr. McCOY. The complaint made by the people who want the privilege of fixing a resale price is that those who buy, cutting the price, are taking away from them the advantage of the advertising, both of the manufacturer who had paid his money out for the advertising——

Mr. ROTHSCHILD. I know of some things which I think have been benefited by that.

Mr. McCOY. By what?

Mr. ROTHSCHILD. By their price being cut by stores.

Mr. McCOY. Do you mean any particular class of articles, or only some one article?

Mr. ROTHSCHILD. I think, for instance, the use of listerine was greatly enhanced by the reduced price.

Mr. McCOY. Did they have any price-fixing agreement, or did they simply advertise to sell the listerine for 25 cents a bottle, and advertise that on the face of the bottle?

Mr. ROTHSCHILD. I think at the outset, when it first became popular, there was an attempt to do that. I know the price at which that has been sold has greatly enhanced the business of that company.

Mr. McCOY. There are a great many similar products sold under different names now?

Mr. ROTHSCHILD. Yes.

Mr. McCOY. Assuming that the field for competition is perfectly open and unrestricted and that there is no monopoly, what is the harm that you see in permitting a manufacturer to say at what price his article shall be resold, either by the jobber to the retailer or the retailer to the consumer, or by both?

Mr. ROTHSCHILD. I think it is un-American and monopolistic to give to any man the privilege of dictating the price after the title to the article or merchandise has passed out of his hands.

Mr. McCOY. A few minutes ago you admitted that the title had not gone out of his hands, because you said that he had agreed not to sell and that he ought not to sell it.

Mr. ROTHSCHILD. I believe if he makes an agreement of that kind he ought to stick to it, but I can not advocate that any man should break an agreement into which he has entered.

Mr. McCOY. That is equivalent to saying that he has not the absolute title?

Mr. ROTHSCHILD. I do not say that the claim to the title rests with him, but he may have been injudicious enough to make that kind of an agreement.

Mr. McCOY. You say you think it tends to monopoly to permit a thing like that to be done?

Mr. ROTHSCHILD. Yes; I do think that.

Mr. McCOY. Have you in mind any instance in which you have seen such a tendency?

Mr. ROTHSCHILD. I think if this law were put on the statute books so that any trade-marked or patented article could have its price dictated by the manufacturer it would lead to a monopolistic state of affairs.

Mr. McCOY. Now, the practice has existed in the case of a great many articles for quite a long time, until some of the recent decisions of the Supreme Court, so that the opportunity for monopolistic control ought to have been developed in the last 10 or 15 years, and should have been apparent in the case of some one article or line of articles. Have you observed any such tendency?

Mr. ROTHSCHILD. I can not state at the present time the case of any particular article where they had a monopolistic control.

Mr. McCoy. If the proposed law should provide specifically that the right to fix a price should not be given in those cases where there was anything like monopolistic control, could you then see any objection to that legislation?

Mr. Rothschild. Yes; on general principles, I should say that the legislation is objectionable.

Mr. McCoy. On what other ground which might exist besides the monopoly feature?

Mr. Rothschild. I think on general principles the giving to the manufacturer the right to set the retail price is wrong.

Mr. McCoy. Suppose you not only gave him the right, but you required him to sell at the same wholesale price to everybody, to sell at the same price to jobbers, and then required the jobbers to sell at the same price to the retailers, and require the retailers to sell at the same price to the consumers, and that the price should be made public, could you then see any harm in the situation?

Mr. Rothschild. Yes; I would.

Mr. McCoy. Would you have anything more than a prejudice against it?

Mr. Rothschild. I have a strong prejudice against it. I do not think it would work.

Mr. McCoy. If you eliminate the possibility of having that practice exist in matters which are monopolies in any way, what other harm could there be?

Mr. Rothschild. Simply as I have stated before, that I think the sale of an article should give the purchaser the right to its disposition.

Mr. McCoy. The man who owns the article has it in his possession. He says to the purchaser, "Yes; I will sell you this chair," for instance, "provided that you agree not to sell it for less than $5." The purchaser says, "I will take the chair on those conditions, and I will agree not to sell it for less than $5." He takes the title, subject to the condition to which he has consented. How can you say he has absolute title?

Mr. Rothschild. I am arguing from the point of view that there should be no restrictions on the title.

Mr. McCoy. But you say you argue that because you think that a man who has the title to the thing ought to be allowed to sell it at any price he pleases?

Mr. Rothschild. But there is a string to the title.

Mr. McCoy. Well——

Mr. Rothschild (interposing). That string, I mean, is objectionable.

Mr. McCoy. If he makes a contract he ought to keep it. That is because he has a qualified title, and so your statement in answer to the question that you think a man ought to be allowed to sell what he has a title to does not answer the proposition, because you admit he has not the complete title.

Mr. Rothschild. We buy our merchandise without any agreement.

Mr. McCoy. I was referring to those people who are willing to enter into such agreements. What is your concern?

Mr. Rothschild. My concern is Abram & Straus, of Brooklyn, N. Y.

Mr. Nelson. Are they not compelled to enter into that agreement by the fact that if they do not enter into it they will not get the goods?

For instance, I had my glasses fixed yesterday, and I asked the doctor here if they had ceased those agreements after the decision in the Sanatogen case, and he said, "Not at all"; that they still insist that you must either agree not to sell that particular class of goods at less than such a price or they will not sell you the glasses. What do you know about that?

Mr. ROTHSCHILD. Goods can sometimes be obtained in spite of those restrictions.

Mr. VOLSTEAD. Is it not true that goods can be obtained by the larger concerns, and if you compel the smaller concerns to sell at a fixed price you put them at a disadvantage, because they can not compete with the larger concerns like Sears, Roebuck & Co. and Montgomery Ward & Co.?

Mr. ROTHSCHILD. That is one reason why I object to the whole proposition.

Mr. VOLSTEAD. Instead of helping the small stores it is likely to drive them out, because they are compelled under their contract to sell at a price at which they can not compete with the mail-order houses?

Mr. ROTHSCHILD. I think we should have the freest competition in business. I do not believe that there ought to be any restriction and I do not believe that any restriction of competition will work out in this country.

Mr. VOLSTEAD. Take Sears, Roebuck & Co. and Mortgomery Ward & Co., and I think we know as much about them as the people in the East, because they do more business in the West than in the East, and I know they buy the outputs of all the factories they can, and, of course, by buying in large quantities they can put their goods at a low figure, and if the local dealer who comes in competition with them has to make that figure, he ought to be able to meet it, if he is going to meet that competition, otherwise you will drive him out. I do not think he can meet that competition if he is not able to meet their figures.

Mr. ROTHSCHILD. I think one of the advantages of the mail-order business is the fact that they own or control the factories or a good many of the factories from which they get their supplies of goods. In regard to that, however, I speak only from hearsay.

Mr. MCCOY. Are they not leading to gradual retail monopoly?

Mr. ROTHSCHILD. I doubt that. I have not seen any evidence of it in New York or Brooklyn, where I reside.

Mr. MCCOY. As I understand it, the mail-order houses do not operate quite as much in New York and Brooklyn as they do in some of the western cities.

Mr. ROTHSCHILD. I understand that Sears, Roebuck & Co. does not sell anything to a person residing in Chicago.

Mr. MCCOY. Is that because they are interested in some of the retail houses in Chicago?

Mr. ROTHSCHILD. Not that I know of.

Mr. NELSON. What would be the reason for that?

Mr. ROTHSCHILD. I do not know, but I understand that it is so; that a resident of Chicago can not go there and get goods from them.

Mr. MCCOY. Then may it not be due to the fact that they want to do a wholesale business with wholesalers in Chicago, who will not do business with them if they do a retail business in Chicago?

Mr. ROTHSCHILD. I do not know the reason for it, but I have understood that is the case; that they will not sell anything at retail to a resident of Chicago.

Mr. McCOY. So far as you are concerned, if you bought an Ingersoll watch, for instance, or a Gillette razor, and agree that you would not sell the watch for less than $1 and the razor for less than $5, you would stick to that contract because you are bound by it?

Mr. ROTHSCHILD. I believe most people would do that. I think, as a matter of fact, that the majority of people would stick to any agreement they make.

Mr. McCOY. Do you think there is any public policy which ought to be interposed between the manufacturer and the man who is willing to make that kind of a contract?

Mr. ROTHSCHILD. If the man wants to make a contract with the manufacturer to sell an article at a certain price, I have no objection, but the law could not back him up.

Mr. McCOY. Should it not at least leave him where he can make a contract if he chooses to do so?

Mr. ROTHSCHILD. He can do that now. There is nothing to stop you, Mr. McCoy, if you are a chair manufacturer, from selling a chair to me on condition that I will sell it for $10.

Mr. McCOY. I have no protection, because anybody who wants to violate the agreement can do so without fear of prosecution.

Mr. NELSON. You can refuse to sell him another chair.

Mr. McCOY. But then you prevent me from doing business.

Mr. ROTHSCHILD. I thank you, Mr. Chairman, on behalf of the Retail Dry Goods Association for the kind attention you have given to us to-day.

STATEMENT OF EDMOND E. WISE, REPRESENTING R. H. MACY & CO., NEW YORK, N. Y.

Mr. WISE. Mr. Chairman, I have been counsel for R. H. Macy & Co. in the protracted litigation which they have had with the book publishers.

I am not going to enter into any lengthy discussion of the matter of restricted prices, because you have a pamphlet which has been distributed to the members of the committee in which you will find a full expression of my views.

I want to call the attention of the committee to a point which may not be germane to the matter of restricted prices, but I do not know that it has ever been called to your attention, and that is to the question that has been in doubt for a long time, and the doubt concerning which has been emphasized by the decision of the United States Supreme Court in the case of Strauss against the American Publishers' Association, sustaining the right of a private individual suffering special damages by reason of a combination to enter into a court of equity, not a court of law, and recover treble damages, and to enter into a court of equity to restrain the wrongdoers from a continuing injury. The Supreme Court of the United States has said that that point has never been presented to them and they refrained from deciding it. Various Federal courts throughout the country have decided diametrically opposite to that. It is my idea that a great many of the proposed extensions of the Sherman anti-

trust law will be helped if all doubt is cleared away and individuals suffering special damages will be permitted to go into a court of equity and prove the fact of the damage and the continuing injury and shall have the right to restrain the continuation of it. I say that because you will understand that in the Sherman law the action is rarely enforced and is rarely possible of enforcement because of the difficulties of proving to a jury the confusing and confused and complicated side of the case, and the facts tend to divert their minds from the real point in the case.

Consequently the absolute power of proving the damage done is one of the most difficult things to prove, unless the individual's business has been totally destroyed, as in the Laidlaw case. I think that by some action of Congress a court of equity should have that power of relieving the immediate needs of the oppressed victim from further oppression, so that it is unmistakably plain and will be enforced.

Mr. FLOYD. Mr. Wise, have you examined section 13 of the tentative bill No. 2?

Mr. WISE. I have looked at it only hastily.

Mr. FLOYD. That is the purpose of section 13.

Mr. WISE. My impression is that that does not give relief to any individual who suffers special damage.

Mr. FLOYD. It is section 13, on page 4, of this large volume, in Roman numerals.

Mr. WISE. The objection that I have is that relief is limited to the district courts of the United States. I think that any court of competent jurisdiction, exercising equitable jurisdiction, should have the right to protect the victims of violations of the Sherman law. The Sherman law is the supreme law of the land and every court should have the right to administrate that law. Every court, the lowest court in any State, should have the right to say to an individual: "You are violating the supreme law of the land and you must not do it." I think that every court of equity and every other court in the United States should have the power to protect a man's rights.

Mr. FLOYD. The purpose of it you approve, do you not?

Mr. WISE. Yes, sir.

Mr. FLOYD. Your suggestion is that instead of restricting it to any Federal court, the power should be given to any court of competent jurisdiction?

Mr. WISE. Yes, sir; whether State or Federal. Now, gentlemen, I thank you for your attention.

STATEMENT OF MR. CHARLES A. KEENE, NO. 180 BROADWAY, NEW YORK CITY.

Mr. KEENE. Mr. Chairman and gentlemen, I am not in any way connected with the Drygoods Association.

I am here not as an orator but just an ordinary retail merchant who has sold watches for the past 30 years. I wish to tell you briefly a few of my experiences with this one-price system as advocated by the manufacturers and their representatives who have appeared here before you from time to time in the past few weeks, and I trust they will be of benefit to you in passing judgment as to whether the protected system would be a benefit or a menace to the public.

We have in the watch trade two companies, the Elgin National Watch Co., of Elgin, Ill., and the Waltham Watch Co., of Waltham, Mass., who together, according to the best authorities obtainable, make about 78 per cent of the watches made in this country, and work together through the jobbers, whom they control by extending to them large lines of credit. The jobber in turn extends a large line of credit to the retailer, and controls him. For the past 30 or 40 years they have been able to dictate prices in this way down to the consumer. Now, let us see how it has worked out. About 12 years ago my supply was stopped because of prices. In Springfield, Ill., there is a watch company known as the Illinois Watch Co. It has been in existence something like 40 years. Their goods have a better reputation among the retailers than the trust goods. They have not the facilities for forcing on the public their products at a high price. For instance, their 23 jeweled Sangamore watch is sold by me to the consumer for $36, and yields a good profit to the retailer. The same grade made by the trust has a fixed price to the consumer of $82 and yields less profit to the retailer.

Mr. Ezra T. Fitch, president of the Waltham Watch Co., favors the one-price system, but does not practice it, as stated under oath in the Waltham *v.* Keene case that he did not sell all of his jobbers at the same price and never did, as long as he has been in business, which is about 50 years. Other statements have been made that price cutters drop a line of goods after the juice was squeezed out of it. This is not so. They have failed to cite one instance of this kind. Once a cutter always a cutter. The public is benefited by the low prices and the dealer by the increased volume of business. There is more money in it than in any other way. After my supply was stopped I went to Europe to buy, and found that I could buy in the open markets of Europe, Asia, and Africa, from such dealers as Hock Sang, 14 Twenty-first Street, Rangoon; Huiti-sandree, 6 Old China Bazaar, Calcutta; Fawkes & Sons, Madras, India, at much less prices than I could buy in the home market. Even in Neuchatel and Chaux de Fonds, the very heart of the Swiss watch-making industry, the Waltham Watch Co. sells watch materials at 50 per cent discount. They attempted to stop reimportations by contracts with foreign jobbers which would render shipments coming back to this country dutiable for the full value of the watch. The president of the Waltham Co. claims that it was to their advantage to buy Swiss dials and put them on their watches in Europe. I have here in my hand a dial taken from a watch made in Switzerland, with the words burned in the enamel on the back, "Made in Waltham, Mass.," which seems to me would indicate that it was advantageous for the Swiss manufacturers to buy their watch dials in Waltham, asd all this under the one-price system. A few years ago three suits were brought against me by the Waltham Watch Co. to prevent me from exercising my own judgment in putting prices on my own merchandise that I had bought and paid for. As a result, the Supreme Court of the United States handed down a decision in my favor only last Monday. The manufacturers who say their reputation is being ruined by cut prices have grown financially strong at the expense of the public. The price cutter has also become strong, and has benefited the public. I feel now that the doing away

of the one-price system by the decision of the Supreme Court will work great good for the public, as well as the small dealer.

Mr. McCoy. Mr. Keane, the argument that you have made now from your own experience is not based, as I understand it, at all upon what we know as the price-fixing proposition, the resale price-fixing proposition by a single individual? Does it not apply more to a combination of manufacturers making different articles and their coming together and endeavoring to control the price of an article?

Mr. Keene. That is the object of price fixing, as I understand it, in the watch trade.

Mr. McCoy. And take it in the case of a watch like the Ingersoll dollar watch or the Gillette razor or some of those well-known articles—that is not the practice that you have been fighting in Broadway?

Mr. Keene. The practice of the Ingersoll company?

Mr. McCoy. The fixing of retail prices for an Ingersoll watch and the fixing of prices of a Gillette razor are not the sort of practices that you have been fighting, but rather the combination of the watch manufacturers to keep up the prices of all of them or each of them.

Mr. Keene. The Ingersoll is struggling hard to keep prices at $1.

Mr. McCoy. But not in combination with other manufacturers?

Mr. Keene. The Ingersoll can hardly be quoted as a good example. Some years ago we had in Waterbury what was known as the Waterbury Watch Co. It was new at first. Their goods came on the market 40 years ago and they were cheaper than any other goods known at that time. They were the first in the field and they built up an enormous business. They had an idea that they made better goods, and they used their own name on the better class and they used it too long, and they did not make a success of it. When they changed to the New England Watch Co. it was too late. About that time Ingersoll came on the market with his watch and took the business away. He is an independent manufacturer. He is practically alone in the field of manufacturing cheap watches. I do not think anybody can take it away from him.

Mr. McCoy. The testimony here this morning has been that there are other people making 75-cent watches. But, however, my point is this: That so far as you know, at any rate, the Ingersoll concern is not in combination with other concerns.

Mr. Keene. No; they own one factory and control another.

Mr. McCoy. And they have no trade agreement with some other manufacturer of cheap watches that the two will maintain the price, each on his own watches, at a dollar?

Mr. Keene. I do not happen to know about that, because I do not happen to deal in Ingersoll watches.

Mr. McCoy. But the point I want to come to is this: That what you have been fighting successfully, on Broadway for several years, is the attempt of several watch manufacturers, by agreement, to keep up the price of their respective watches. Is not that the fact?

Mr. Keene. I have been fighting everybody in my business for dictating prices.

Mr. Nelson. Your objection is not only to one form, but to all forms of fixing retail prices?

Mr. Keene. All forms. Ingersoll fixes prices all over the country. They charge a price here, and they force the dealers all over the

country to sell at the same price. The jewelers are a very small people.

Mr. McCoy. Do you mean that the Ingersoll watch sold at $1 here, is sold at a less price abroad at retail?

Mr. Keene. I have not followed that, but if they do not sell it to the dealer at a lower price abroad, I do not think they would get very far.

Mr. Volstead. Do you think you have a watch in Europe that sells at a much less figure than the Ingersoll?

Mr. Keene. Yes; in Germany, the Roskopf watch sells for 3 marks, something like that, or 2 marks 50. You can not go to Europe with an American article unless you make the price lower, and that is done at the expense of the American public, but not in the watch line.

The Chairman. In the course of your business you have been going over to Europe and buying American watches there for less than what you could buy them here and bringing them back here and selling them at retail, have you not?

Mr. Keene. Yes, sir.

Mr. Nelson. American-made watches?

Mr. Keene. Yes, sir; American-made watches.

Mr. Nelson. And pay the import duties?

The Chairman. You do not have them.

Mr. Nelson. No; that is right.

Mr. Keene. No; you put the foreign dials on them and that takes away the profit.

Mr. FitzHenry. As I understand it, you go to Europe and buy American watches and import them back to the United States and then sell them for less than they would cost you here?

Mr. Keene. Yes.

Mr. FitzHenry. Not only less than the other dealers sell the same goods, but less than you could have bought them here?

Mr. Keene. Yes; the most surprising thing of all is this: When I first went there—when the thing was new—I made a contract, through a jobber for some dealer, for watches at 19 shillings each ($4.75). They contracted to deliver 2,000 watches that fall or pay a penalty of 12 shillings a watch. They found out that the goods were coming to America and they only delivered 100. Those watches were sold for $8.25, and I could have sold 10,000 at that price to other jobbers.

Mr. FitzHenry. How much would that same watch have cost you if you had bought it in the regular way in the United States?

Mr. Keene. It was about $8.50 that that cost, but they kept the market so short that the dealers were paying a premium to get the watches here and they contracted to deliver a certain amount or pay a certain penalty. I know I collected some of the penalties.

Mr. Nelson. The jobber made a contract with you?

Mr. Keene. The jobber over there?

Mr. Nelson. Yes.

Mr. Keene. Yes.

Mr. Nelson. And he was also protected by a contract?

Mr. Keene. He made a contract with the London office of the Keystone-Elgin Co. and they wanted to take on a contract to deliver 10,000, 8,000 to come the following year. It has been their policy

and their method to keep the market short here, and ship their goods over there at a lower price.

Mr. NELSON. In order to keep up the price here?

Mr. KEENE. Yes.

Mr. NELSON. Then, the two companies are acting together?

Mr. KEENE. Yes.

Mr. FITZHENRY. Now, in reference to this dial that was put on, how was this dial marked?

Mr. KEENE. It was marked "O'Hara, Waltham, Mass." O'Hara was a man who worked in the Waltham factory. He was a great friend of Mr. Fitch, the president. Mr. Fitch bought his dials from him. That watch came from Switzerland. I bought that watch in Switzerland—some 100 of them—and some customer here had bought it and broke the dial and it was brought in for a new dial. The name of the watch is the Dreadnaught.

Mr. FITZHENRY. On the back of the dial there is "O'Hara, Waltham, Mass."

Mr. KEENE. That means the "O'Hara Dial Co." It is on a Swiss watch. The Swiss people evidently bought their dials in Waltham.

The CHAIRMAN. It is a Swiss-made watch with a Waltham dial on it.

Mr. VOLSTEAD. How long since you imported any of those watches?

Mr. KEENE. Two or three years. I have forgotten exactly.

Mr. VOLSTEAD. You have not been importing any lately?

Mr. KEENE. No. I am going over next month. The duty has been reduced 30 per cent, so that, I think, I can go over and buy them and just pay the duty and still undersell them. I have seen contracts where they sell for $2 what we pay $4 for here.

Mr. BELL. After the Swiss dialing was put on they were held dutiable?

Mr. KEENE. Yes; if one watch was found in a thousand watches with a Swiss dial on it you would have to pay the duty on the whole thousand.

Mr. BEALL. That is the only change that was made in the watch?

Mr. KEENE. Yes, sir.

Mr. BEALL. That makes it dutiable?

Mr. KEENE. Yes. The protected price system in this country makes this possible. When you buy a watch made by the Waltham Watch Co., or the Ingersoll Watch Co., or any other well-known American company, you are paying 50 cents for the name and 50 cents for the watch, and you buy the name every time you buy one, and nothing else.

Mr. BEALL. A watch that sold at $82 here would sell at what price abroad?

Mr. KEENE. That sold for about $31. It is the Riverside watch, made in Waltham. It sold abroad for $10. The suit they brought against me here was to oblige me to charge $28.50. I have copies of the contracts here showing that fact.

Mr. MORGAN. Do you know whether the foreign manufacturers to some extent follow the same policy? Do they in some cases sell cheaper here than at home?

Mr. KEENE. I do not know.

Mr. NELSON. What is their object in selling at such an extraordinary price at home?

Mr. KEENE. They are in a position here to charge a high rate. An independent company may make watches but can not sell them at their own price.

Mr. VOLSTEAD. Take the Riverside Co. that you speak of. You say they sell their watches at $10 and they are trying to sell them here for $28.

Mr. KEENE. You mean the wholesale price?

Mr. VOLSTEAD. The European price is $28 wholesale.

Mr. KEENE. Yes.

Mr. VOLSTEAD. What is the wholesale price in this country?

Mr. KEENE. At the present time it is about $21.50, less 6 per cent.

Mr. VOLSTEAD. What was it at that time?

Mr. KEENE. $21.50, less 6 per cent.

Mr. MCCOY. Mr. Keene, by what claim of right did they try to make you sell this watch at $28 or any other figure?

Mr. KEENE. They had these little stickers printed on the box and they tried to say that I made a contract in the open market when I bought them with the little sticker on them. It is impossible to get them in any other way.

The CHAIRMAN. You can read that sticker, Mr. McCoy.

Mr. NELSON. I have a Howard watch. Is that controlled by the trust?

Mr. KEENE. The parties that now control it are controlled by the trust. It is owned by the Keystone Watch Co. They bought the patent and name of the old Howard watch, but it is not as good as the old Howard watch.

Mr. NELSON. And they have fixed the price on it?

Mr. KEENE. They have fixed the price on it at $160 when an independent company, which has not the facilities for perfecting its goods, sells it to me so that I can sell it at $87—a watch exactly as good as one they can sell at $160.

Mr. MCCOY. What means do you think they have for foisting their watches on the public?

Mr. KEENE. They have been in business for 50 years and they control the jobbers. Their goods are so strong in the market that no jobber can go in the watch business without those two lines. They walk into his office and give him his orders, like this Keystone Co. did. It is a branch of the trust now being prosecuted by the Government.

Mr. MCCOY. You mean that no jobber can go into business because of the reputation of this trust, and the people want their watches?

Mr. KEENE. The small manufacturers have been in business for 40 years, and they do not have the opportunity of dictating to these jobbers as the big companies do.

Mr. MCCOY. We had the president of the Hamilton Watch Co. as a witness the other day, and my recollection is that he claimed that he makes 300 watches a day. That is a small business, is it not?

Mr. KEENE. Yes; they make only high-grade watches.

Mr. MCCOY. He testified that he had been able to control the jobbers and retailers' selling price up to the present time.

Mr. KEENE. Well, I will tell you how that was done. They make arrangements with the manager of a railroad to put a time system on that road, and they appoint inspectors, and so on, to inspect the men's watches and see that they have proper watches, and they advertise the well-known engineers and put their pictures in the magazines and talk nice to them, and they manage to make a demand on the railroads for that Hamilton watch. They sell no cheap watches. I understand they claim to sell about 50 per cent or 55 per cent of the high-grade watches used on railroads.

Mr. McCOY. Now, they claim another advantage for their practice of fixing prices: That they make their interchangeable parts in large quantities, so that any jeweler in a small town who sold a Hamilton watch could afford to carry these parts, and the customer always knows that he can come back to the jeweler and easily get a repair part or have his watch looked out for.

Mr. KEENE. That is true of every watch company in existence here and abroad.

Mr. McCOY. If I buy a Waltham watch, is there anybody that I can go to and have him look after that watch without paying anything for having the repairs done?

Mr. KEENE. You look to the man you bought the watch from to make it good within a reasonable time. You do not take the train to Lancaster, Pa., and see the president of the company.

Mr. McCOY. They claim they have to maintain a repair shop costing $25,000; and no matter what puts the watch out of business, even though it was through no defect in the watch, they would take it back and give another.

Mr. KEENE. Well, they could do anything for the enormous price they get for their watches. Mr. Ingersoll, I understand—you can buy one of his watches for a dollar and carry it for 5 or 10 years, and you can say, "I want a new watch," and you are handed a new watch for 25 cents.

Mr. McCOY. Is not that an advantage to the public?

Mr. KEENE. Yes, sir; and also to Ingersoll.

Mr. McCOY. But Ingersoll does not do it from charity?

Mr. KEENE. Yes, sir.

Mr. McCOY. He claims that he can do that by reason of the fact that he sells so many of the watches, and that fact is due to the price maintenance.

Mr. KEENE. They can do lots of things. They can give him a meal ticket, and they ought to do it, if they can sell watches the way they do.

Mr. McCOY. So that there is no advantage to the public then?

Mr. KEENE. No; because there is only a small percentage who come back.

Mr. McCOY. Well, I am not sure about that, because I have some boys, and I have had to take their watches back to the jeweler to be replaced, because the boys step on them or get them out of order.

Mr. KEENE. Where do you take them?

Mr. McCOY. To Ingersoll's place, on Courtland and Vesey Streets, or wherever it is.

Mr. KEENE. The poor jeweler has to stand for anything the watch companies do. They have to repair the watches, and that is why they——

Mr. McCoy. I do not ask him to repair the watch, but I take it right in and get another watch for it. I think sometimes they charge you 10 cents to make the exchange.

Mr. Keene. Yes, sir.

Mr. McCoy. But that was an advantage to me.

Mr. Keene. Naturally. But it would have been a bigger advantage if you had bought it for 40 cents, because you would not have had to have it repaired so many times.

Mr. McCoy. No; this was not to be repaired, but on account of some carelessness of the boys. If I had taken it to a jeweler he would have probably charged me a dollar.

Mr. Keene. Hardly on an Ingersoll watch.

Mr. McCoy. I should not wonder.

Mr. Keene. But they buy them for 60 or 70 cents.

Mr. McCoy. You mean he could not afford to repair it?

Mr. Keene. None of us can afford to do things that do not pay. If a man can not afford to repair a watch that cost 60 cents for less than a dollar, he can do many things. If they are put on the market for 40 cents the public would be more willing to buy them, even without a comeback.

Mr. Floyd. Do you not think the general public would profit largely by it if they got the watch for 40 cents without the privilege of repair?

Mr. Keene. I should think the general public would be more benefited than if they got it at a dollar with the privilege of repair.

The Chairman. Is there anything else you desire to say, Mr. Keene?

Mr. Keene. I wish to add that the price-fixing proposition is only for the benefit of the manufacturer and no one else. That is how it has worked out for 50 years.

STATEMENT OF MR. ADOLPH H. ROSENFELD, 76 WILLIAM STREET, NEW YORK CITY.

Mr. Rosenfeld. Mr. Chairman and gentlemen of the committee, I have represented Mr. Keene in all this watch litigation probably for the last two and one-half or three years, and I think it will be of interest to the committee to find out how in practice the system was operated. Now, the Waltham Co.—I take them for an illustration, because what is true of them is true of the Elgin, and what is true of the Elgin is true of the Howard, and what is true of the Howard is true of any other companies—they seem, by some surreptitious method, diabolical in its effect, to reach people and pull them in. There is not, to this day, outstanding against the entire system, a man who has cut the price to whom they have not made advances in one form or another to get him into the fold. Now, the system by which they get him into the fold is very peculiar. For example, they have come to us repeatedly, and said to us, "We do not care what you sell your watch movements over the counter for, but don't advertise it." It is not the question of price cutting that comes into the field; it is the fact that they make known to the consumer that we do sell it below the fixed price. That is the evil that they are aiming at in this litigation, and that is the evil they are aiming at and have been aiming at ever since I have been in the case. They have come

to us and said, "What do you want? What can we do for you?" And Mr. Keene has invariably said, "I want to run my business at 180 Broadway as I please, and I do not want to run it as anybody else dictates."

That has been his system from the outset and this is just what he is fighting here to-day. He represents no one but himself, a man who started 25 years ago in business in a small way in Boston with a little repair shop, and moved from place to place until he has made himself a factor in the retail business, and he wants to maintain his business in his own way and sell his goods at his own price. He does not want anybody to come in and say, "Here, sell it at my price." They work out the system in this way: The Watham Co. a few years ago, until it was stopped, marketed all its goods through their selling agents, known as Robbins & Appleton, who maintain offices in New York, Chicago, and Canada, and through the selling agents of the company in a manner that we have never been able to reach by litigation, through selling as selling agents of the company and being in entire control of it, the officers of the company were enabled to loot the company to the extent of $135,000 or $200,000, as was testified by Mr. Ezra C. Fitch before the House Committee on Ways and Means on January 14, 1913. Now, after the practice became warm they discontinued it, and the result has been that they have now eliminated Robbins & Appleton and come into contact with their jobbers direct. They sell a watch movement to the jobber and they have a contract with this specific jobber. This contract, or what they call a bill to jobbers, is a peculiar arrangement. They first say, "Waltham contract notice." Then they say, giving the size, "Waltham movement No." giving the number—

bearing the trade-mark "Riverside 19 jewels," essential parts of which are protected by United States Letters Patent, is sold subject to the following conditions, which every buyer thereof by accepting this movement agrees with the undersigned company to keep and perform, viz, (1) jobbers may sell this movement to established retail watch dealers, except those designated by this contract, and to no other persons, and only at the price and discount authorized by this company. The term "retail watch dealers" shall include all watch dealers other than those recognized as jobbers by this company; (2) jobbers must in every instance deliver this contract notice with the movement; (3) retail dealers may dispose of this movement by sale only, and only to buyers for use and not for resale and must not advertise nor sell this movement for less than $25. A breach of any of these conditions shall revest in the company the title to this movement, and upon tendering the price paid therefor to the holder thereof the company may retake possession of the same. These conditions will be enforced by the company.

WALTHAM WATCH CO., *Waltham, Mass.*

Then they run a paster through, containing substantially the same thing, clear down to the retail dealer. That was put in a metal container at Waltham. I want to take the 16 size, Riverside movement, which was involved in the New York case, because I believe it is true of every movement that they handle. The gentlemen will remember that some time, about 1906 or 1907, there were certain cases that were decided in various circuit courts throughout the United States seeming to look to the fact that the private-contract system of patented articles would be recognized as good law. Immediately after that we find that this company very generously and very nicely increased its price. The decision had hardly grown cold before the price was run up. It was originally sold for $25—the 16-size River-

side movement, and then on April 15, 1907, just about this time, they served a notice increasing the schedule of prices. I think it was $26. Then, in September, 1909, they very generously, when a few more decisions came in, I suppose about the time the button-fastener case was decided, they very generously increased its price to $28.50. Then about the time the Dick Henry case came along they very generously increased the price to the consumer to $32, and $32 is the consumer's price to-day in all the jewelry stores. Now, that is beautiful.

Mr. VOLSTEAD. Do you know whether there was any change in the movement during that time? Was the movement improved in any way?

Mr. ROSENFELD. None perceptible to the jeweler?

Mr. KEENE. No.

Mr. ROSENFELD. You could not see it in the movement itself.

Mr. VOLSTEAD. Did they make any claim for it?

Mr. ROSENFELD. No, sir; they did not make any claim for it. They just sent out the pasters increasing the price. That is brought out in the case they brought against Mr. Keene in New York.

Mr. VOLSTEAD. This was an Elgin watch, was it not?

Mr. ROSENFELD. This was a Waltham. The Elgin Watch Co. has, at precisely the same time in every instance, increased its prices at the same time that the Waltham Co. has done it. I do know that there is one instance where they did not, and that was when the changes were 15 days apart. That was the only exception. The watch movements of the leading companies are almost indentical in price, or have been until the recent agitation came along. When you want to know the corresponding price of a certain movement, you only look at a Waltham watch or an Elgin watch, because one is as good as another. They do not have to bother which one. Now, I am going to follow this 16-size Riverside watch movement, 19 jewel. That is what they do to the consumer in this country. What do they do abroad? A contract now in effect with the Keystone Watch Case Co., which is a defendant in the action brought by the United States Government——

Mr. VOLSTEAD. You mean that suit is now pending?

Mr. ROSENFELD. Yes, sir. They have a contract with the Keystone Co., which is dated the 1st day of June, 1909, to go into effect the 1st day of January, I believe it was, of the following year and to run for a period of five years from the 1st day of January, 1910. Now, we see in this contract a 16-size, 19-jewel Riverside watch for $10. They not only sell it for that, but they deliver it free of charge to Riverside, N. J., and pay the insurance, too.

Mr. MCCOY. Is that the wholesale price?

Mr. ROSENFELD. Yes, sir. The jobber's price in this country is $21.50, less 6 per cent. There is not any jobber's price. That is a joke of it. Mr. Fitch testified that they did not have any fixed price; they sell it at any price they want to.

Mr. MCCOY. In this contract from which you read it fixed a $10 price approximately.

Mr. ROSENFELD. No; it fixed it accurately.

Mr. MCCOY. Now, that is the price in wholesale quantities?

Mr. ROSENFELD. This contract was originally with the Philadelphia Watch Case Co. and assigned to the Keystone Watch Case Co.

Mr. MCCOY. That is in wholesale quantities?

Mr. ROSENFELD. Yes, sir; that is the jobber's price.

Mr. McCOY. Now, you say that you can not find any jobber's No." giving the number—

Mr. ROSENFELD (interposing). How can I when the president of the Waltham Co. said they did not have any fixed price to jobbers and they sold everything at any old price they could get; and they always have sold everything at any old price they could get since they have been in business.

Mr. McCOY. Do you know whether or not they do sell or have sold to any jobbers in this country at $10 or thereabouts?

Mr. ROSENFELD. I do not believe they have.

Mr. McCOY. The Keystone Co. puts the works into their cases and then exports them?

Mr. ROSENFELD. Yes.

Mr. McCOY. Then, what is the——

Mr. ROSENFELD (continuing). With or without cases.

Mr. McCOY. What is the export price of the works without the case?

Mr. ROSENFELD. The export price to whom?

Mr. McCOY. Well, to anybody who buys it for export, or to the man who buys it on the other side as exported by the Keystone Co.

Mr. ROSENFELD. They charge anything they can get. Mr. Keene gives me the fact that in Rangoon, Bombay, Calcutta, and Johannesburg they get better discounts than they do at any other place, except at the London office. We can not tell what it costs, even though we know the exact price they have on their watch movements sold from the London office. The discounts are so large that they are not even given; they are kept secret.

Mr. McCOY. What was your object in citing this $10 price which they make to the Keystone Co.?

Mr. ROSENFELD. For the simple reason that that was the watch in litigation and it was easy to follow.

Mr. NELSON. The point is that we have not got the comparison of the points you are bringing out.

Mr. ROSENFELD. All right; I will get this comparison. Now, you want to know how they sold it. Here is the testimony of Mr. Fitch in the trial in New York.

Mr. FITZHENRY. We are not fussing about that, but the thing we want to know is how you follow that watch that you started out with? Let us know what it sells at to persons in Europe or to the jobber, if you know, and then to the consumer, to the final purchaser, and then what the same watch costs in this country.

Mr. ROSENFELD. Might I just read this? This is the testimony of Mr. Fitch in the trial of Mr. Keene's case in New York. I asked Mr. Fitch this question: "On these Waltham contract movements did the Waltham Watch Co. between the years 1905 and 1910 sell watch movements at the same price to its jobbers, grade for grade, size for size?" Then there was an objection, and the answer was, "No." I then asked the question, "When you answer that question 'No,' you refer to the entire period between 1905 and 1910?" Mr. Fitch replied, "I refer to the entire period the company has been in business." I then asked him the question, "And your answer 'No' applies to all the contract-price movements, does it not?" The answer was, "It applies to all the business, both noncontract and contract movement,

and everything we deal in." They substantially only market their products to jobbers and they have no price to the jobbers.

Mr. McCoy. The only point of the question is this: You called our special attention to a $10 price made to the Keystone Co.

Mr. Rosenfeld. Yes, sir.

Mr. McCoy. We want to follow your argument, but we do not know what use you are going to make of that special fact, if any, as contrasted with some other fact. In other words, was the thing cited with reference to something you are going to disclose, or did you cite it incidentally?

Mr. Rosenfeld. I cited it because of the fact that I wanted to show, first, that the prices they got—that the watch movements were delivered free to Riverside, N. J., charges prepaid, and some other incidental expenses added.

Mr. McCoy. Now, having established that fact, what is the conclusion which you draw from it?

Mr. Rosenfeld. The conclusion that I draw from it is this: That the watch movement itself, from the information I have gotten, can not be bought by the jobber at anything like that price in this country, and never could.

Mr. McCoy. Now, what is the proof of that fact, and at what price does any jobber buy it?

Mr. Rosenfeld. Why, I can not tell you that, because they have not any price.

Mr. McCoy. Well, some jobber must buy these watches, and, if so, what price does he pay for them?

Mr. Rosenfeld. The best information that Mr. Keene has is that they get about 6 per cent and an added 10 per cent off of the $21.50.

Mr. FitzHenry. At what price is that same watch movement sold to the jobber, or somebody in Calcutta?

Mr. McCoy. Or any other place outside of the country?

Mr. Rosenfeld. Mr. Keene can answer that exactly for you.

Mr. Keene. I wish to state that my agent has bought Waltham watches in retail shops in London, over the counter; he has walked in from the street and bought them cheaper than he could buy them wholesale here.

Mr. FitzHenry. Referring to this particular Keystone watch——

Mr. Keene (interposing). I am going to tell you about that. I personally have also bought Riverside watches in Manchester, England, for about 39 shillings, but I have nothing to prove it. I have contracts to prove that they sell in this country at $10 for export, but I have bought them and I am satisfied that they have been sold in Manchester for less than $10.

The Chairman. What would be the retail price of that watch which you bought at Manchester?

Mr. Keene. That is the one they are protecting the prices on. It is up to $39 at the present time. I bought them from Mr. Pendlebury, of Manchester, England.

The Chairman. What does that same watch sell for here?

Mr. Rosenfeld. $21.50, 6 per cent off to the retailer, and, as far as I know, an extra 10 to the jobber. The jobbers claim that they do not make anything, but they make 10 per cent, and there is a bare possibility that they get 20 per cent.

The CHAIRMAN. When you say jobber in this sort of a case, you mean the foreign jobber?

Mr. KEENE. No; I mean the American jobber. The American jobber pays $21.50, less 6 per cent, with an extra 10 per cent.

Mr. MCCOY. I did not want to cut the other witness off, but I wanted to connect up your statement.

Mr. ROSENFELD. Well, when I got the evidence that they did not have any fixed price for jobbers I was not going to chase all over the United States to find out what the average price was.

Mr. VOLSTEAD. In that hearing did Mr. Fitch give any price to the jobber?

Mr. ROSENFELD. No; I just asked him that question, and, having no fixed price, I could not go any further.

Mr. VOLSTEAD. Did you go any further into the price at all?

Mr. ROSENFELD. No, sir.

Mr. VOLSTEAD. Is not there any evidence in the record to show what they contracted to sell them for?

Mr. ROSENFELD. We tried to get the facts of the cost but we have not succeeded.

Mr. VOLSTEAD. Is there not anything in the record as to what figures they sold them to the jobber?

Mr. ROSENFELD. No, sir.

Mr. VOLSTEAD. I did not imagine that they would handle anything at 10 per cent.

Mr. KEENE. The jobbers handle them at anything they can.

Mr. VOLSTEAD. My understanding is that they practically retail them to a great many of these dealers——

Mr. KEENE (interposing). The jobbers sell them for nothing. They give the jobber enough to buy a Uneeda Biscuit for dinner. He has to do simply as they say if he wants to stay in the business.

Mr. FLOYD. Mr. Keene, Mr. Rosenfeld has read the testimony of the president of the Waltham Co. to the effect that they have no fixed price, and I understood Mr. Keene to state, Mr. Rosenfeld, that the jobbers' price in this country is $24.50.

Mr. ROSENFELD. That is as near as he made it out.

Mr. FLOYD. I want to ask Mr. Keene what he has to say to that statement of his attorney.

Mr. KEENE. $21.50 is the published price. I think it is really published in their official catalogue at $43. That means 50 per cent off and the cash and the jobber's discount. It may be 10 or 20 extra. I do not think there will be any more than 20 off to the jobber, but Mr. Fitch's testimony upsets all my calculations.

Mr. VOLSTEAD. You are speaking of the printed statement of price?

Mr. KEENE. I think in the general catalogue everything is published as half and the retailer gets 6 off and the jobber gets 10 or 15 off, or whatever it may be.

Mr. FLOYD. Well, that is all I want to know. Mr. Rosenfeld is talking about the sworn statement of the president of the company.

Mr. ROSENFELD. Mr. Keene is basing his figures on what he has heard in the trade, and as soon as he found out this fact all his calculations were naturally upset, and what he is giving you now is what is generally supposed to be known in the trade. That is what he is giving you at this point. They sell an 18-size, 7-jewel movement,

Waltham watch to the Keystone Co. at $2.20, and I think that is $4.50 in this country.

Mr. KEENE. It is about $3.75 in this country, about 33 per cent higher than abroad.

Mr. ROSENFELD. In the same way it goes all through the list. You take the price, say, for an 18-size, 15-jewel movement, and it is $2.75. Then a patent regulator, 15-size—that is, a Waltham movement——

Mr. NELSON (interposing). Do they attempt to fix the price to the consumer in the foreign countries?

Mr. ROSENFELD. I do not believe they do; I never heard of it.

Mr. KEENE. That price fixing was done here on account of the railroad man, in order to charge him a high price. They got the general manager of a railroad to issue an order to the employees that they must have a time system. On the English railroads they furnish their own system, and guards on an English railroad can carry a $40 or a $50 watch if he wants to, but the American railroad man must supply at his own expense the time system required by the American railroad.

The question was put this morning to several witnesses about what happened in case they did not maintain the price. Well, this is the way it worked. They issued a list of jobbers at certain periods. I believe I brought along several such lists. And when a jobber did not walk the chalk line to the proper music his name did not appear on the list and that meant that he was off the list of jobbers. That was done, as was testified to in the case of the Waltham Watch Co. *v.* Mr. Keene. Now, down in Boston it was testified to that it was done by indirection, that they simply issued another list of jobbers with the name of the jobber off of the list who had deceived them in that way.

Now, what was done with reference to retail dealers who did not maintain the fixed price? Here is what was done if they did not maintain the price. I have the originals of these letters in my office. This is a copy of a letter addressed to a jobber in Boston, dated May 4, 1910:

SMITH PATTERSON CO.,
52 Summer Street.

GENTLEMEN: Will you please advise us if you have been or are now selling Waltham watches to the Baier Jewelry Co., of Salina, Kans., and oblige.

Yours, truly,

ROBBINS, APPLETON & CO.

That is very innocent. That is the most innocent-looking inquiry imaginable. Let us get the history of it. Every watch movement that is manufactured by any watch company has a number, and after it is manufactured they put the name of the jobber alongside of the watch movement in their watch book and the jobber to whom it is sold. Now, in the case of the Waltham Co., they go to the jobber and say to him, by a contract or by a notice pasted on the bill of sale, as follows:

Jobbers must immediately send to the company's selling agents.

That was during the period of the selling agency of Robbins, Appleton & Co.; the same thing exists, only with the selling agents' phrase left out.

A duplicate of every bill of the above-named movements and watches which they issue.

In addition it is provided that the jobbers—

Must bill said movements or watches only on billheads approved by said company and bearing the conditions of sale; must not bill said movements or watches with any other goods; must not exchange said movements or watches for any other goods whatsoever; the Waltham contract notice must be delivered with the movement or watch in every instance.

What does that mean? That means that when a jobber sells this watch movement with a number on it he must send to the Waltham Watch Co. the name of the retail dealer to whom the movement is sold. Now, the company has traced the movement from the factory to the dealer, and although they were unable to enforce this condition, I have my serious doubts whether a man could remain long on the list of jobbers of the Waltham Co. unless he obeyed this condition. At any rate, they could follow the history of the watch movement, and whenever they found a jobber or jeweler who had disobeyed this condition they were able, through having the number of the movement and being able to trace it, to punish those men, and if they did punish them it meant that some missionary, or somebody in the employ of the Waltham Co., had found a man selling at less than the retail price fixed to the consumer. That is what that meant. They have the history of the movement through to the jobber and from the jobber to the retailer, and having the history down to the retail jeweler, they are enabled to make inquiries as contained in the letter I read to you a moment ago. That letter was signed Robbins, Appleton & Co., by E. P. Fitch, jr., manager, the son of the president of the Waltham Co., but now general manager, I believe, of the Waltham Watch Co.

Here is another letter, dated November 18, 1911, addressed to the same people—Smith, Patterson & Co., 52 Washington Street, Boston, Mass.:

Please inform us if you have ever or are now supplying Waltham movements to U. S. Webb, of Corbin, Ky., and oblige.

Yours, truly,

WALTHAM WATCH CO.

Knowing the history of the watch movement, they send out letters of inquiry and in that way endeavor to ascertain whether watches are being sold for less than the fixed price.

Here is another one, dated June 6, 1911:

GENTLEMEN: Will you please advise us if you are selling Waltham goods to the following party, Ben F. Harless, Houston, Tex., and oblige.

Yours, truly,

WALTHAM WATCH CO.

The committee is anxious to know what a fixed-price system will do if they establish it, and if they want to know what it will do here it is. There is not anything to prevent the numbering of the article or package that they have sold to dealers and then writing a letter of inquiry. I would like to see any jeweler, after they found that Waltham watch movements were sold at a price to the consumer less than the fixed price, get another movement from a Waltham jobber. I would like to see a man who had sold Colgate's soap at less than the fixed price to the consumer buy it again, and the same thing applies to the soaps of Roger & Gallet. I would like to see a man, known to sell the Gillette safety razor at less than the fixed price, buy it again if they found it out.

Mr. VOLSTEAD. Is not this true, that what you complain of largely grows out of the fact that there is practically a monopoly?

Mr ROSENFELD. Exactly.

Mr. VOLSTEAD. Outside of the question of fixing prices?

Mr. ROSENFELD. It is a monopoly, and Judge Ray said, in his opinion in the New York case of the Waltham Co. *v.* Keene, that it was a monopoly.

Mr. VOLSTEAD. It seems to me that the question of fixing prices is not so very material in this monoply except that the monopoly feature gives the power to fix prices.

Mr. ROSENFELD. Exactly. A monopoly works this way: They start at the top. Then they distribute through jobbers to retail dealers and they fix the price to the retail dealers and have enforced it or have been trying to enforce it.

Mr. VOLSTEAD. What sort of legislation do you want?

Mr. ROSENFELD. Personally, I do not believe we should have any legislation which in any way interferes with the retail dealer in selling his own merchandise in his own way.

Mr. VOLSTEAD. You do not think it is necessary to amend the law so as to prohibit price fixing beyond what the Supreme Court has done?

Mr. ROSENFELD. I do not think so. I think the law as it now stands effectually prohibits price fixing.

Mr. VOLSTEAD. Is not this true, that in a case of this kind, especially where there is a monoply back of the article, that they may go and make contracts just the same as though they were not forbidden, and that those contracts would be observed generally by a great many people?

Mr. ROSENFELD. I do not think that under the present law even a contract to sell at a fixed price would be valid.

Mr. VOLSTEAD. Of course, I am assuming it is not valid, but would it not bind men as a matter of honor?

Mr. ROSENFELD. That is the way, and they have not changed the system.

Mr. VOLSTEAD. Then you think it is necessary for us, if we are going to try to get rid of this, to impose a penalty on these practices?

Mr. ROSENFELD. I think so.

Mr. VOLSTEAD. The practice of fixing prices?

Mr. ROSENFELD. I think a penalty should be imposed, and I think to that end the fixing of prices should be stopped, and that after a man has parted with his article and it is in the possession of another man that he should sell it in his own way, and if anything is done to prevent that I think it should be declared in violation of the Sherman Act and presumptive evidence of monopoly. According to the decision of Judge Ray, in the United States Circuit Court of Appeals—a writ of certiorari being applied for from the Supreme Court on that decision—it is a monoply and in violation of the Sherman Act.

Mr. NELSON. This case has been settled?

Mr. ROSENFELD. Yes.

Mr. NELSON. Was any penalty involved in it?

Mr. ROSENFELD. In what way?

Mr. NELSON. You say a case was brought——

Mr. ROSENFELD (interposing). There are two cases—really three cases. One case was brought in New York on one particular watch movement.

Mr. NELSON. Were they not found guilty of certain practices in violation of the law?

Mr. ROSENFELD. We were the defendants in that case.

Mr. NELSON. That presents a different situation.

The CHAIRMAN. It was a suit in equity to enjoin you from selling the watches.

Mr. ROSENFELD. Yes; below a certain fixed price. We were selling watch movements and watchcases for $13.95 to the consumer that they wanted us to sell for $28.50.

The CHAIRMAN. The court on the trial of that case held——

Mr. ROSENFELD (interposing). That they could not restrain us from doing that, and that the whole thing was in violation of the Sherman Act.

Mr. NELSON. Can you give us that citation?

Mr. ROSENFELD. I think it is reported in 202 or 204 Federal Reporter.

Mr. NELSON. And was it the Waltham Co. *v.* Keene?

Mr. ROSENFELD. Yes.

Mr. NELSON. You mentioned a penalty. Could you frame the exact language that you have in mind; that is, as to the sort of penalty that you would inflict upon those who are guilty of these practices?

Mr. ROSENFELD. I have not thought of the exact language, but I could do so, I presume. However, I should say that if a man is able to prove in any way that he has been the victim of any such practices that he is entitled to a set sum without requiring him to go into any proof of damages, because the difficulty of proving damages is almost insurmountable.

Mr. NELSON. In your case would it have been difficult to prove damages?

Mr. ROSENFELD. I do not think so. I think when we get through with this case we can prove damages.

Mr. NELSON. Suppose you think it over and send the committee such language as you think would reach that.

Mr. ROSENFELD. Yes; I will try to. I will try to frame it in such way as to reach that practice.

Mr. KEENE. I want to say a word or two about price fixing. I receive communications by mail and in person from railroad men something like this: I am a brakeman, a crossing tender, or flagman; I get $40, $50, $60 a month, whatever the case may be. I have a family of six or eight children to support. I must have a watch, under the new system, costing $10 or $15 or I can not continue to do the work here. What can you do for me in the way of price?

Mr. VOLSTEAD. Has there been any reduction in the price of watches since the reduction in the tariff?

Mr. KEENE. Not to my knowledge.

Mr. VOLSTEAD. Are there any foreign watches that compare with American watches that could be imported under the present tariff?

Mr. KEENE. Oh, yes; we import now.

Mr. VOLSTEAD. Do you know whether there has been any increase in importations since the tariff was taken off?

Mr. KEENE. Some, but it is difficult for them to get a market, because these companies have built up a trade that it is hard to overcome. Forty years ago, when watchmaking was new in this country, they started to work on the retailers and gradually took them in until the retailer and the jobber owed so much money that they could not do any different. They have got a very smooth-running piece of machinery, that Watch Trust. You can never see it, but you can feel it.

Mr. McCOY. But it has not anything to do with or is not due in any respect to the fixing of the resale price?

Mr. ROSENFELD. If you were in the jewelry business I would like to see you buy Howard watches, Elgin watches, or Waltham watches from a jobber if you did not maintain the price. I would like to see you buy them from the jobbers or go into the open market and buy any one of these movements, which are controlled by companies that are working together with a perfect system; that is, when they know you have cut the price.

Mr. McCOY. That is not the point at which I was aiming my question at all. I will state what appears to me to be the deduction to draw from what you have said, and if I am wrong correct me. Perhaps I can do that better than by asking questions. There is a combination amongst watchmakers which, and that, coupled with the fact that they have been in business for so long and have established such connections with the jobbing and retail business, enables them to control the whole situation, but they have not secured control of the whole situation, because at some time in the past they have been permitted by law to fix the resale prices; am I right?

Mr. KEENE. They came out with their contracts for my benefit after that reimportation campaign.

Mr. ROSENFELD. It still works just as smoothly.

Mr. McCOY. But their present strongly intrenched position was not secured by their ability to fix resale prices, but was due to other circumstances.

Mr. KEENE. I would not say that. Of course, the other little fellows are hammering and hammering constantly.

Mr. ROSENFELD. Trying to get somewhere.

Mr. McCOY. I know, but the fact that they control the business is not due to the Waltham and the Elgin people fixing their prices, but it is due to the fact that they have a certain control over jobbers and retailers, which they have gradually built up by their practices.

Mr. KEENE. But occasionally one kicks over the traces.

Mr. VOLSTEAD. That may be perfectly true, that control has not been obtained by this practice of fixing prices.

Mr. McCOY. They fixed prices because they got control, and have not gotten control because they fixed prices.

Mr. ROSENFELD. It is impossible in the lifetime of either Mr. Keene or myself to tell when the fixing of prices began, because that fixing of prices has been going on for years; way back 30 years ago or 35 years ago, when the old Manufacturers' Association was in existence, composed largely of watch manufacturers and manufacturing companies, there was a penalty imposed for price cutting and things of that sort. That price system is very old indeed.

Mr. McCOY. I have been very much interested in Mr. Keene's campaign and always have been, but in your statement I have not seen

any evidence to show that they have secured their control by price fixing, but having secured a control they are endeavoring to retain it for the purpose of fixing prices. What you show is a combination in existence which apparently, on your statement, is in violation of the Sherman Act.

Mr. KEENE. That is a great aid to Mr. Ingersoll.

Mr. McCOY. That may be.

Mr. KEENE. And he maintains that he had the right to do it and that he was not securing any monopoly of the watch business while doing it. He has practically got a monopoly of the cheaper goods; he has, I should say, 75 per cent of it.

Mr. NELSON. Reversing this, and in view of the fact that the Sanatogen case prevents price fixing, what effect will that have upon their practices?

Mr. ROSENFELD. We can not buy watch movements any more than we could before; we have the same difficulty now to meet in getting watch movements that we had before that decision.

Mr. NELSON. Do they still refuse to sell to you?

Mr. ROSENFELD. Yes.

Mr. KEENE. They are acting in defiance of the law the same as they did before.

Mr. VOLSTEAD. Are you in favor of amending the law or of allowing it to stand as it is?

Mr. ROSENFELD. We are not in favor of any price fixing. A campaign has been begun throughout the United States in favor of permitting price fixing to the consumer, and we are here to oppose that. That has been injected into many of the hearings before this committee. We are here to oppose any such amendment being put in any of the bills before this committee.

Mr. VOLSTEAD. You are not asking for any affirmative legislation?

Mr. ROSENFELD. We are not asking for any affirmative legislation, but we are asking to have the present law enforced.

Mr. VOLSTEAD. Following the language of the decision of the Supreme Court of the United States in those cases?

Mr. ROSENFELD. Yes.

Mr. FLOYD. In that connection let me ask you this question: As I understand it, with all of their efforts and with all of their power and combination in the past, through which they have endeavored to make this uniform price, still they have not been absolutely able to do it in all cases?

Mr. ROSENFELD. Not fully; no.

Mr. FLOYD. If we leave the law as it is interrupted by the Supreme Court, that this price-fixing is unlawful and that such contracts can not be enforced, do you not think that in time they will lose all power; that is, if we leave the law alone and do not have any additional legislation?

Mr. ROSENFELD. I rather imagine they would eventually. What is desired is to let the dealer have access to the market and to the supplies of watch movements, Colgate soaps, Gillette razors, the soaps or articles of Roger & Gallet, or any of Colgate's articles.

Mr. FLOYD. I would like to ask Mr. Keene a question in that connection. You are a retail dealer in watches. Do these companies that we have been discussing—the Waltham, Elgin, and Hamilton companies, and these other companies—refuse to sell to you direct?

Mr. ROSENFELD. They sell through jobbers and the jobbers refuse to sell to us.

Mr. KEENE. Just the same as some years ago they refused.

Mr. FLOYD. The jobbers refuse to sell these watches to you direct?

Mr. KEENE. Oh, yes.

Mr. FLOYD. They still continue that practice?

Mr. KEENE. Yes; they expressed that opinion to investigators—that they intended to go on the same as they had been going on before.

The CHAIRMAN. How do you buy your watches?

Mr. KEENE. Through the back door and indirectly; paying a little premium to some man to get them for me.

Mr. ROSENFELD. They have always curtailed our supply. It is very difficult to get a supply to sell at the price we want to sell at. It is very difficult to do that.

The CHAIRMAN. You buy some abroad, do you not?

Mr. ROSENFELD. We will under the new tariff, no doubt.

Mr. FLOYD. With all these added expenses you still can afford to sell and do sell at a profit these watches at a lower price than these companies wish to have them sold?

Mr. KEENE. Yes. I think under this new tariff it can be done.

Mr. FLOYD. In your trade you do sell them at a lower price?

Mr. KEENE. Yes, sir.

Mr. ROSENFELD. Of course, there is some difficulty in reimporting, you know. Under the old tariff articles could be reimported if they were in the same condition as when shipped. Dials were sent abroad and the words "Made in Switzerland" were placed thereon, and when the merchandise was reimported to this country the custom-house officials in some way were notified by the Waltham Co. and these particular shipments were opened and the dials there were found to be stamped on the back "Made in Switzerland," and this fact resulted in a duty being imposed, not only on the dials upon the watch movements, but also on all watch movements contained in the entire shipment.

Mr. MCCOY. Mr. Keene, in connection with some articles sold by mail-order concerns, suggestions have been made here that they were bought at secondhand and sold without that fact being advertised. Do you sell any secondhand watches at all?

Mr. KEENE. No; and I do not think the mail-order houses do. I am very well acquainted with Sears, Roebuck & Co. and Montgomery Ward & Co. and I do not think there is anything in that at all. For instance, here is a little incident told me by Mr. Marum, of Montgomery Ward & Co. They were advertising these Hamilton watches at a cut price; they were having difficulty in getting their supply; and they received an order from some retail jeweler in Michigan, inclosing a check for one hundred and some odd dollars for a dozen of those watches. He did not have the goods at the time and he did not know what he would do about it. So he took one of his expressmen and sent him to the jobber, saying, "Mr. So-and-so, a jeweler in good standing in Detroit"—or wherever it was—"wants a dozen Hamilton watches. I will pay you for them the wholesale price. Please ship them to him." And he put the profit in his pocket. He personally made that profit after paying the wholesale price through the expressman. He afterwards found out that this jeweler was acting as

a spotter for the Hamilton Watch Co. That is one way of getting goods and doing business around the back door.

Mr. ROSENFELD. Now, there is one point against fixing prices that I want to call to your attention. You are not going to allow a merchant or dealer to return articles unless he is in bankruptcy, in danger of bankruptcy, or in the hands of a receiver, but why on earth should not a merchant be free to distribute his articles as he sees fit? If he has a financially bad season, when his business has not been good, why on earth, I say, is he not permitted to sell his goods as he sees fit, turn them over and get a small profit or get sufficient money to enable him to pay his bills? Why should he be compelled to wait until he is in bankruptcy before that privilege is accorded—the return of the articles? Why should he be compelled to reach that condition before a manufacturer is bound to accept the return of the articles? Why should he wait that long? If he is a good mechant why should he have his shelves stocked with merchandise which he can not sell, because year after year every merchant in business accumulates stock. If he is a good merchant he sells it and gets rid of it; he reduces his prices in order to enable him to obtain cash. But if he is a poor merchant he allows that stock to accumulate and accumulate until finally he finds himself absolutely insolvent by reason of the fact—perhaps not insolvent, but unable to pay his bills for the simple reason that his capital is invested in merchandise that is on his shelves, and therefore he can not pay off his bills. Now, if you are going to say to that man, "You can not sell at a less price than fixed or we will not sell to you," how can he take care of himself? What about the interest on his money; what about other expenses and items that go into that business that are necessary expenses to meet? However, if the present system can be enforced that is what will be done to him, and you have him nailed to a price system and he can not turn. I understand that the Waterman fountain pen costs $5; that fountain pen costs the retail dealer something like $2.25 or $2.30, but he must sell it for $5. But if he is overstocked with fountain pens, or overstocked with any, other article that is trade-marked, patented, or copyrighted, why should not he be permitted to sell those pens for $3.50?

Mr. McCOY. Why did he buy it with that condition attached?

Mr. ROSENFELD. Why should he be compelled to buy it with such a condition? That is the answer to that.

Mr. McCOY. Why should the manufacturer be obliged to sell it without attaching that condition?

Mr. ROSENFELD. Because he has gotten every nickel he wants out of it; and all he gets out of it is the privilege of trying to foist it on the dealer; he does not derive a nickel's worth of profit out of it. The manufacturers are not obliged to sell their articles; they can frame their articles if they want to.

Mr. McCOY. They are not obliged to sell and the other man is not obliged to buy. Why not allow them to make any contract they see fit to make?

Mr. ROSENFELD. For the simple reason that it would only be a short time before every article will either have a trade-mark on it or be in somewise protected under some sort of price-maintenance system. And in order to engage in business it is necessary for him to have articles with which to do business; otherwise he must stay

out of business. That is the answer. Now, for example, let us take a haberdasher's store, and we will go through it. You take collars. They have a resale price. The E. & W. brand, the Arrow brand, the Lion brand, whatever collar you mention that goes into a haberdasher's store has a resale price. You take your shirts—the Manhattan brand, the Eagle brand, or any other shirt, and you find they try to fix the retail price. Take your hosiery; take the Onyx hosiery, and go through it further. Take your underwear. The B. V. D., the Scriven underwear, or this wool underwear—I have forgotten the name of it—the Jaeger underwear. Go in and see what they can do. Go into a haberdasher's store and see how much business he could do on articles that are not trade-marked or in some way patented. See what he could do if they were removed from his stock.

Mr. McCoy. Let us take the Manhattan shirt. I can take you to any street in New York almost twice a year and get you Manhattan shirts at a marked-down price, at which everybody is selling.

Mr. Rosenfeld. Yes. Of course the Manhattan Shirt Co. sends out notices. The dealers are notified that on a certain date—say in January and in July or the 1st of August—on a certain date the prices can be marked down to a certain extent; but if a dealer sells those shirts at a reduced price on any other day and it is discovered, his supply is cut off.

Mr. McCoy. I appreciate that. But this practice of fixing a day on which they will cut the price does away with one of your objections, which is, as applied to the resale price proposition, that they have got to carry stocks of goods. Now, they clean out everything there, as you know, twice a year.

Mr. Rosenfeld. I am not so sure but that they manufacture shirts for those sales; I am not so sure but that most of these sale shirts are manufactured for specific sales.

Mr. McCoy. They may be.

Mr. Nelson. Do you mean to suggest that they are a different grade of shirts?

Mr. Rosenfeld. Yes; although I would not make that statement as applying particularly to Manhattan shirts.

Mr. McCoy. I do not believe that he wants to say that about Manhattan shirts.

Mr. Rosenfeld. Well, I can only answer particularly as to those things with which I am familiar.

Mr. McCoy. I am quite sure the people who manufacture the Manhattan shirts do not put out an inferior grade of shirts to be sold at so-called marked-down prices twice a year, and I do not believe you meant to contend that.

Mr. Rosenfeld. I did not: no. I do not know that they do that.

Mr. McCoy. Let me give another instance: I live out in the country and do business in New York. My doctor will give me a prescription calling for a certain kind of proprietary medicine. I go to my druggist and he says to me, "You will have to go to New York to get that, because I can not afford to carry it, because the cut-rate stores in New York sell for so much less that I can not carry the stock." Now, where do I come in on that kind of a proposition?

Mr. Rosenfeld. You?

Mr. McCoy. Yes; I am a consumer.

Mr. ROSENFELD. The cut-rate stores do sell at reduced prices and the men have made a great deal of money and have prospered.

Mr. McCOY. I do not care about that. I am telling you what I have encountered more than once in the course of the last 21 years living in this little town 13 miles from New York. I would prefer to patronize my own druggist, because he has got to have business in order to keep his store running, but he has told me more than once, when I have gone there for some particular medicine, "I do not carry that article, and I can not afford to meet those down-town prices." For me it is very convenient, because I pass those stores almost every day; but what becomes of the man who does business out in this little town and who does not get to New York?

Mr. ROSENFELD. May I illustrate that for you?

Mr. McCOY. Take my own illustration. I am asking about something I know about.

Mr. ROSENFELD. I do not know anything about this, but I can answer your question in this way: On the corner of One hundred and fifty-seventh Street and Broadway, New York City, there is one of the Riker & Hegeman drug stores. There is a man named Hansen who has a drug store on Broadway at One hundred and sixty-first Street or One hundred and sixty-second Street. For years he has been there; he has no other store. He started the practice of cutting prices on articles such as Spearmint gum. I believe he sells Spearmint gum for 3 cents, and all sorts of other articles at reduced prices. He gets, he tells me, a profit that is satisfactory, and he has prospered under the cut-price system, within two or three minutes' walk of one of the Riker & Hegeman drug stores. That is done under the cut-price system.

Mr. McCOY. You are taking a man who is doing business in a section where there are thousands of people.

Mr. ROSENFELD. I am taking a man I know.

Mr. McCOY. And I am taking a man I know, but you are comparing a man in a town of 5,000 with a man at One hundred and sixty-first Street and Broadway, New York City, with many thousands of people around him.

Mr. ROSENFELD. The man on Broadway near One hundred and sixty-first Street or One hundred and sixty-second Street has not a store that is as large as this room, but he has prospered.

Mr. McCOY. But New York, in that particular section, is largely populated. How are you going to take care of the druggists in little towns such as I speak of? What is such a druggist going to do and what am I going to do as a consumer of the articles?

Mr. ROSENFELD. What he can do is to purchase his articles the same as other people.

Mr. McCOY. He can not afford to do that. He has not the capital nor the sales to permit him to sell at cut prices. He has to sell to 5,000 people while these other people have many thousands coming to their stores.

Mr. KEENE. I am not much on medicines, but it strikes me that a town of 5,000 should be a live town. Do you mean to tell me that he is not live enough to have the articles his customers want?

Mr. McCOY. Oh, I do not know about that; I presume he has most articles. But I have had that experience with him on several occasions.

Mr. KEENE. Something must be wrong about him if such a thing happens in a town of 5,000.

Mr. McCOY. I am speaking about personal experiences that I have had several times during the last 20 years.

Mr. KEENE. At your own druggists, I believe; the one you prefer to deal with?

Mr. McCOY. He is the leading druggist in the town.

Mr. KEENE. It is unbelievable, that in a town of 5,000 he should not have articles that you want; he should carry all medicines.

Mr. McCOY. Well, it happens that there are medicines he does not carry.

Mr. KEENE. Of course, the question of cut prices does not enter into it at all. He should carry it because you must have medicine.

Mr. McCOY. I know; but new medicines are coming on the market all the time, and a doctor prescribes them as he discovers them.

Mr. KEENE. Well, as I said before, it does not seem possible that such a thing could happen in a town so near to New York. If you will permit me, I would like to answer you on that subject, that the dealer is not obliged to buy from the manufacturer, and that the manufacturer is not obliged to sell. That is true; I will agree with you. But if you have spent 30 years of your life rooting for their brands of watches and have built up a trade in them, and then they come along with a proposition, which they are trying to legalize in the courts, making it almost criminal for you to sell at your own prices, you certainly feel that you have done wrong in attempting to build up such a trade and in trying to sustain the watch business. It is not fair to the retailer, who has made the manufacturer by shouting for his goods for years, to come along and say you can not have any more.

Mr. McCOY. I have always sympathized with you in your fight, but you are up against a proposition which I would reach in another way, if what I understand to be the facts are true.

Mr. KEENE. I would be very glad to have instructions.

Mr. McCOY. I would go to the Attornel General.

Mr. KEENE. Mr. Henry T. Rainey told me that he has worn out several pairs of shoes in going from his office to the Department of Justice trying to have them take up this very thing.

Mr. McCOY. But we have a new Attorney General.

Mr. KEENE. I do not know whether Mr. Rainey has more shoes or not.

Mr. McCOY. I think he has.

Mr. KEENE. If he has, I will see him, have him put on a new pair, and start up there.

Mr. NELSON. Would it follow that Brother McCoy's druggist would have that particular article simply because he was permitted to fix his price?

Mr. KEENE. Why would it follow, did you say?

Mr. NELSON. Would it necessarily follow that he would have that article?

Mr. KEENE. I understand he did not have it because he could not compete in price with the New York man.

Mr. NELSON. My question was this: Mr. McCoy claims that because of failure to fix prices the local man is held to the price that is fixed; was not that it?

Mr. KEENE. No; he would not have it at all.

Mr. McCOY. No; it is not a question of fixing prices.

Mr. NELSON. Then, I failed to follow your line of argument.

Mr. McCOY. If the retail price were fixed at 25 cents, and he had to sell it at 25 cents, and the big man in New York had to sell it at 25 cents, the man in New York could not take the business away.

Mr. NELSON. There is the point. Why does it necessarly follow that your druggist would have that article simply because the price was fixed?

Mr. ROSENFELD. It would not follow at all.

Mr. McCOY. However, the fact is that in that part of the country thousands of people go into New York every day; they go right by these great, big, cut-price drug stores, and they get their goods at something like 30 or 40 per cent cheaper.

Mr. ROSENFELD. Now, I want to bring out one thing, after which I shall close. In this Keene case I asked the assistant manager of the Waltham Co., in New York, if he could name a single person who had not purchased a Waltham watch movement as a result of Mr. Keene's campaign of cut prices, and he said he could not name a single consumer. They kept their missionaries out all the time, and yet they testified they could not give the name of a single individual consumer who, as a result of the campaign of Mr. Keene to sell these watch movements at his own price, had failed to purchase a watch movement of the Waltham Watch Co. And they have spent large sums of money all over the country to find men who sold at less than the fixed retail price.

Mr. NELSON. What is the extent of your business—what capital have you in the business?

Mr. KEENE. Well, I have an assorted lot of jewelry, watches, and diamonds.

Mr. NELSON. Is it a corporation?

Mr. KEENE. No; I am an individual in business.

Mr. NELSON. I thought it was a corporation and that we could get at the capital stock of your corporation.

Mr. KEENE. No; it is not a corporation. I am carrying on business alone. I am now taking account of stock to see what I have got.

Mr. ROSENFELD. Gentlemen, we thank you very much for your kind attention.

Mr. DYER. Mr. Chairman, I desire to have incorporated in the hearings a letter from Mr. Festus J. Wade, of St. Louis, Mo. Mr. Wade is the president of a bank and also of a trust company.

The CHAIRMAN. The letter pertains to tentative bill No. 3, and will be incorporated in the record.

(Said letter follows:)

FEBRUARY 28, 1914.

Hon. L. C. DYER, M. C.,
Washington, D. C.

MY DEAR MR. DYER: In reply to your request for my views on the bill prohibiting interlocking directorates, the following are some of the reasons I am opposed to same:

It is unfair to assume that men occupying a fiduciary relation to two corporations will be unfaithful to one.

The law should always presume that men are true to their trusts, as most men are. Those untrue should be punished and not those who are true penalized.

The law is a reflection on the integrity of the business men of this country.

In many cases such a law will prevent corporations from obtaining men of the highest ability as officers and directors because they may happen to be officers or directors of another corporation coming within the forbidden class.

Banks and trust companies, to best serve the community, should have on their boards, men of ability representing the chief interests of the country. This law will make that an impossibility in many instances.

Frequently directors represent creditors as much as stockholders, and properly so. Banks and trust companies are usually the largest creditors of corporations, and this law will make it impossible for such creditors to be represented. For this reason the law places a burden on legitimate business.

The interests of two banks and trust companies are often identical and there is nothing inconsistent in their having one or more in common.

The law makes the fact that two corporations have one or more common directors conclusive evidence that the corporations are not competitors. This should not be the law because it is not the fact.

The act will not accomplish its purpose because designing men who desire to use corporations for private gain can still have men made officers and directors who will do their bidding.

The Federal Government has no control over concerns who do not do interstate business. Consequently, while a corporation might network an entire State, and be most guilty in the things the bill is aimed to prevent, the corporation and its officers would not be bound escaping as they would under the technicality that they were not doing interstate business.

Why not let the commercial, industrial, and financial institutions of the Nation alone for a few years, at least until we can adjust ourselves to the new tariff, the income tax and the new banking and currency bill? We are all crying for a rest from further legislative action.

Yours, very truly,

FESTUS J. WADE.

The CHAIRMAN. I am requested by Mr. Frederick H. Allen, of New York, who desired to appear before the committee, but who is unavoidably unable to do so, to incorporate his letter in to-day's proceedings, and without objection it will be made a part of the record.

(Said letter follows:)

LAW OFFICES OF ALLEN & CAMMANN,
New York, March 3, 1914.

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: I take the liberty of sending you this letter in regard to the "trust" bills now before Congress. I do this for the reason that I have represented foreign capital in this country and have also been the representative of American capital in Europe, and as such have taken part in the actual formation of companies in England and France which have been formed for the development of American enterprises, and so have had an actual, practical experience in their laws as well as having been a student of the principles inspiring them. While I have not actually taken part in the formation of companies in Germany, I have made a study of the laws relating to commercial and industrial enterprises in that country and have a fair knowledge of the business methods there. Further, I am impelled to write this letter for the reason that, as I view it, some of these bills would directly interfere and oftentimes prevent the attainment of the objects which some of us on the Permanent American Commission are trying to carry out for the betterment of agricultural conditions and for the improvement of the farmer's business. Certainly I think most of us felt that one of the principal reasons for the great improvement in Europe of agricultural conditions has been the result of cooperative effort among farmers. The New York State apple is one of the best in the market; suppose we succeed in forming cooperative societies throughout the State for packing, grading, and selling the New York State apple and that these societies were joined in one federated society to cover the whole of the State. Such a federated society would manifestly be illegal.

As England and Germany are the two most advanced and progressive countries in Europe in commercial and industrial enterprise their experience and

their methods of handling industrial and commercial business can not help being of value to us in the consideration of the trust question.

Prior to the passing of the "English companies act," in 1862, and before the passage of the German law in 1884, a great deal of the same chaos, company mismanagement, and unfairness prevailed both toward investors and the general public as has been the case with us, and the passage of the acts, in both instances, eliminated a great many of the evil practices then in vogue and defined the zone within which the powers of these companies could be lawfully exercised.

In my study of and experience with this legislation in its practical workings, I have been impressed with the fact that in the efforts of these Governments to solve the vexing problems of the relations between company promoters, directors of companies, their shareholders, and the public they have been animated by the desire to define accurately and prescribe what acts are to be permitted and legalized rather than by actual prohibition of things which would not be permitted; consequently on examination of both the German and English acts, which are the world's models for this kind of legislation, it is found that the law goes into great detail as to what positive acts must be done by those incorporating and promoting companies, these provisions being designed to safeguard the rights of shareholders in their investments in such companies by positive regulations as to what promotors and directors must do rather than as to what they must not do. Personal liability immediately attaches to them if they do not, if they fail to carry out the provisions of the law. The result of this policy has been to clarify and make certain from the very inception of the company formation the consequences which flow from it, without the need for future judicial determination, thereby commanding for the company the confidence and assistance of investors. The supervisory control exercised by the Governments of both countries further secure the confidence of investors in the integrity and honesty of the management.

The idea upon which these acts are modeled is this: That full publicity both in regard to the formation and the operation of these companies would cure the majority of the evils to which the investing public has been subjected, and the full responsibility of both the promotors and directors is one of the cardinal features contained in both acts. The confidence of the public in the integrity of this publicity is obtained in England by certain powers of inspection and supervision and audit which are gven by the act to the board of trade, which is required to make an annual report to Parliament, and in Germany by the provisions for the mandatory registration in the commercial courts of the district in which the company is domiciled, setting forth the same kind of facts relating to the company's operations. The full knowledge of the affairs of these companies that is required to be given to stockholders by independent audit of chartered accountants prevents trickery on the part of directors, and the ability of stockholders to have at any time a list of their fellow stockholders further enables them to have close knowledge of what is being done and to combine for their own protection.

This full publicity by independent audit secures the general buying public against too high prices, so that the public secures, at any rate, a fair share in the economies resulting from cooperation. These, then, are the cardinal features of these acts—full statements by promoters and organizers of companies as to the value of properties brought into the combination, and statement of promoters' profits, personal liability of directors for these statements, and fiduciary relation of directors toward their stockholders in the management of companies, and full publicity by independent audit, both for the protection of investors and for the protection of the public.

It is frankly acknowledged in both countries that the large company is a better instrument and more effective, more economical, and more powerful to enlarge and extend, not only their own businesses but to further advance the influence of their countries in foreign markets and against foreign competition. The lowering of the tariff at this time, which has been accomplished, as expressed by Mr. Underwood, to permit of competitive conditions here, will naturally open somewhat, at any rate, our home markets to foreign traders. So far as this happens it will take away from our own people the outlet for their products which they had previously had, so that it becomes all the more necessary for us to seek foreign outlets for our trade, and important that American companies of strength should not be unnecessarily hampered in their operations.

The fact that in this country companies could be formed in all our different States with their varying laws, that in a great many of them the utmost license was permitted, and that practically anything was allowed, led to the evils from which we have suffered. The demand for the passage of the Sherman antitrust law grew out of the abuses which characterized these conditions, and it has in the course of time and by the decisions rendered become an effective instrument for restraining these evils; but in any given case it is still difficult if not impossible for business men to know definitely whether or not they have violated this law in advance of a judicial decision determining the point, which takes a long time to get and injects a feeling of apprehension and hesitancy in the business world between the time when the actions complained of are done and the handing down of the decision settling the point, usually by the court of last resort. In other words, the action of this legislation is restraining and negative, not permissive and positive. The present bills seem to be conceived in this wise: States may still permit incorporation with whatever license they please; but the Federal Government, by means of these bills, steps in and says to a company doing an interstate business, "You shall not do thus and so." My view is that it would be better to pass a Federal law to the effect that all companies doing an interstate business and applying to the public for support by the sale of its securities should incorporate under a Federal act or should apply for a Federal license if they wish to secure the benefits which should be set forth by regulations of the Federal Government.

It is a very important thing and a matter about which we should exercise the greatest caution that laws shall not be passed which shall hamper trade. Freedom, without license to harm the public, is the desideratum, and I am the more impressed with this because of the experiences that I have had in France, where, according to my views, the laws have been too restrictive and tended to hamper French trade development, so that while France has more unemployed money than any country in Europe, it is behind both England and Germany in industrial and commercial enterprise and trade, although it often loans money which becomes available for the furtherance of the commercial and industrial enterprises of those countries. I admit that this is not wholly because of the French law; it pertains also to the character of the people who are of a more cautious temperament in business than either the Englishman or the German, but it is a factor of very considerable importance.

It is certainly true that in connection with the consideration of the whole matter of trust legislation as careful attention should be given to legislation which will be permissive as to what may lawfully be done as to that which is merely restrictive or restraining.

Interlocking directorates.—It is a fact that one of the great elements of our wonderful industrial and commercial development has been brought about because powerful and wealthy bankers of established reputation have been on the directorates and actively interested in the growth and prosperity of such enterprises, because it has given the public confidence, which has enabled these corporations to dispose of their securities and so secure the money necessary for their success not only in this country but in Europe. The withdrawal of such support would be, as I view it, a very backward step in the development of the country. There is no question but that this power has at times been abused, but the way should be provided not to kill the goose which lays the golden egg, but to secure the advantages and eliminate the evils connected with the situation.

Germany.—The wonderful industrial advance which has been made in this country has been largely brought about by the fact that powerful banks and bankers have given their support to and active cooperation in furthering and developing the business enterprises of the country, and the evils have been largely eliminated by the provisions of the German law setting forth what the directors must do and establishing their responsibilities, so that even if any particular individual should happen to be a director in a number of corporations his responsibility in every case is so definitely fixed and so real that it is impossible for him to use his official position for any personal advantage, and by this means the industries of the country as a whole are able to avail themselves of men of the particular ability who are naturally placed in such positions. Such a man becomes an asset and not a liability to the various companies and to the country as a whole.

Conclusion.—From what I have said it will be seen that in my opinion the best way to handle the trust situation in our country would be this: The passage of a national incorporation law upon the lines of the English and German statutes, which with its full publicity would protect both the investors and the consuming public. Let the Sherman antitrust law stand as it is, for as a result of the later decisions following upon the decision of the Northern Securities Case, it has become effective in restraining monopoly or attempts to monopolize, and then pass a law creating a trades commission, which should have the power to investigate acts of corporations, and prevent such things as unfair competition, espionage, unfair trade agreements, and the various unfair practices by which often competition is eliminated.

Yours, very truly,

FREDERICK H. ALLEN.

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

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J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 26.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, March 4, 1914.

The committee met at 10.30 o'clock, a. m., Hon. Henry D. Clayton (chairman) presiding.

STATEMENT OF MR. HORACE STERN, PRACTICING ATTORNEY, PHILADELPHIA, PA.

Mr. STERN. Mr. Chairman, I am a practicing attorney in Philadelphia, with offices at 1328 Land Title Building.

What I have to say here is rather more in the nature of a broad suggestion than of any detailed consideration of the subject. The subject is almost too big, as I view it, to hope to cover it in any reasonable time that I could devote to it at this hearing before your committee. My only thought is to give an idea of what is in my mind to the committee so that if you think it worthy of following up, it can be done in a more comprehensive way at leisure.

Mr Chairman, with deference to the other bills which are now pending before the committee, and without at all attempting to take up any of them in detail, it does appear to me, and I say it with all re-

spect, that while it may be in every way advantageous to the country that they be passed, still they do not seem to me to be what might be said to be of the highest importance in legislative matters, in the sense that they do not bring forward, as I view them, any great new constructive policy in antitrust legislation. The one bill, the definitions act, so called, may limit the Sherman Act rather than extend it. Lawyers seem to differ on that point. As to the interlocking-directorate bill, while it may be a very proper measure, still none of us, I believe, feels that it is going to accomplish any unique advantage for the people of the country at large. In all modesty, the proposition which I have to submit to the committee seems to me to deal with a subject which gives the country a foeman worthy of its steel—a much broader constructive policy in antitrust legislation than the pending bills. The thought I have in mind is to institute a campaign against foreign trusts operating within the United States. It seems to me that in the attempt to realize the "new freedom," so called, the administration has taken us out of the throes of the oppression of the Money Trust by the currency bill; it has also lowered tariff duties, and in that way made competition presumably freer between this country and abroad; and it has also undertaken quite a relentless suppression of the domestic trusts. In that threefold way the administration has tried to bring about competitive conditions.

My theme this morning is that these measures, each of them good in itself, are incomplete unless we follow them up with some effective restriction against the foreign combinations and trusts operating in this country.

The reduction of the tariff, we more or less fear, has not successfully brought about an effective reduction in the so-called high cost of living. We confidently expected that the new tariff might do that, and possibly it has done it. That is a matter of opinion. I suppose, however, that it is useless to argue here just what the effect of that new tariff will be. But whether justly or not, it is a fact that there are some charges being made that the Democratic Party has not brought about a reduction of the high cost of living, and we all feel that perhaps there is justification for the thought that while everything was done that was thought possible of being done, in some way there is a power operating against us to prevent our realizing the benefits of the new low tariff.

Now, in this connection—and this is only the thought of a person interested in the subject: I do not for a moment pretend to be any special student of the problem or of the Sherman Act any more than comes within the scope of a practicing attorney—the thought has occurred to me that whatever changes have been or may be made in our tariff are relatively unavailing and unimportant if it lies within the power of foreign trusts and combinations operating in our own markets to defy our tariff policy by refusing to give us the benefit that that tariff was supposed to bring about.

If we take a commodity—I mean a necessity of life; I am not talking about manufacturing products, because there the foreigner has to compete with our domestic manufacturers. I am talking about the raw materials, the foodstuffs and necessities of life which we can not produce in this country. If, in order to lower the cost of living, we take off, and have taken off, the duty on such com-

modities, and immediately exporters and foreign producers of these articles combine to keep up the prices or raise the prices, it merely means that the American consumer gets no benefit at all; and so far from helping the country we have harmed it, because the duty which formerly went into the Federal Treasury as a tariff tax now goes into the pockets of these foreign trusts, and is added to the profits of the foreign producer, and no advantage is derived by the domestic consumers.

The CHAIRMAN. Mr. Stern, I do not wish to interrupt you in your argument at all, but I understand you to say that there are certain foreign trusts operating in this country, and I wish you would explain what they are and how they operate.

Mr. STERN. Let me adopt the suggestion which the chairman has made.

It is undoubtedly true that in Germany the business of the large industries of the country is regulated by trusts. Germany is the hotbed of trusts; the same is true to a lesser extent in France and to some extent in England and in Italy, but more particularly in Germany. The whole business there is regulated by what they call "Cartels" or syndicates or trusts, large combinations in every conceivable industry, to keep up prices.

I have obtained quite a great deal of information, which I have had translated from German official sources and German writers upon the subject of trusts in Germany, and without in the slightest degree attempting to give the committee this verbally, if I may incorporate it into the record, or part of it, I would like to do so.

The CHAIRMAN. You may do that.

Mr. STERN. These documents show, to sum up the entire matter, that in every industry, such as silk, wool and cotton, hemp, flax and linen, salts, acids and alkalis, foodstuffs, coal, earthenware, china and porcelain brick and stone, clay and cement, paper, the glass industry, leather and rubber, etc., the different producers and manufacturers of Germany have combined and formed trade associations which openly and defiantly keep up the price of the articles which they produce. I say defiantly, not of their own Government, because the German Government, as far as I understand it, does not in any way discourage the formation of these trusts, but defiantly as far as we are concerned. What is the result? I would like to give one illustration of something that has occurred which, in my opinion, clearly demonstrates the point I am making, and that is in regard to silk yarns. Under the new tariff bill the revenue on silk yarns was reduced, I believe, from 37 per cent or 38 per cent to 35 per cent, and yet since the bill has passed, the price of these yarns, which are spun in France and Germany and are imported into this country and which we have not been able to spin, which we have thus far practically been unable to produce, and as to which we are therefore dependent upon these countries, the price has gone up, since the Underwood bill has passed just 25 per cent, and even allowing for some increase because of natural conditions and trade conditions, we are nevertheless met with the fact that despite the reduction of the tariff by the Underwood bill this article costs more merely because the foreign exporters have combined and arbitrarily raised the price. And that particular trust is an international trust, which is made up

of the German trust, which is a trust within itself, the French syndicate, the Italian syndicate, and the English syndicate, and these constitute a trust of these four countries keeping up the prices of that article for export to the United States.

In 1912, according to the official figures, there were exported by Germany into the United States goods of the industries I have mentioned amounting to about $100,000,000. When we consider that 85 per cent or 90 per cent—and of course that figure is only approximate, as it must necessarily be; but, at any rate, a very large proportion of the German production—is controlled there by large syndicates or trusts, it would seem reasonable to suppose, with $100,000,000 worth of these goods exported from Germany to the United States in 1912, that 85 per cent or 90 per cent, whatever the figures may be, of those imports was imported not at the natural prices of the goods, but at the prices arbitrarily fixed by the exporters—the German producers and German manufacturers. I do not think it necessary for the purposes of this preliminary statement to take up the matter in any more detail at this point. I think we all do realize that there are these German combinations; we all know in a general way that they do exist in foreign countries; we know that they export goods into this country; we know that they arbitrarily keep up the prices; and it seems to me that, no matter what we make our tariff duties, no matter how much we lower them, if the cost of these articles is to remain the same in this country, as I said before, we are simply at the mercy of these foreign trusts. They do do business in this country, not only in the sense of importing their goods into the country directly to the consumer, but by having selling agencies or selling agents in the United States, and that is why I came here in order to suggest this amendment to the legislation which you are now considering.

Of course, we can not prohibit the importation of trust-made goods into the United States. I say we can not prohibit it, but I do not mean that we can not legally prohibit it. We all know that in a certain critical stage of the history of our country we did pass embargoes and nonintercourse acts, and at other times have prohibited the importation of certain commodities into this country. We do now prohibit convict-made goods from being imported into this country, and there is no reason, legally, why we could not prohibit the importation of trust-made goods, as a mere legal theory. But I mean, practically speaking, that I do not think that that is a feasible remedy. In the first place, it is too complicated; and, in the second place, it may give rise to retaliatory legislation; and, in the third place, we need the goods, and you can not say to a foreign trust, "You can not operate in this country," because if we need the goods, we would rather pay more for them than to pay nothing for them and not get them. So that it does not seem to me that it is practicable to attempt to prohibit the importation of these goods.

The question may be asked whether we could not proceed against these foreign trusts under existing legislation, under the Sherman Act. I do not believe we can, and I say that after having made some study of the cases under the Sherman law. It is true that in some more recents cases decided by the Supreme Court of the United States, such as the American Tobacco Co. case (221 U. S., 106), and in one or two cases that have lately come up in the Federal courts

of New York, for example, Thomson *v.* Union Castle Mail S. S. Co. (149 Fed. Rep., 933) and United States *v.* Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft (200 Fed. Rep., 806), the courts have said that foreign trusts or combinations operating in this country and doing business in this country are subject to the Sherman Act; and, while no act can have an extraterritorial effect and while we are powerless to go into Germany and dissolve a trust there or properly to say it is illegal here when it is legal in the place of its native formation, still, so far as these foreign trusts establish plants in this country and make themselves amenable to our jurisdiction, we can interfere. Perhaps the best illustration of that is in the Tobacco case, where one of the companies which were enjoined was the Imperial Tobacco Co., which was an English company and which was made subject to the decree of the court, and the contracts between it and the American companies were dissolved. The Supreme Court said explicitly that when a foreign trust operates in this country it does so under and subject to the provisions of the Sherman Act.

But these cases were cases where the restrictive contract was between the American trust or combination and the foreign one, and of course there we were in a position to make our decree effective, because if we had control over one of the parties to the unlawful contract we could very well say to that party, "You must stop these contracts, for you are amenable to criminal prosecution and the other remedies of the Sherman Act;" and if we can effectively by equity proceedings enjoin one member to a contract of that sort, we do not care very much about the other member, because if we break the working of that contract on the one side it breaks it on the other side.

But there is no case in the Supreme Court or in any other court, so far as I have been able to find in my search of the decisions, which holds that where a trust is formed entirely in a foreign country by contracts entered into there between natives of that country, that we can in any way, under the Sherman Act, get at that trust. In fact the Supreme Court, in the case of the American Banana Co. against the United Fruit Co. (213 United States, 347) has intimated the contrary. This was the case in which the United Fruit Co. (which, under the facts of the case, was admittedly a monopoly in restraint of trade) went down to Costa Rica and Panama and developed a monopoly in the banana trade, and the American Banana Co. tried to compete with it, and through certain acts, in which the Government of Costa Rica itself, I believe, participated, the American Banana Co. was driven out of competition. They were not allowed to grow bananas there; they were not allowed to build a railroad there; and, in general, there were some very violent measures taken—at least, so the bill in equity said in that case.

Now, in deciding this case the court said, in a characteristically illuminating opinion by Mr. Justice Holmes, that that was none of our business, even though both companies involved were incorporated under the laws of the United States. One was an Alabama corporation, I believe, and one a New Jersey corporation.

Mr. McCoy. In that case did it not turn out to be a fact that the Government of Costa Rica itself had made possible the doing of these things and therefore that our court could not interfere in a matter which a foreign government itself had take part in?

Mr. STERN. Yes, sir; that was admitted to be an element in the case, and it was made the ruling reason for the decision of the lower court; but if you take the decision of the Supreme Court, in the opinion which was written by Mr. Justice Holmes, he prefers to rest his opinion on the other ground, as I have said, and that is his stated reason for deciding the case as it was decided—that the trust was made in a foreign country by American citizens, and that if the trust was legal in the country where it was formed, the Sherman Act could not in any way get at it.

Mr. WEBB. Were the acts in violation of the Sherman Act done in this country or were they committed in Costa Rica?

Mr. STERN. The acts were done in Costa Rica or Panama by an agreement entered into in Costa Rica, but brought about a restraint of foreign commerce between Costa Rica and this country by keeping up the price of bananas imported into the United States, so that while the acts were done in a foreign country the result or effect was felt in this country.

In that case Mr. Justice Holmes used language something like this: He said that the Sherman Act is expressed in very broad language; "every combination in restraint of trade," "every person who monopolizes," etc. He said that it does not mean every person under the sun; it means every person subject to the jurisdiction of the act. It means every person within the United States. It does not mean a person in Germany who monopolizes, and therefore it has merely territorial operation, and while, as I say, the decisions rendered in the Tobacco case and in the Hamburg-American Line case in the Circuit Court of New York, which was the case against the Atlantic Conference, and also in a later case, viz, United States *v.* Pacific & Arctic Railway & Navigation Co. et al. (228 U. S., 87), do contain the dictum that where these foreign companies do business in this country, and in so far as they do do business in this country we can get at them under the Sherman law, nevertheless in all those cases save one the agreements were between American companies and foreign companies, and there is not a single case in the United States Supreme Court and only one in the lower courts, so far as I have been able to find, where there was any attempt made to restrict any foreign combination entered into in a foreign country entirely by foreign citizens, and the only one exception that I have mentioned in the lower court was this Hamburg-American Line case, and that involved transportation to and from the United States. It was not a case merely of a high price of imported articles due to a trade combination fixing that price abroad.

It stands to reason, gentlemen, that the Sherman Act can not touch that thing. How are you going to get at that through the Sherman Act? The Sherman Act was made to dissolve trusts. Can we dissolve a foreign trust? Can you say to a foreign trust, "You can not import your goods into this country unless you are dissolved"? As I explained before, that would be poor satisfaction to us, because we want their goods, and need their goods. But not only that, how would you get service on these foreign trusts? Suppose they have an agent going all through the United States soliciting orders and selling their goods; can we get service on him? And if we do get service on him, would it be effective? Can we make any effective decree against a large trust in Germany by getting

service merely on some traveling salesman or drummer going through the United States, or even some resident agent, who has a few samples in New York?

Mr. McCoy. Or on an officer, either?

Mr. Stern. Or on an officer, either. Therefore it occurs to me that the Sherman Act is entirely ineffective for the solution of this very big problem, and particularly because we do not want to attempt wholly to prohibit the importation of these trust-made goods into this country.

It has occurred to me that the only way to get at this subject would be by attacking the resident agents in this country of these foreign trusts, not in order to prohibit these companies, these combinations, these foreign combinations, from importing into this country but with a view of in some way discriminating against these foreign trusts in favor of independent foreign producers or manufacturers by saying to the independent foreign producer or manufacturer, "You can have your agents in this country to sell your goods or solicit business; our doors are open to you; we welcome you to do business in this country in competition with our own citizens"; but to say to the foreign trusts, "While you can import your goods into this country on mail orders from the consumers, or by means of correspondence between our citizens and your concerns—we are not putting up any embargo—we do say to you that we will not give you the privilege of establishing selling agencies or resident agents in this country unless you break away from these trade combinations."

The Chairman. Let me ask you there, how are we to determine which is a foreign trust and which is a foreign independent dealer? How are we going to find that out? You know the difficulty that we have here now in some of these cases, where it is challenged that the concern is a trust and that has been denied, and the department has had to get a great deal of proof to show that it was a trust and in violation of the antitrust law. Do you suppose that it will not be contested? When you say that a foreign concern which is doing business here is a foreign trust, will they not deny it? Then, how will we establish the fact that it is a foreign trust?

Mr. Stern. Mr. Chairman, I realize entirely the force of that thought and it is a very difficult thing to do. But I do not think it is a bit more difficult than was the situation as regards domestic trusts when the Sherman Act was first passed. I think what we knew we would have to prove in those cases at that time loomed up quite as large and almost as forbidding as now the proof of the existence of a foreign trust, for this reason——

The Chairman (interposing). Let me suggest this: In the case of a domestic trust, you can get after them directly, you can go and have access to the books, and you can have our bureau of corporations gather information, and you can have special agents of the Department of Justice to probe into all of their affairs. But can we do that in the case of a foreign concern?

Mr. Stern. Mr. Chairman, peculiarly enough, speaking of Germany, which as I said, was the center of the trusts, they do not do anything at all to conceal the fact that they are trusts. In other words, their trade agreements and their operations are all public property, and all the information which I have here is derived from

German official publications. The trusts not being unlawful over there, rather glory in the fact of their strength. There are in Germany all kinds of documents, official and unofficial, which give all the evidence in regard to the combinations and trusts. In other words, it is a mere matter of record. Here, where it is against the law, an element of suppression of proof comes in, but over there these people have put themselves on record, and the mere fact that I, with my limited researches into this subject, know about the existence of these trusts—and I say it advisedly—shows that persons whose business it may be, in any given case, to pry into the subject would be able to get at the facts. Not only that, but admitting that it may be a matter of great difficulty, a matter of tremendous difficulty, to prove in any given case that any concern over there is a trust, still this proposition goes to the very root of the high cost of living and the antitrust problem, which seems to me to be only half solved by being solved as against domestic corporations, and it seems to me it is well worth trying.

The CHAIRMAN. Tell us what sort of legislation is necessary to accomplish that.

Mr. STERN. I have taken the liberty to try to draft a tentative act illustrating what was in my thought merely as the beginning of a consideration of the subject. I have no idea at all that this draft will stand all the test of critical analysis, but if it suggests any idea at all which may subsequently be developed by maturer thought it will have served its purpose.

I have drawn this up with the view of putting it in as an amendment to what the committee calls, I believe, its bill No. 2, the definitions bill. Now, if I may read this act, I have here some copies that I will pass around to the different gentlemen of the committee, and they can follow it as I read.

The CHAIRMAN. It is suggested by Mr. McCoy that you put it in the record right at this point.

Mr. STERN. I shall be very glad to do that.

(The paper submitted by Mr. Stern is as follows:)

PROPOSED AMENDMENT TO BILL NO. 2.

SEC. 6. That if any contract, combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce, monopoly, attempt to monopolize, or combination or conspiracy to monopolize, such as is declared to be illegal or the engaging in which is made punishable by "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and as further defined in this act, has been or hereafter shall be made, entered into, formed, continued in, or conducted in any foreign country, it shall be unlawful for any person, firm, or corporation within the United States, as agent for or on behalf of any such combination or trust or for or on behalf of any of the persons, firms, or corporations entering into, forming, conducting, or continuing in any such contract, conspiracy, monopoly, or attempt, combination, or conspiracy to monopolize as aforesaid, to sell or contract or attempt to sell within the United States any merchandise, produce, or commodity owned or to be owned by any such combination or trust, or the sale, contract, or attempt to sell which is or shall be in pursuance or furtherance of or subject to any such contract, conspiracy, monopoly, or attempt, combination, or conspiracy to monopolize, for the purpose or with the intent that such merchandise, produce, or commodity should be imported into the United States.

SEC. 7. That every such sale and contract to sell made or negotiated by or through an agent as prohibited in section six of this act is hereby declared to be illegal.

SEC. 8. That any person, firm, or corporation, knowingly violating any of the provisions of section six of this act shall, upon conviction, be adjudged guilty of a misdemeanor and be punished by a fine not exceeding $5,000 or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The bill, as you see, aims at the twofold purpose of making it criminal on the part of any person within the jurisdiction of the United States to act as selling agent for a foreign trust; and secondly, of declaring illegal the contract so formed, which would mean, of course, that the foreign trust could not recover the purchase money for the goods sold, and this would naturally be an effective deterent.

The CHAIRMAN. Let me ask you this question, if it will not interfere with your argument: Suppose that Congress should pass this proposition which you have just suggested, taking the case which you have referred to—the Silk Yarn Trust—what remedy, what relief do you afford the people who want to use this silk yarn? What benefit do they derive from such legislation? They would not be able to import this silk yarn into this country.

Mr. STERN. If it accomplishes the result you suggest it would certainly be a great disadvantage instead of a benefit, because we would need the raw material whether it be yarn or whatever it may be. My thought would be that it does not accomplish that result.

The CHAIRMAN. Then what will it accomplish? You penalize that foreign trust, and if it is effective legislation they dare not bring their goods in here.

Mr. STERN. Oh, yes; they dare bring their goods in here.

The CHAIRMAN. How?

Mr. STERN. By direct importation. In other words, you encourage the independents. For instance, if I want the yarn I can order it direct from the German trusts. I do not want to stop the importation of these goods into this country. Of course, it is a tremendous advantage to a man to have his selling agents here soliciting our business. It will be a serious disadvantage to the foreign trusts in competing with the independents if they are not permitted to maintain selling agencies in this country, while the independents are permitted to do so. For instance, you say to one of these companies, "We will allow you to place a resident agency in New York, and to go out and solicit business in New York and in other parts of the country;" and you say to the other company, "You can not do that;" and it is going to give one party a tremendous advantage over the other. You say to both the foreign trust and foreign independent, "You can import your goods into this country," but you say to the foreign trust, "You can not have a sales agent here; you can not solicit our business."

The CHAIRMAN. They never could sell their goods in Germany and France unless they can come over here and establish their agencies.

Mr. STERN. Certainly not so well. We can send them mail orders over there, and they can pick up some business here, but not so advantageously, and that is the thought that is back of the bill. We are stimulating and encouraging the independents. There are some foreign independents. If we come to these foreign independents and say, "We are going to help you; we can not go into your foreign country and dissolve your trusts that are hurting you, but we can give you an advantage by letting you come in here and establish your selling agencies, and we will not allow your competitive trusts, which are now throttling you, to do that; we will allow

them to sell their goods here, but under more disadvantageous trade conditions," it seems to me that thereby we are encouraging the foreign independents to do business in this country.

Mr. McCoy. To what extent now is the business, such as you refer to, carried on through agencies in this country?

Mr. Stern. Practically all of it. In other words, of the $100,000,000 of merchandise imported in 1912 from Germany, a very large bulk of it was sold by resident agents. The most cursory observer in New York, looking around in the office buildings there, will see that they are flooded with the selling agents of foreign trusts.

Mr. Morgan. What assurance would we have that the so-called independents would furnish us goods any cheaper than the trusts?

Mr. Stern. That brings up the whole question of antitrust legislation, which is too fundamental for me to discuss now. I have taken as a fundamental premise that to oppose the trusts by small independents operating against the trusts will result in lower prices and better conditions. If it does it in this country it ought to do it abroad. And I do not think that there are many of us but will admit that the antitrust legislation in this country has been beneficial.

Mr. Graham. I say, take it as admitted that the independents will not proceed to lower the price, but will sell at the same price that the trust does, if you cut off the foreign trusts' privilege of selling goods here and give the independents the monopoly, would it not result in transferring the monopoly to the independents?

Mr. Stern. If there were but one foreign independent, or you said to but one foreign independent, "You can do business here," of course it would mean a monopoly; but there are different independents, and they are all allowed to do business here and they are allowed to open selling agencies, but the moment they get together and make an agreement they come under the ban of the act. If they are in good faith foreign independents and they do business here in a competitive way, we can depend upon that competition as the life of trade to keep down the prices.

Mr. Morgan. Are the independents doing business here now?

Mr. Stern. They do a small measure of business, I believe, but not under circumstances which will enable them to compete with the trusts, because the trusts have the big selling agencies here; they have all the eclat and advantages that go with the trusts; and as the independent is naturally not a very potent factor in his own country, he is, a fortiori, less potent in this country.

Mr. Graham. Do you think that the larger companies, the trusts, naturally, from various reasons, can manufacture these goods cheaper than the smaller independents?

Mr. Stern. Your question, sir, brings up the whole question of the advisability of antitrust legislation, and I take it it would apply in regard to the Sherman Act quite as much as to the measure I am proposing. I admit that if you do not consider it advisable to oppose the trusts in this country and you are not in favor of the Sherman Act policy, then this policy necessarily falls with it. It is merely collateral and supplementary to our domestic antitrust propaganda, and I have started out with the supposition that the Sherman Act is a good act, that the dissolution of the American trusts is a good

thing, but I say that from the standpoint of justice it is most ridiculous, to use somewhat strong language, to say to our own citizens, "You have got to compete, and the minute you combine we will dissolve you," and to say to these foreign trusts and combinations that they can come into this country, and we invite them to come to New York and open up their selling agencies and sell their goods in interstate commerce and all through this country.

It seems to me, gentlemen, to use a crude illustration, that here we are commercially doing battle with foreign nations. We bring up our Army and say to each soldier in our own Army: "You mustt fight your own battle in your own way. You must not enter into any plan or arrangement with your fellow soldiers. Shoot your bullets, each as you please, but do not have any prearranged understanding with one another as to where each man is to fire, or that one man shall cover with his rifle one point and another man another point." That may be a fine system when our Army is merely practicing within our own borders, because otherwise it has often been found to happen that when some of these imaginary soldiers combined and plotted among themselves the other soldiers, who were not invited into the conference, found themselves without any bullets to shoot at all, or with the targets so fixed and conditions so arranged that they could not shoot effectively with the bullets which they did possess.

But how does this system work out when we bring such an army, working under such laws and regulations, to the border of our country, and then tear down the protective wall that formerly stood there, and then invite to invade the country the commercial armies of our foreign friends, not working under any such rules, but, on the contrary, marching in the most highly organized phalanxes that the world of trade has ever known? What will be the result of the ensuing conflict? Mark you, gentlemen, I do not say that the rules which we have applied to our commercial army are not the proper ones, neither do I say that it was improper or unwise to have torn down that protective wall. Those are matters to be considered by themselves. But I do say that, having adopted those rules and having torn down that wall, it is only fair to our own soldiers, and especially to the consumers in that army, to apply the same rules to the foreign army when it is doing commercial battle here by invitation on our own soil. In short, to apply the illustration correctly, when we have this commercial invasion of foreigners, let us say to them, "You must come here as single, independent units and not as trusts, and not act here in our own country in a way in which we do not allow our own citizens to do."

Mr. DANFORTH. In other words, as I understand your argument, it is that the laws of this country, the tariff laws as well as the Sherman Antitrust Act should be equally as much for the benefit of our own people as it is for the foreigners; in other words, we should not give preference to the foreigners over our own manufacturers.

Mr. STERN. Yes; and if there is to be any inclination toward any inequality whatever the scales ought to incline just a little bit our way.

Mr. DANFORTH. As I understand it, this new tariff law we have has given an advantage to the foreign manufacturers and trusts.

Mr. STERN. I would be very reluctant to say that, because I do not want to get into any discussion of the tariff bill.

Mr. WEBB. The trusts operate just as well under a high tariff as under a low tariff?

Mr. STERN. No doubt.

The CHAIRMAN. These trusts were built up and encouraged long before the Underwood bill was passed, were they not?

Mr. STERN. Yes. I have no attack to make on the tariff bill or on your tariff policy. I admit that there will be foreign trusts, whether there be a lower or a higher tariff, but I mean merely to say that, given a lower tariff and admitting, at least for the purpose of this argument, that your tariff policy is the best one, I say it is ineffective unless you couple your lower tariff policy with an attack on the foreign trusts who deliberately take advantage, under present conditions, of our low tariff. Take for example, the sugar industry. There was a tariff duty on sugar, and the tariff duty on sugar has been taken off.

Mr. DANFORTH. Not yet, it has not.

Mr. STERN. I think it has gone into action now.

Mr. DANFORTH. Only partially.

Mr. STERN. We will assume that the tariff duty goes off on sugar X cents a pound; the foreign exporters of sugar add X cents to their selling price by combinations regulating in their own country the prices paid. That simply will mean that the reduction in that duty will reduce our revenues. One object of the reduction of the tariff was to benefit our consumers; but how are we going to help our consumers if these foreign combinations simply maintain the prices and put the amount of the tariff reduction into their pockets, adding it to the coffers of the trusts? Where is the American consumer benefited? Contrary to benefiting the American consumer, we have merely diverted a large sum of money from our own pockets, from our Treasury, into the pockets of the foreigners. I do not say that that is because of the low tariff, but I say it is because the low tariff is not sufficient. We have only swung two clubs; we have dissolved our trusts here in order to make competition and we have taken down the tariff wall in order to make more competition. And now you must take your third step, which is to go after the foreign trusts which have taken advantage of the lower tariff wall and have come in here and invaded this country. Unless you can swing your third club to carry out the policy of the Democratic Party in that respect, it seems to me we have not obtained the full benefit of the "new freedom," but, on the contrary, have harmed ourselves.

Mr. VOLSTEAD. You have simply shut off the method by which they are to dispose of their wares in this country by prohibiting them from having selling agencies.

Mr. STERN. Yes, sir.

Mr. VOLSTEAD. It seems to me you will not control your foreign trusts to any extent, because they will sell to importers here, and, in a measure, you are taking away a certain amount of competition, it seems to me, rather than the other, because here if you had these selling agents in various portions of this country, if there is any local domestic production, those agents naturally would have to compete. Now, if you stop those goods at the port of entry by turning the articles into the hands of the importers here, it seems

to me they can destroy competition more easily than they could if they had a number of agents all over the country competing with the domestic production.

Mr. STERN. That criticism would be entirely justified if the problem complained of was that of manufactured goods, but not where it relates to foodstuffs, such as sugar, coffee—those may not be apt illustrations—and silk yarn, which I have mentioned, and the many things we can not well produce in our own country, and which enter into the manufacture of goods.

Mr. VOLSTEAD. Then you would make some distinction? Otherwise, it seems to me you would tend to destroy competition rather than enhance competition.

Mr. STERN. So far as the problem relates to the importation of manufactured goods, I think that the natural competition in this country with our own manufacturers, if we can produce the article here, would bring about an equitable result by the very force of economic conditions. It would not make so much difference in that case as it would in the case of a commodity which we can not produce in this country.

Mr. McCOY. Is not the answer to the proposition simply this: That if you stop these practices, if we can stop the practice in that way, if we do enact such legislation as this, they will change their practices and then they will come into competition on the same plane with our own producers?

Mr. STERN. That was my thought, Mr. McCoy. My thought was simply this: That we have an admitted evil here, and we all want to get at it in some way, and we all admit it is not so very easy to get at, and it presents difficulties which certainly are much greater than anything aimed at in the Sherman Act itself, because we are dealing with something that is working outside of our own country, defying us, but yet is doing business here. We can not get after those foreign trusts in their own lairs; we have no jurisdiction; we can not prohibit the importaion of their goods, because we need their goods; so the most feasible way, it seems to me, to solve the problem is to get at the one thing that we can get at, namely, their agents here.

Mr. McCOY. You are not going to destroy competition by doing that, because you are not proposing to prohibit them from importing their goods into this country.

Mr. STERN. We are not going to shut them out of the country. We are going to allow them to do business here, but we are going to make it a little more difficult to do business for the trusts, and make it a little less difficult for the independent foreigner.

Mr. VOLSTEAD. Would not that mean that there would be another profit to be paid—that is, that it would enhance the price?

Mr. STERN. I did not quite understand that.

Mr. VOLSTEAD. Do you not think that rather than tending to decrease the price it would tend to increase the price? You are putting another party in between the producer and the consumer. Now, as I understand, they sell direct through agents in this country. Now, your proposition is to force them to sell to importers, practically, and those importers will deal with the consumers here, so that you are practically putting another middleman in between.

Mr. STERN. I think that criticism would be justified if it were not predicated on the thought that there are no independents in the field. We do not want to put a Chinese wall around the country and say, "You can not come in here." We do not want to keep out the foreign trusts. It is merely a discrimination in favor of the independents. We are simply making it less advantageous for foreign trusts to come in here, with the view of making it more advantageous for other foreign companies, independents, to do business here, and in that way to encourage the latter to bring about a better competition. Certainly these big foreign syndicates are not going to sit idly by and see their weaker neighbors allowed to come over here and do business by having their agencies here, and calmly see this $100,000,000 of trade pass out of their hands. They will have to meet the situation. They will not say, "We accept this with resignation, gentlemen; we are not going to try to do business in America any more." On the contrary, they will have to do something to meet the situation. What will they do?

Mr. VOLSTEAD. Why can they do business now, under the present law?

Mr. STERN. For the reason I have pointed out—that, in the first place, it is very doubtful whether the Sherman Act is applicable to foreign companies.

Mr. VOLSTEAD. It would be applicable to the agents if they indulge in any practices that would prevent competition in restraint of trade. To that extent they could be reached under the Sherman Antitrust Act.

Mr. STERN. Let me answer your question by asking one, if I may be so presumptuous. Suppose a trust exists in Germany; there are 10 corporations there which unite to form a trust or enter into a trade combination to keep up a monopoly price, and they put an excessive price on a certain article of x cents a pound; they put a resident agent in New York to solicit articles, and he sells goods all through the United States in interstate commerce and asks x cents a pound for the merchandise. There is a complaint made and a prosecution under the Sherman law. Do you think that the Sherman law could give any relief? What can we do? Can we dissolve that trust?

Mr. VOLSTEAD. How is your proposed law to get at that?

Mr. STERN. Under the Sherman Act the agents who sells the goods of a trust is not amenable to the act. The agents of the Standard Oil Co., assuming that to be a trust, are not punishable under the Sherman Act. It is only the persons who form the combination. Now, under this act we say to the agents, "If you are selling the goods of a foreign trust you must quit."

Mr. VOLSTEAD. Suppose there is a corporation formed for the purpose of importing these goods; that corporation has to buy at the x price; they can demand the x price from that corporation just as well as they can say to the agent, "You must sell at the x price."

Mr. STERN. Yes; but if another independent producer appears, taking advantage of this act and the encouragement it gives, and establishes a selling agency in New York, and another independent does the same thing, and a dozen of those independents do the same thing, and instead of having one selling agency of a foreign com-

bination in New York you have 10 selling agencies, the agencies of 10 independent foreign concerns, then you do not have the x price.

As I said before, the thought lurking in the minds, apparently, of some of the committee is that we wish to keep out the goods of all but one independent and allow him, although he calls himself an independent, to open just as great a monopoly as was formerly done by the trust. But the thing of importance is that there is but one trust in a country, but there are a dozen small independents.

Mr. McCoy. Is not the best explanation the fact that the foreign trusts to-day put a price at a very high figure; even increase it over what it used to be?

Mr. Stern. Yes; making us feel foolish about our low-tariff act.

Mr. McCoy. If you permit the independents to sell under more favorable circumstances, then if the foreign trusts sell to importers in this country they have got to reduce their price to meet the independent competition.

Mr. Stern. That is my thought, and I instance it again by saying if there are three or four independent concerns in New York and one trust in New York, and we say to the trust "You can not put a selling agent to do business in Chicago or any other part of the country," and we say to the independent 'You can put a selling agent in Chicago, you can put a dozen selling agents in Chicago or St. Louis or anywhere else," what will the trust do? You can not get your business in these days by waiting for orders. You must go after it. And these three or four little foreign independents, with their selling agents in New York and in Chicago, have an advantage in doing business in this country and the trusts have to meet that competition. That is the way to get at the evil. We have to encourage these independents to come here, and we will have a dozen independents where before we had one trust.

Meantime, if these independents combine they come under the act. They must do business here under competitive conditions, the same as our own people.

Mr. McCoy. The selling price of the trusts would at least have to be cut to the price made by the independents?

Mr. Chandler. You used a military illustration a while ago.

Mr. Stern. That was a very crude illustration.

Mr. Chandler. The trust comes here in the form of an army and we have dissolved our force, disorganized them, and you say we have put them to a disadvantage compared with the foreign trusts. In other words, that would put our trusts to a disadvantage in dealing with the foreign trusts. You just said that the trusts fixed prices, and what we want to do with the Sherman Act is to reduce the high cost of living by reducing the prices. Are you not really arguing that in fact we should not dissolve our trusts; in other words, are you not arguing that you think the trust has, in some way, an advantage in underselling?

Mr. Stern. No; I mean that the trust has an advantage in overselling. In other words, my point about this organized army coming in is not that they have, by any greater efficiency in production or anything of that sort, been able to undersell us. I am not talking of competition between us; I am talking of our army as a purchasing agent and of the foreign army as a selling agent. I have my thought

focused on the raw material which we have to buy from abroad and at its increased prices, and I want to lower the cost of that raw material and of foodstuffs.

What is evidently in your mind is that my illustration of the armies was meant to imply that we have no trusts and that they have trusts, and the trusts make a more formidable army and that therefore they could overcome us. I did not mean that, and therefore my illustration was perhaps inapt. What I meant was that our unorganized army was to do business, not against their army, but with their army. If the proposition was one of foreign export to other countries, that would be a different proposition. That, I believe, was touched on by Mr. Ryan, who was before the committee, and I believe he said that we should allow trusts to be formed here for the one purpose of competing with foreign trusts in foreign trade; and when I made that use of the army illustration I had in mind business done with the foreign army, not business done with a third party in competition with the foreign army.

Mr. CHANDLER. This law is to be a law of universal application to trusts?

Mr. STERN. Yes, sir.

Mr. CHANDLER. Our army may not be a buying army, but may be a selling army and we then come in. With the foreign trusts, what advantage has our army over the foreign army, if they both are selling armies? Can they undersell manufactured goods by reason of their being able to produce them at a cheaper rate, and if so, why not permit our trusts as armies, to be organized in certain cases?

Mr. STERN. As far as this proposition would apply to manufactured articles, our American manufacturers being in competition with foreign manufacturers, foreign manufacturers can not raise the prices unless we allow trusts in this country.

Mr. CHANDLER. If the trust raises prices, then our people will buy from them who sell most cheaply, and we are not at a disadvantage, but it is to our advantage to be a disorganized army.

Mr. STERN. It seems to me that foreign trusts are not obnoxious in this country as far as they sell articles which come into competition with our own manufacturers, because we do not allow our manufacturers to combine, therefore our manufacturers must keep the prices down as low as possible, and the foreign manufacturers come here and they compete with domestic manufacturers and they can not put up the prices, because they have to meet the competitive conditions which prevail here. Therefore, as far as the conditions relate to manufactured articles, which we can make here, the Sherman law produces a cutthroat competition in this country, which prohibits the foreign manufacturer from putting on monopoly prices, because he must meet the conditions here. He may, it is true, by reason of the fact that they have cheaper labor over there, obtain some extra profit.

In other words, he may get greater profits because he can hire cheaper labor than we can. That is merely because the one manufacturer—the foreigner—is able to produce the article cheaper than the other or American manufacturer. If the foreign manufacturer, selling goods at the same prices which our manufacturers do, working under a competitive system, he can get more profits out of the manufacture of those goods, because he is able to get the cheaper

labor—he is welcome to that kind of profits. We are not desirous of enhancing our profits at the expense of wages to our workingmen. But when it comes to an article where there can be no competition—to raw materials which we do not produce here—what possible advantage can it be to this country to have high prices on raw material and to charge us—manufacturer and, therefore, ultimately consumer—those high prices?

Mr. McCoy. There is one well-known instance illustrating that in a very necessary article, and that is what is known as quebracho extract used in tanning. It is produced in South America and almost absolutely controlled by a foreign syndicate.

Mr. Stern. If you consider the case of coffee, which I admit is rather a poor illustration, because, as I understand it, the Brazilian Government itself enters into that proposition—we have no duty on coffee, but what good does that do us? Suppose the exporters get together, and that the Brazilian Government itself puts on any price they want. We have to pay that price whether we have a high tariff or low tariff or no tariff at all. But if we can say to the Brazilian combining exporters, "You can not sell your coffee in this country through resident agents unless you break up this monopoly which fixes the price of coffee," and say to the independents—and I presume there are independent coffee growers in Brazil—"You can come into this country; we are going to give you extra facilities to do business here; and we will let you put your selling agencies here, provided you work here upon a competitive basis," are they not going to come here to do business and put that price of coffee down to decent prices in order to obtain the American business? In that way we can encourage better conditions even in foreign countries. We have a club to swing as consumers. We are a large purchasing market. We can go direct to the independent producer, and we have the club of the purchaser to swing, and we say, "I prefer to deal with you, because you are the kind of a man who likes to do business as I prefer to do it." We say to him, "We want to do business with you. Come into this country and we are going to give you special advantages." How better can you force the trusts and the prices fixed by the trusts down from their lofty perch?

Mr. Morgan. Would there not be other features. Would there not be complications with the German Government in undertaking to discriminate between her citizens? Under the German laws the trusts are perfectly legal. They use them for the benefit of the country, to promote their trade. If the Government undertakes to discriminate and makes a thing unlawful here which is lawful there, would that not be in effect to destroy their business, and would not that bring about new complications?

Mr. Stern. I think not, sir; because our treaties contain only the "most-favored nations" clause. We do not in our treaties give to any nation the right to do business here except subject to the same advantages that every other nation has. We are not discriminating between nations when we say to the foreign trusts, whether it may be of Germany, France, Italy, England, or of any other country, "We do business here under competitive conditions, and you must do the same." No foreign nation can claim that there is any discrimination as among themselves.

Secondly, how can any country blame us for saying that its citizens must do what we compel our own citizens to do? They might say, "It is not fair for you to provide that we can not do business in your country with our trusts when you allow your own citizens to do it," but we are only applying to them what we first applied to ourselves. We first asked ourselves to do what we now ask them to do. How can there be any complaint?

Mr. MORGAN. Have we not got a great many trusts here now?

Mr. STERN. Well, we have; but we ought not to have. That is a matter not of legislation, but of executive administration.

Mr. MORGAN. Do you not think we will have trusts?

Mr. STERN. That depends upon the vigilance of the Attorney General in enforcing the act, and not on the act.

Mr. MORGAN. It becomes a question of policy of the administration then. The administration of the Attorney General—he has certain conceptions of what is a trust. He has an idea of what a corporation ought to be in order not to be prosecuted, before he proceeds under a certain policy. Of course his conception might be entirely different from yours, and all that. We have trusts and probably will have for the next quarter of a century.

Mr. STERN. Nobody ever devised any set of laws that could be run by going off and letting them run themselves. The administration of the law depends not wholly nor by any means as of the greatest importance on the wording or the phraseology of the law, but it depends on the vigilance of the attorneys administering them. They might be the best in wording and phraseology, but if the Attorney General does not enforce them we might just as well not have them on our statute books. On the other hand, a vigilant Attorney General might enforce an act not so good as the Sherman Act. All you can do is enact the best law possible, and put the power in his hands, and if he is not faithful to his trust, under our elective system we can put in somebody who is.

Mr. CHANDLER. Speaking about Attorneys General, I assume you have studied the subject. Quite recently Mr. Wickersham made an address over in Philadelphia in which he said that we do not need any amendment to the law, that it is already sufficient. He made the statement that there is now no monopoly in America, no business trusts in America whatever, except those in certain cases which the Government is now seeking to dissolve. Do you agree to that as a fact, that there is no monopoly in America? In other words, is there any necessity to amend the Sherman law to prosecute the cases we now have in hand?

Mr. STERN. The gentleman who made that statement may, I think, have been dealing in glittering generalities. I do not see how anybody could make any such statement as that unless he had made an intimate study of the existing trade conditions, and had an intimate knowledge of the whole country.

Mr. CHANDLER. He was himself ex-Attorney General.

Mr. CARLIN. Take that bill as applying to industrial corporations engaging in the manufacture of any competitive article which was likewise manufactured by a foreign company or combination; if this combination in this country were such as to bring about competitive conditions here, could the admission of a foreign corporation have

any other effect to the consumer than to reduce the cost at which the article was to be sold?

Mr. STERN. I think not. That was my answer to the suggestion that was made before, that as far as this applied to articles with which we can engage in competition with foreigners, the act might be unnecessary in trying to keep out foreign trusts, but even in that case it could do no harm, because as an economic proposition the foreign producers would have to do business here as individual units and not as a combination, in cases where they must meet the competition of our own manufacturers.

Mr. CARLIN. Now, as to articles that are not manufactured in this country, or produced in this country, what article would you refer to or consider?

Mr. STERN. I have referred to certain foodstuffs, like sugar or coffee, and to certain raw material in the textile industry, such as silk yarns, of which I gave an instance before, where even since the tariff act they have rubbed it in on us, so to speak, by arbitrarily adding 25 per cent on the prices, taunting us almost to our faces with the Underwood Act, not because the Underwood Act was at fault—I would not blame the Underwood Act for it—but simply because we have shut only one door instead of two. Of course many other instances of foodstuffs and raw materials might be given.

Mr. CHANDLER. You are from New York, are you not?

Mr. STERN. From Philadelphia.

Mr. CHANDLER. You are from Philadelphia?

Mr. STERN. Yes, sir.

Mr. CHANDLER. A supreme court justice of New York, in an address to the New York Bar Association, said if it were left to him he would repeal the Sherman law and all the laws of similar kind in the State, and then that he would establish a board or commission to regulate the question of commerce, that he would repeal the anti-trust law entirely.

Mr. WEBB. Is he a Progressive?

Mr. CHANDLER. He is a Progressive; yes.

Mr. STERN. My modesty forbids me from going into so deep a subject. I came here with this proposition assuming that the Sherman law was a good thing, and that it had come to stay, and that if you apply it to your own country, you ought to apply it also to foreigners. What is good for the goose is, in this case, good also for the gander. Whether the Sherman law is a good law, whether, so far from extending it to foreigners, we ought to take it away from our own industries and manufactories, is such a tremendous subject and involves a study of policies to such an extent that I do not like to enter upon that kind of a discussion.

Mr. CARLIN. Would you not have the courts of this country in the last analysis, passing upon the laws of every foreign country, to determine what would be a combination?

Mr. STERN. No; because our courts would be treating only with the facts. Having been given the facts we measure them by the Sherman law, just as if it happened in this country. Given the fact that there is a violation of the Sherman law by a foreign combination acting in this country, its agents can not sell goods here. We do not say that, although Germany allows it to operate legally there,

we are condemning it as illegal here. Mind you, this act does not contain any such offensive remark that any such foreign combination is illegal. I would not say that, because if it is legal in Germany we can not say that it is illegal. We do not say that it is illegal. We simply say that if that state of facts exists, it is illegal for a firm in this country to act as selling agent for that concern, whether legal there or illegal there.

Mr. CARLIN. Have you known of any country that has taken that attitude toward American competition?

Mr. STERN. I do not know of any such attitude except to this extent, that Germany, while it helps its own trusts, does not, I think, love a foreign trust; and Germany, as we all know, is pursuing a campaign now to drive the Standard Oil Co. out of Germany. I read about that in the papers only a few days ago. They do not like our trusts operating over there.

Mr. CARLIN. They have not empowered their courts to determine when a corporation constitutes a combination in the form of a trust?

Mr. STERN. They seem to have more effective ways for doing things in Germany than by judicial decision. They simply have a way of sending their officials out to confiscate the articles, and to clean out the entire establishment that is offensive to them. Of course Germany has not developed that fine sense of individual right and liberty that we have. They look to the result of things, to the grand result, not to any benefit to the individual, nor do they consider what he might suffer in his individual right. They consider what is best for the whole German Government, looking at it as an entity. What is the position of the German under that system? What is his economic future? They make themselves a nation more or less of slaves in order to get the results—they enslave labor. We believe, in this country, that it is better to take care of the individual.

Mr. CHANDLER. Even the German has a theory that monopoly is a good thing and should be fostered by the Government.

Mr. STERN. Yes.

Mr. CHANDLER. Because it can give a cheaper and more finished product to the people?

Mr. STERN. Perhaps.

Mr. CHANDLER. The only thing the Government is called upon to do is to direct the trust and regulate it for the benefit of all the people. Is that their theory?

Mr. STERN. To what extent they regulate it for the benefit of the people is a question. But there is no denying the fact that Germany encourages it. There are a lot of different States of Germany which go to make up the German Federation, which themselves become members of these trusts. We all know that in the Potash case the German Government was itself back of the Potash Trust.

Mr. CHANDLER. How does it happen that in the Potash Trust business they have a number of different trusts, different mines, and one trust will control one mine and then another, and they will say to one mine, "You do business now until the supply has reached a certain point, and then shut down," and then go over to another place and take it up. Is not that the way they operate?

Mr. STERN. I think their system is to have different combinations in the various branches of the same manufacturing processes.

The CHAIRMAN. Going back to this Potash Trust, the object of that Potash Trust is to keep up the price of potash and limit the production, is it not?

Mr. STERN. Yes, sir; I so understand it.

Mr. CHANDLER. Does the Government derive a revenue from that? Why do they want to keep up the price of potash?

Mr. STERN. Because Germany looks after its export trade more than any other people in the world.

Mr. CHANDLER. They use potash in Germany, do they not?

Mr. STERN. Yes; but Germany encourages its export trade to such an extent that the export price is often much less than the price of that article in Germany. That has been the practice in Germany. In other words, the Germans pay much more for the German product than the foreigner does. In some places it pays better for a German consumer to import back, say, from Austria into Germany German goods which have been exported to Austria, than to buy direct in Germany. Germany gives rebates on its export business. It has lower freight rates on its railroads carrying goods for export than for domestic trade. It does everything to encourage its export policy.

Mr. CARLIN. I understand you to say that as far as articles are concerned that are manufactured in this country, we have nothing to fear from outside combinations, except competitive prices?

Mr. STERN. To this extent, that they will probably make more profits than we will, because of their cheaper labor, but they can not sell for more than our ordinary competitive conditions here would warrant.

Mr. CARLIN. The amendment which you propose includes manufactured articles?

Mr. STERN. It is meant to include everything.

Mr. CARLIN. Why should we include the articles from which we get the benefit of competition? Now, there might be some cases there, so far as the articles which are not produced in this country are concerned, or manufactured in this country are concerned, we might, from the standpoint of the consumer, undertake to do something to protect ourselves from high prices on that line, but where the articles are manufactured here or the article is produced here, the only effect of competition from any point outside or inside would be to reduce prices.

Mr. STERN. The policy of this act is not in any way involved with the idea of stopping competition even in manufactured articles. I do not want to keep the foreign trusts out of our field, but to bring in the independents.

Mr. CARLIN. Yes; but the effect of it is this, if we apply our law to the foreign combination, so far as manufactured articles are concerned, we drive that competition out of this country—prevent it from coming in here—because of the penalties we have imposed upon it.

Mr. STERN. But in its place we have brought in five independents.

Mr. CARLIN. You have produced a local market and have driven out these competitors.

Mr. STERN. Suppose we did. Suppose we have a manufactured article such as you have named; suppose we had competitive condi-

tions prevailing here; suppose there are five different firms of corporations producing that article, which results in its selling for, say, 10 cents. If a foreign trust operates here they can not sell it for more than 10 cents. They have to meet our own competition, and, even if we drive out that foreign trust altogether, assuming your theory, we do not in any way lower the competition, because we have competition among our own people. But if, when we keep out that foreign trust, in its place we bring in 10 competing foreign independents, is that going to result in the price being increased to more than 10 cents? I do not want to keep them out. I want to make them come in.

Mr. CARLIN. I know what you want to do, but I am talking about what this proposed amendment does.

Mr. STERN. Yes, sir.

Mr. CARLIN. Assuming that there is a combination or monopoly there, which is the ground of your argument——

Mr. STERN. Yes, sir.

Mr. CARLIN (continuing). Then you have not got the independent operators there to invite, that you are talking about.

Mr. STERN. Yes; because the mere fact that you have a trust does not say that you have no independents. A trust is relative. I doubt if any trust has 100 per cent in anything.

Mr. CARLIN. It is a monopoly only so far as the prices are concerned. The monopoly only fixes the price of the article. When it comes, therefore, to the articles which are manufactured in this country, under your proposition, would you not also drive out the strongest competitor these manufacturers at home would have?

Mr. STERN. I do not consider them the strongest competitors, because they do not operate in competition. You see, after all, when I speak of foreign trusts, the great combinations abroad are not so much trusts as we understand them; that is, formed of several corporations under one corporate form, but they operate under trade agreements. I am not speaking of the German syndicate in the sense of a trust, but in every industry—take, for example, the silk or velvet ribbons industry—all the corporations and people that make velvet ribbons got together under their agreements. That is the way they operate. There is a certain number of them who operate under that pool, and they get as strong a pool as they can get, and sell at the prices fixed by that pool; but there are people in Germany manufacturing velvet ribbons who are not in that pool.

Mr. CARLIN. I am speaking of manufactured articles produced in this country as well as in that country.

Mr. STERN. Yes, sir.

Mr. CARLIN. This bill would have exactly the same effect, as far as they are concerned, as a prohibitive tariff.

Mr. STERN. I do not think so. If it did I would not be in favor of my own bill.

Mr. CARLIN. Let us see. A high tariff would keep the foreign competitor out of this country, so it is contended.

Mr. STERN. Yes, sir.

Mr. CARLIN. And give the home market to the home manufacturer.

Mr. STERN. Yes, sir.

Mr. CARLIN. And when you say to a foreign combination, as you do by this amendment, that you shall not operate in this country,

because we do not allow our own combination to operate here, we either penolize them with the criminal statutes or we dissolve them, do you not drive them out of your market and keep them away from competing?

Mr. STERN. If you will allow me, I think the difference is probably this, between a protective tariff, which you mention, and my plan. A protective tariff puts up a wall around the country and says to the foreigners, "None of you can enter the wall; we are going to play in our yard and no one outside can come in here." I say to the "good" foreigners, if I may get down to almost childish language, "There is a door in that wall, and you can easily come in. The wall is only for the foreign trusts, and if the foreign trusts want to come in, there is even a gateway through which they can come in."

Mr. VOLSTEAD. Let me suggest how the foreign trust can get across under your bill, if I understand it correctly.

Mr. STERN. Yes, sir.

Mr. VOLSTEAD. Suppose here is a Coffee Trust which comes in here and it finds this statute. Would they not simply do this: Some of the people interested in the coffee business would immediately form a corporation here to buy that coffee and it would not probably cost them any more than it would the agents. They have got to have coffee here on hand anyway to distribute. They have got to act, in a measure, the same as any other middleman has to do, so they would organize a corporation, of which, perhaps, they would have American members, and, perhaps, all Americans. They would be an independent company. They would not be agents, because they would be buying that coffee. They would buy it at a figure at which the trust is now selling. How is your proposed act going to reach that situation? It seems to me that is the general way and a very easy and a practical way of getting around it.

Mr. STERN. I can only say this in answer to that suggestion: I had considered it and I was going to write another section in this act that I thought would meet that, and I purposely abstained from it because I did not want to attempt too much at once. But my general thought in reference to that would be this: That it would not stand as far as it was a palpable evasion of the act—of the Sherman law—as interpreted by the United States Supreme Court. The Sherman law has penetrated much deeper below the surface than to allow any evasion of that kind. The Sherman law has gone into the spirit of the thing and not merely to the form, and by whatever method there has been a combination the Sherman Act has shown it can reach it, even though the superficial form of it lacks the elements of a combination. If you have a combination abroad, deliberately formed in order to evade this law, and it has a resident agency here——

Mr. VOLSTEAD (interposing). Yes; but the court would have certainly to find that it was in fact an agency, and it seems to me it could easily operate so that no court could possibly find that the corporation was an agent.

Mr. STERN. If that corporation be composed of the same stockholders abroad as here, it would be a manifest device for evading the act, and as far as it is different——

Mr. VOLSTEAD (interposing). It is a different concern?

Mr. STERN. If they choose to establish a purchasing agency here, but with other stockholders, so that the profits would go to other groups of people, the trust is not getting the advantage of it. Some persons in their trust may be stockholders of this company.

Mr. VOLSTEAD. Still it seems to me the trust could sell to the importers at just exactly the same figure as they are selling now and they would have all the advantages of an agent, because that importer would get these goods and the agent would get the goods and in distributing the goods it would have to do just exactly the same work that the agent would do. The only difference that I can see is this: That the importers would have to pay for the goods when they were imported. But I do not think that would be any great injury to them, for the simple reason that any trust that operates in this country, if it is going to be effective, would have to have on hand here quite a lot of goods so as to be able to distribute them in various markets.

Mr. STERN. The way an agent operates here is to take an order and send it abroad, and it is handled only on orders. This concern would have to lay in a whole stock of goods.

Mr. VOLSTEAD. Is it not true that almost every large concern that operates in this country does that anyhow?

Mr. STERN. I think they merely carry sample lines in this country. However, I think there is possibly an opportunity for evasion there. I grant you that, and it is a question whether the court, under this law, would get at it, but I do not think it is a bar to this act, because I think it can be reached. If the committee has in view seriously to consider any such act, I would be glad to make an attempt at it. I have already had in mind a section that I believe will cover it.

Mr. VOLSTEAD. It seems to me they could do just exactly the same thing under your proposed act, because they could say, "We have not got much on hand, and we have to get it," and they could send that order to the German syndicate and get the goods in just exactly the same way.

Mr. STERN. If you find that corporation did that sort of thing—that is, instead of buying as importers, operated as an agency, and instead of buying stock and reselling it, when it got orders sent those orders to Germany, and instead of having the goods billed to the real purchasers had them billed in its own name and collected the money itself in its own name. I do not think a scheme of that kind under the broad interpretation given to the Sherman Act would last for a moment. I do not care what the form is, the law will come in and say it is the difference between shell and substance. If the domestic corporation were not legally an agency here making sales on orders, but acting as one big distributer in our market for that foreign company under a collusive arrangement to evade the law, I say by a supplemental section to this act that condition, I believe, could be reached.

Mr. VOLSTEAD. Even assuming that they would only sell to this purchasing company exclusively, I do not suppose that that would be proof that they were agents. They might not have a single stockholder in common, and it would not be necessary that they should at all. The corporation might be owned under some law of some State here, and they would carry on a legitimate business as

purchasers from the syndicate and selling it in this country, and I do not see how their expenses would be necessarily any greater than that of an ordinary agent, so I do not see how you penalize the trust.

Mr. STERN. I merely say that so far as it is an evasion of the law, in the sense of merely being in form and not in substance a separate corporation, carrying on a legitimate business as purchasers, the law can get at it. If you accede to the desirability of getting at these foreign trusts, the fact that there is one gap or one possible evasion, I do not think ought to discourage us, because I believe that further thought on your own part, if not on mine, will lead to a remedy for the evil which you are aiming at. I do not believe that there is any admitted evil which can not be cured to some extent by legislation. I do not think this act is a panacea, but I think that if there is an evil or an injustice to Americans under the Sherman Act, as compared with foreigners, we can get at it, and if there is some way in which they can evade it we can take that up when the time comes and get at it in another way.

Mr. PETERSON. Let me see if I understand you. We generally like to know what is the purpose of the gentlemen in appearing before this committee. Now, is it not your purpose here to dispose of these selling agents in this country, and thereby remove competition to yourselves as importers, rather than to benefit the independent exporter?

Mr. STERN. Absolutely not, sir. I certainly disclaim any such thought. There is no person who has ever talked to me about the subject who has the slightest idea that the effect of this act would be to keep out competitors, because I have never talked to anybody, and I do not represent anybody who has any idea that competition from abroad is going to be kept out by the passage of this act.

Mr. PETERSON. Would not you yourself suppose that these selling agents would thereby divide their business with your clients?

Mr. STERN. No, sir. My object and the object of the people interested in this thing is to bring about lower prices in raw materials which are now controlled by foreign trusts and in that sense benefit our manufacturers. In other words, the raw materials that are now used by our manufacturers are sold here under foreign trade agreements which arbitrarily make the price. We can not get them here, and we want to enable the manufacturer in this country to buy his raw materials under a competitive system. I never had any thought of the manufacturers in this bill, as far as their finished product is concerned, and I believe that as to that they will take care of themselves. Nor do I see how bringing in independents and keeping out big trusts is going to reduce competition here in manufactured articles, because, assuming that the Sherman Act operates here, and we have competition among ourselves, even if we keep out foreign trusts I do not see how it is going to enable our manufacturers here to raise the prices. Your assumption is that the minute we keep out foreign competitors the American manufacturers are going to combine to raise the prices. The minute they do that they are guilty of violating the Sherman law.

Mr. PETERSON. The specific question I want to ask you is this: Would not the removal of these selling agents remove an element of competition from your importers? Would not that be the result?

Mr. STERN. Except in the case of using the imported raw materials which those persons send over here, there is no competition that I have in mind.

Mr. PETERSON. These men go out over the country, you say, and they have their agencies in every city and go out and solicit the business. That is in competition with the importers of the article in this country, is it not?

Mr. STERN. No, sir. Oh, you mean that these foreign producers may sell their goods directly through the country instead of selling them to one importer?

Mr. PETERSON. You say they have selling agencies that go out over the country and sell their goods?

Mr. STERN. They have agents; yes; resident agents.

Mr. PETERSON. Those resident agents come in competition with your clients, who are importers?

Mr. STERN. No; they are not. My clients are manufacturers who buy the raw materials from these foreigners. Yes; and they are at the mercy of the foreign trusts. The raw material which we use in our manufactories is subject to foreign trust conditions.

Mr. PETERSON. That may be true as to you but would not be for the gentlemen that I have indicated.

Mr. STERN. I do not see how. Some members of the committee seem to have the idea that we are going to keep out the foreign trust. That is not in my mind. I say what I want to do is to invite in the independents and invite the foreign trust, but make the foreign trust behave when it comes in. As I suggested a while ago, we want to build a wall, but I want spacious gateways in that wall, and I want to see that everybody that enters that gateway enters it under the rules of the game as we play it and abides by our rules, and they can all come in the gate, and all that they have to do is to dissolve their trade agreements. If I thought they would not do it, I think my act would be futile; but I think by inviting their competitors we compel them to give up their trade agreements and make them come in as individual units instead of as a combination selling force.

Mr. CHANDLER. Whom do you represent here? Are you expressing your personal views or do you represent some firm?

Mr. STERN. My personal views. I really represent the manufacturers' interest who are concerned in this matter, but only, I assure the committee, in the way I have indicated.

Mr. CHANDLER. We can understand it. It is perfectly right that you should represent somebody that may be interested.

Mr. STERN. I want to say this: The evil was suggested to me in one way, and I have taken it up and tried to work it out along this idea. I do not suppose any person is entirely disinterested in the sense that as a theory he sits down and thinks out some patriotic scheme. What really impels him is some personal interest, and then in order to develop it he finds the remedy in some patriotic policy for the country. But the initial impulse, I think, even the most altruistic and patriotic, is always something which some one observes in his own life or in the life of those connected with him.

Mr. MORGAN. Did you read Mr. Ryan's testimony on the copper industry?

Mr. STERN. Yes, sir.

Mr. MORGAN. You know that his idea was that the Sherman law should not apply to combination or agreements made between local manufacturers—between home manufacturers—and home miners or producers when they were dealing with foreigners?

Mr. STERN. Yes, sir.

Mr. MORGAN. And he claimed that the foreigners combined to bear down the price of copper?

Mr. STERN. Yes, sir.

Mr. MORGAN. Why would not his remedy apply to your case?

Mr. STERN. That idea does not appeal to me. My idea is that we do not want to establish trusts in this country. I do not think it comes with good grace, as an ethical proposition, to say that we do not want trusts in our country but we will allow trusts to form here for the purpose of preying upon the foreigners. In other words, that we will send out our agents to do abroad what we will not allow them to do here. It seems to me that my proposition is the more fair—to say to our citizens that they can not form trusts here and they can not go into other countries to do what we will not allow them to do at home. It does not strike me as being a high and ethical thing to say that we will allow them to do abroad what we will not allow them to do at home. Do unto others as you would have them do unto you; but it is fair to insist that these others apply the same maxim in their dealings with yourselves.

The CHAIRMAN. For instance, the Harvester Trust threatened to go to Canada and carry on their manufacturing business there.

Mr. CHANDLER. That is not in any sense a monopoly—the Harvester Trust.

The CHAIRMAN. I have heard that same statement, too; but I do not think that the Harvester Trust should be allowed to carry on their same practices——

Mr. CHANDLER (interposing). When you say "practices," you do not mean in any ugly sense? I have a decision of the supreme court of Missouri passing upon the Harvester Trust, saying that they were in no sense oppressive.

Mr. STERN. I think that remark of the chairman expresses a helpful thought, and I want to say this in regard to it, that under our present system, if the Harvester Trust is a trust, it can very easily go across the line into Canada and do exactly there what it is doing here, and then import its product into this country. The American Tobacco Co. could go to England and form a trust there and ship its tobacco at high prices to this country. It seems to me a ridiculous proposition.

Mr. FLOOD. While we are speaking of the Harvester Trust, I would like to make a suggestion about the Harvester Trust. In the State which I represent here, Arkansas, we passed a law several years ago which prohibited any combination or pool made anywhere in the world outside of that State from doing business within the borders of the State. And under that broad law the Harvester Trust was driven from the State. But it did not keep us from getting the products of the Harvester Trust, and our merchants to-day deal with them outside of the State, and they deal with them to better advantage than they did when they had their local agents within the State.

Mr. STERN. That is the principle of this act exactly.

Mr. FLOOD. They would go to St. Louis and would get better contracts with them. We were not deprived of the benefit of the Harvester machinery, but we got it to better advantage. Our merchants got it to better advantage than they did under the old system.

Mr. STERN. That is the principle embodied here.

Mr. FLOOD. The Supreme Court of the United States has upheld the validity of that law; and what we can do within a State outside of its borders, it seems to me that the great Government of the United States can do outside of its borders.

Mr. STERN. I only want to say in conclusion, Mr. Chairman, as I said at the beginning, that this proposed amendment is merely tentative. I did not anticipate nor presume it would be the last word on the subject; but I think, in suggesting the consideration of this proposition to you, it is, as I said, giving you a foeman worthy of your steel, as being a subject well worthy of investigation along the line of antitrust legislation. There may be a much better way than I have suggested.

The CHAIRMAN. You have given us some valuable suggestions this morning. You are a lawyer and have studied this question, and have, perhaps, more time to work on this particular thing than the committee has, and I would suggest that you devote some of your time and send this copy back to us in better form.

Mr. STERN. I will be glad to do it. I want to say, by way of apology, that this was a new subject to me a week ago, and everything I have gathered together has been done in that short space of time, and for that reason it may seem presumptuous, in the present immature state of the subject, to appear before this committee.

Mr. VOLSTEAD. Let me suggest to you this idea. It may not be worth anything, but perhaps it may be of some value. Instead of pursuing the agent, suppose you pursue the goods by an act that would perhaps in a measure regulate the method of disposing of those goods in this country, and then you would follow it and you can get at the corporation itself, instead of the selling agent.

Mr. STERN. I wanted to avoid the very thing which some of the gentlemen on this committee think I am trying to do, namely, to keep out these trusts and these trust-made articles and prevent competition. I do not want to be too drastic about it.

Mr. VOLSTEAD. I am not suggesting to exclude the goods, but that you draw an act that would follow the goods to some extent from the trusts to the purchasers who use them in this country, because then you might be able to accomplish, it seems to me, what you aim at; but if you simply regulate the agent, they will get rid of the agent and practically get rid of your law. They will simply seek another corporation, probably in New York, an American corporation, probably, without any foreign stockholders, and go on and do just exactly as they are doing to-day. It seems to me, if you are going to make it effective, you have got to follow these goods in some way.

Mr. STERN. I am sure I shall find that suggestion helpful.

(The papers submitted by Mr. Stern are as follows:)

CARTELS IN GERMANY.

SURVEY.

The Government investigation of the German cartels (published in the documents of the German Reichstag, 1905–6) contains a list of 385 cartels existing

or founded up to autumn, 1905, distributed as follows among the different industries:

	Cartels.
Coal	19
Iron	62
Other metals	11
Chemical industries	46
Textile industry	31
Leather and rubber	6
Lumber and wood	5
Paper	6
Glass	10
Brick	132
Earthenware and china, etc. (earthenware, 4)	31
Foodstuffs, etc	17
Electro industry	12
Various industries	7

The existence of so many cartels in the same industry is due to the practice, quite common in Germany, of having separate cartels for different products in the same industry, so that one concern may belong to a number of different cartels. Another reason for the presence of so many cartels in the same industry is that many of them are of a local character.

There have been, of course, considerable changes in the last nine years since the Government investigation was made. Some cartels have completely disappeared, others have been united, many have been newly founded. Now formations have been especially frequent in the textile industry and in other industries of products of a highly finished character.

The Government report of 1905 regards the cartels of the coal mining, the iron, and the chemical industries of greatest economic importance.

In this respect there seems to have occurred no change in the last decade, although perhaps the cartels of the textile industry mad be added to the ranks of the most powerful cartels.

With a few exceptions, the development of cartels in Germany started after 1880. In the period 1880-1895, the average yearly number of new formations of cartels was about the same. A remarkable increase of new formations is to be noted for the period 1895-1904. Since then there have been every year a considerable number of new formations of cartels, which exceeds the number of dissolutions.

INTERNATIONAL CARTELS IN GERMANY.

The total number of cartels in Germany is estimated at present to be between four and five hundred, and the number of articles controlled by them about 400.* At present there are about a hundred international cartels, of which the German cartels form a part. These cover a few dozen chemicals, steel rails, tubes, rolling-mill products, steel billets, wire, wire nails, woven wire, needles, screws, enameled ware, zinc, lead, nickel, copper, aluminum, and manufactures of these metals, porcelain, plate glass, cement, kaolin, rubber goods, clay, leather goods, velvet, cloth for neckties, silk thread, schappe, mufflers, illustrated postal cards, moving-picture films, and a few other products. Most of the international cartels of Germany are with Austria and Belgium, the most conspicuous one with France is that of the Velvet and Plush Cartel of Germany, with headquarters at Krefeld, with a similar French syndicate with headquarters at Lyon, France.

CARTELS IN GERMANY.

TEXTILE INDUSTRY.

SILK INDUSTRY.

*German velvet ribbon pool. (Deutsche Samtbandkonvention.) Founded, 1904; reorganized, 1910. Headquarters, Krefeld. Control of market almost complete. Since January, 1911, arrangement with the association of velvet and silk-goods jobbers (Vereinigung der Samt- und Seidenwarengrosshaendler) as to amount of production they are allowed to buy from outsiders of the velvet ribbon pool. The jobbers are not allowed to buy from south German manufacturers (who are not members of the velvet ribbon pool, which consists of manufacturers concentrated on the lower Rhine) such varieties as are produced by the members of the pool.

*Association of German velvet and silk-plush manufacturers. (Verband deutscher Samt- und.) Founded, 1904, as association of velvet and silk-plush manufacturers of the lower Rhine. (Verband niederrheinischer Samt- und Plueschfabrikanten.) Reorganized, 1907, on a national scale. Headquarters, Krefeld. Membership, 1905, 31; 1911, 33 firms. Regulation of prices and distribution (regulation of exports included). Agreement with velvet and plush manufacturers in Lyon, France, as to division of German and French fields.

*Association of manufacturers of silk cloth of Germany. (Verband der Seidenstoffabrikanten Deutschlands.) Founded, 1905. Membership, 1911, over 70 firms (German producers and foreign branches producing in Germany). Control of market complete.

*Association of manufacturers of hat ribbons for ladies and gentlemen. (Vereinigung der Damen- und Herrenhutbandfabrikanten). Founded, 1906. Membership, 1911, 63 firms. Control of market. There are a few firms in south Germany which are not members of the cartel. But as they are big houses and maintain the same prices and conditions as the cartel it practically controls the market.

*Association of German manufacturers of umbrella silk cloth. (Vereinigung deutscher Schirmstoffabrikanten.) Founded, 1888; reorganized, 1905. Controls about 75 per cent of the market. Allied with the associations of floss dyers and silk finishers.

*Association of manufacturers of cloth for necktles. (Verband der Kravattenstoffabrikanten.) Founded 1903. Headquarters, Krefeld (the industry is concentrated on the lower Rhine). Controls the German market. Is allied with the cartel of necktie cloth manufacturers of Austria. Membership, over 40 firms.

*Association of necktie manufacturers. (Verband der Kravattenfabrikanten.) Since 1900 in alliance with the former cartel.

*Association of manufacturers of silk ribbon of Germany. (Verband der Seidenindustrie Deutschlands.)

*Association of manufacturers of ribbons of the upper Rhine. (Verband der oberrheinischen Bandfabrikanten.)

These two cartels are, since January, 1913, united under the same management, but maintain their distinct organization. The former cartel consists of the manufacturers of silk ribbons on the lower Rhine; the latter cartel consists of Swiss firms producing on German territory. Both cartels practically control the German market. They have an agreement (Kartellvertrag) with the association of jobbers in silks and silk ribbons (Vereinigung der deutschen Samt- und Seidenwaarengrosshaendler).

*Association of manufacturers of turquoise. (Verband der Turquoisefabrikanten.) Founded, 1907. Membership, 6 firms. Dominates the German market and, together with French, Austrian, and Italian manufacturers, the world market.

*General German Satin-pool. (Allgemeine deutsche Zauellakonvention.) Founded, 1895. Headquarters, Elberfeld. Membership, over 20 firms. Practically controls market.

*Pool of German and Swiss manufacturers of mufflers. Founded, 1907. Dominates German market in alliance with the association of manufacturers of cloth for neckties (Verband der Kravattenstoffabrikanten), see above. But has to meet French competition in Switzerland.

*Association of silk and half silk dyers. (Vereinigung der Stueckfaerbereien ganz- und halbseidener Gewebe.) Founded, 1911. Headquarters, Krefeld. Agreement with association of silk dyers and association for silk finishing. (Verband der Seidenfaerbereien und Stoffappretur-Vereinigung.) The agreement refers to rebates.

*Association of silk dyers. (Verband der Seidenfaerbereien.) Founded, 1906. Sixty-two members.

*Association for silk finishing. (Stoffappretur-Vereinigung.) Founded, 1904. Twenty-two members. Headquarters, Krefeld.

*Association for finishing of velvet. (Samtappretur-Vereinigung.) Founded, 1893. —— members. Headquarters, Krefeld.

*Association for finishing of Asiatic silks. (Vereinigung zur Ausruestung asiatischer Seidenstoffe.) Founded, 1904. Three firms. Headquarters, Krefeld.

*Pool of dyers of silk ribbons. (Bandfarb-Konvention.) Founded, 1895. Eleven members.

*Association of dyers. (Faerbereiverband.) Founded, 1901. Twelve members. Headquarters, Krefeld. Dyeing of floss.
*Association of pressers (of velvet and plush). (Pressereivereinigung.) Founded, 1904. Ten firms. Headquarters, Krefeld.

NOTE.—*Sources.*

H. v. Beckerath, Die Kartelle der deutschen Seidenweberei-Industrie. (Volkswirtschaftliche Abhandlungen der Bad. Hochschulen, Heft 2. Karlsruhe 19 1. p. 50 seq.)
Denkschrift ueber das Kartellwesen. Erster Teil. (Deutscher Reichstag, Aktenstuecke 4) XI. Legislaturperiode 1905–6, vol. 1–2.
Kartell-Rundschau (Zeitschrift fuer Kartellwesen und verwandte Gebiete) Duesseldorf.
* Verband der Schnittseidenbandfabrikanten. Founded 1907.

LACES AND EMBROIDERIES.

*Association of manufacturers of laces and embroidery. (Verkaufsvereinigung der Stickerei- und Spitzenfabrikanten.) Plauen i. V. Founded 1907.
*Association of Bergish manufacturers of "iron-yarn." (Verband Bergischer Eisengarnfabrikanten.) Founded 1907. This yarn is used for laces, etc.
* International association of the embroidery and lace industries. (Internationale Vereinigung der Stickerei und Spitzenindustrie.) This association, founded in Munich (Bavaria), in August, 1913, includes Saxony, Bohemia, Switzerland, and Vorarlberg (Austria).
* Pool of manufacturers of Plausen laces. (Konvention von Plauener Spitzenfabrikanten.) Includes 62 of the most important factories of lace in Plauen i. V. Founded 1912.
* There exists also a "Zentralverband der Schiffchenstickereifabrikanten" in St. Gallen (Switzerland), Association of Manufacturers of Machine-made Embroideries at St. Gall, Switzerland.

WOOL AND COTTON.

I. Cartels of spinners.

*Association of German jute manufacturers (ltd.) (Verband deutscher Juteindustrieller G. m. b. H.) Membership, 26 firms, extending over the whole of Germany; headquarters, Braunschweig; founded, 1905; form of organization, limited company (G. m. b. H.); purpose, regulation of conditions of production and distribution.
*Association of German spinners of colored worsteds. (Verein deutscher Kammgarn-Buntspinnereien.) Membership, 18 firms, extending over the whole of Germany; headquarters, Dresden; founded, 1905; form of organization, free association; purpose, maintenance of uniform prices and conditions of distribution for colored worsteds.
*Association of spinners of carded yarn of Saxony. (Verband saechsischer Streichgarnspinnereien.) Founded, 1913; membership, 30,000 spindles; minimum prices.

II. Cartels of weavers.

*Association of manufacturers of Jacquard-double-moquette. (Verband von Fabrikanten von Jacquard-doppel-moquette.) Headquarters, Chemnitz (Saxony); founded, 1903; membership, 9 firms; form of organization, members bound by agreement, extending over all countries except Austria-Hungary and the United States; purpose, maintenance of a minimum price for Jacquards. Competition is now confined to beauty and suitability of design and quality of product.
There are various cartels of a localized or specialized character like the following:
*Association of manufacturers of half woolen English goods. (Verband der fabrikanten halbwollener Englischer waren.)
*Association of German weavers of English curtains. (Verband Deutscher webereien Englischer gardinen.)

* Pool of the German wool combers. (Lohnkonvention der Deutschen Wollkaemmer.)
* (Konvention der Presidentfabrikanten.) Founded 1902. Headquarters, Berlin. Membership, 10 firms. Regulation of production and distribution. Covers the whole of Germany.
* Vereinigung der Webereibesitzer von Aachen Eupen und Umgegend. Association of cloth manufacturers of Aachen, Eupen, and vicinity. Founded 1902. Headquarters, Aachen. Membership, 24 firms. Minimum prices.
* German cleaning-waste syndicate. (Deutsche Putzwollsyndikat.) Founded 1911.
* Pool of upholstery manufacturers. (Konvention der Moebelstoffabrikanten.) Founded 1911.
* Association of manufacturers of gauze. (Verein der Verbandstoffabrikanten Deutschlands.) Includes two-thirds of the gauze factories in Germany. Regulates prices.
* Pool of German cloth manufacturers. (Deutsche Tuchkonvention.) Founded 1912. Regulates prices over the whole of Germany.
* Association of manufacturers of ladies' dress goods. (Verband der Fabrikanten von Damenkonfektions- und Kostuemstoffen.) Founded 1912. Membership, 1913, 153 firms. Controls the market.
* Association of cloth manufacturers of Chemnitz and vicinity. (Vereinigung der Stofffabrikanten zu Chemnitz und Umgebung.) Founded 1913. Regulation of prices.
* The association of manufacturers of half woolen (English) cloth (Verband der Fabrikanten halbwollener englischer Stoffe) and the association of manufacturers of men's clothing (Verband der Herren-Kleiderfabrikanten Deutschlands) have an agreement (Kartellvertrag), which stipulates mutual information on nonmember firms. Outsiders do not share the rebates and other advantages granted by this agreement to members of both associations.

HEMP, FLAX, LINEN.

* Association of German manufacturers of linen. (Verband deutscher Leinenindustrieller.) Founded 1912.
* Association of German hemp-spinning mills and twine factories. (Verband der deutschen Handspinnereien und Bindfadenfabrikanten.) Founded 1911.
* Association of the flax-spinning mills of Rhineland-Westfalia, Saxony, and Silesia. (Interessengemeinschaft der Verbaende der Rheinisch-Westfaelischen und der Saechsisch-Schlesischen Flachsspinnereien.) Founded 1911.
* International association of the flax and oakum spinning mills. (Internationale Vereinigung der Flachs- und Werg Spinnereien.) Founded 1909. Headquarters, Ghent (Belgium).

Various industries.

* Association of German manufacturers of straw- and felt hats. (Verband der deutschen Strohhut und Filzhutersteller.) Founded 1907.
* Association of fur manufacturers. (Verband der Pelzwarenfabrikanten.) Founded 1912. Includes also all fur manufacturers of Vienna (Austria).
* Pool of sealskin manufacturers. (Konvention der Sealskinfabrikanten.) Founded 1911. Headquarters, Krefeld.

Finishing industries.

* Association of singeing mills of Aachen, Burtscheid, and vicinity. (Verein der Karbonisieranstalten von Aachen, Burtscheid, und Umgebung.) Founded 1895. Eight members.
* Association of dyeing mills of Aachen and vicinity. (Verein der Stueckfaerberelen von Aachen und Umgebung.) Founded 1895. Ten members. Dyeing of cloth in piece.
* Association of dyeing mills of Apolda and vicinity. (Vereinigte Faerberelen von Apolda und Umgebung.) Founded 1901. Four members. Dyeing of woolen and cotton yarn.
* Association of dyeing works of the Wuppertal. (Stueckfaerberei-Verein des Wuppertales.) Founded 1895. Seven members. Dyeing in piece of woolen, cotton, and mixed cloth.

*Dyers' Association of the Wuppertal. (Wuppertaler Faerberei-Vereinigung.) Founded 1899. Headquarters, Barmen. Includes 26 of 32 firms in Elberfeld and Barmen. Dyeing and finishing of ribbons, yarns, braidings, and cords.

*Association of finishing mills in Saxony and Thuringia. (Konvention saechsisch-thueringischer Faerbereien und Appretur-Anstalten.) Includes Saxony and Thuringia. Founded 1894. Headquarters in Leipzig. Twenty-seven members. Dyeing and finishing of worsteds.

*Association of finishing mills of the Vogtland. (Verband vogtlaendischer Appreturanstalten.) Headquarters, Plauen i. V. Founded, 1899. Ten members. Dyeing, bleaching, finishing of gauze and linings.

*Association of dyers of woolen stockings of Chemnitz and vicinity. (Konvention von Wollstrumpffaerbereien von Chemnitz und Umgegend.) Founded, 1911.

*Association of finishing mills of Krefeld. (Krefelder Appreturanstalten.) Founded, 1909.

*Association of German finishing mills of cotton goods. (Verband deutscher Vereddungsanstalten fuer baumwollene Gewebe.) Headquarters, Leipzig.

Dyeing and finishing.

*Association of North-German finishing mills of cotton goods. (Landesverband norddeutscher Baumwollwarenausruester.)

*Association of finishing mills of cords. (Cord-Ausruester Vereinigung.) Headquarters, Krefeld-Muenchen-Gladbach.

*Association of manufacturers of printed moquette. (Verband der Druck-Moquette-Fabrikanten.) Chemnitz (headquarters). Founded, 1903. Seventeen firms, which include Germany, Holland, Belgium, Switzerland, and Luxemburg.

Various industries.

*Association of German manufacturers of furniture stuffings. (Vereinigte deutsche Polsterfliessfabrikanten.) Headquarters, Werdau i. Sa. Six members. Furniture stuffings and oakum. Founded, 1905. Includes Germany, Austria, Holland, Sweden, Norway, Denmark.

* Pool of manufacturers of shoe elastics. (Zentrale fuer Schuhelastikfabrikanten.) Founded, 1892. Nine members.

* Pool of manufacturers of lasting piece goods. (Konvention fuer Lastingstueckwaren.) Founded, 1900. Headquarters, Wermelskirchen. Eight firms. Woolen and halfwoolen lastings.

* United factories of lamp wicks. (Vereinigte Dochtfabriken.) Founded, 1898. Headquarters, Duesseldorf. Six firms. Cotton wick.

*Association of manufacturers of cotton and woolen braids of the Wuppertal. (Wuppertaler Riemendecker Verband.) Founded, 1890. Seventy members. Headquarters, Barmen.

* United industry of artificial flowers. (Vereinigte Staubfaeden- und Knospenindustrie.) Headquarters, Sebnitz (Saxony). Six firms. Founded, 1900.

*Association of fur dressers and dyers. (Verband vereinigte Rauchwarenzurichterei- und Faebereibesitzer.) Founded, 1899. Forty-nine firms. Headquarters, Leipzig.

CHEMICAL INDUSTRY.

1. SALTS, ACIDS, AND ALKALIS.

* Syndicate of German soda works. (Syndikat deutscher Sodafabriken.) Headquarters Bernburg. Extent of Cartel Germany. Membership 19 factories. Founded 1900. Regulation of distribution for domestic consumption and export.

* Potash syndicate (Kali Syndikat.) Founded 1889, reorganized 1898, 1904, and finally by the potash law of 1910, which made the potash syndicate a legal institution of which all potash mines have to become members. Amongst the members are the Governments of Prussia and Anhalt. As to the potash controversy between the United States of America and Germany, see especially H. R. Tosdal, "The kartell movement in the German potash industry." (Quarterly Journal of Economics, Cambridge, 1913, Vol. XXVIII,

p. 179 seq.) As to the regulation of prices by the cartel, the same author says:

(P. 186.) In its influence on prices the potash syndicate has differed somewhat from other kartells. Except for very short periods, export prices have been higher than domestic. Having a monopoly of the products, there has been no necessity for a resort of the "dumping" which has been a practice of the steel and coal kartelle. This has always proved an effective prosyndicate argument. Prices have certainly been steadied.

(P. 188.) The influence of the government mines has always been exerted in the direction of lower prices for domestic consumers. Most favored have been the large agricultural associations; in part, it is alleged, because of their political influence. The favoritism shown to these societies has led to many complaints from potash dealers.

(P. 189.) The membership of the Prussian Government has given the potash syndicate a charter distinct from other kartells. Far from being a passive member, the Government has always exerted a large influence upon syndicate policy. * * * It can not be seriously doubted that, had not the Prussian Government played the part it did, the syndicate would have gone to pieces.

* Chloride of magnesia pool. (Chlormagnesium-Konvention.) Founded 1870. Seven members. Headquarters Leopoldshall b. Strassfurt. Extends to all countries.
* German potash manufacturers' pool. (Konvention deutscher pottasche Fabrikanten.) Five firms. Not complete control of market.
* Association of producers of sulphuric acid of Rhineland and Westphalia. (Vereinigung rheinisch-westfaelischer Schwefelsaeure-Produzenten.) Founded 1888. Almost complete control of German market.
* Association of German salt works. (Deutsche Salinen-Vereinigung.)

This cartel covers by different subdivisions the whole of the German Empire and leaves only very few outsiders. Members of the cartel are eight German State governments: Prussia, Bavaria, Wurttemberg, Baden, Hessen, Braunschweig, Mecklenburg, Lippe.

* Syndicate of German rock-salt mines. (Ausschuss deutscher Steinsalzwerke.) Leopoldshall (Anhalt) eight members. Extent: North Germany.
* Association of North-German rock-salt mines. (Verband norddeutscher Steinsalzwerke.) Founded 1897. Two Members. Eastern Germany.
* Calcined sulphate of soda pool. (Konvention fuer kalziniertes Glaubersalz.) Bavaria, Middle and Eastern Germany. Six members. Founded 1890.
* Sulphate and hydrochloric acid syndicate of the lower Rhine. (Niederrheinisches Sulfat- und Salzsaeuresyndikat.) Coeln a. Rh. Founded 1905. Six members Rhineland and Westphalia.
* German Association for the Sale of Ammonia (Ltd.). (Deutsche Ammoniak Verkaufsvereinigung G. m. b. H.) Forty-seven members. Founded 1895. Rhineland and Westphalia.
* Association of German gas works. (Wirtschaftliche Vereinigung deutscher Gaswerke A. G.).

This is a cartel which consists of about 166—mostly municipal—gas works for the sale of coke and other by-products of the gas industry.

* Association of Thorium works. (Vereinigung der Thorium Fabrikanten.) Four works. No other information.

II. CHEMICAL COMPOUNDS.

* German bromide pool. (Deutsche Bromkonvention.) Founded 1870. The pool is managed by the "United chemical factories at Leopoldshall A. G." (Vereinigte Chemische Fabriken zu Leopoldshall-Stassfurt A. G.) It extends over the whole world. There exists also a "Bromate Pool" (Bromsalzkonvention) and a bromide of silver pool, founded 1912.
* Crude jodine syndicate. (Syndikat fuer Rohjod.) No information in Government report.
* Pool of the manufacturers of cyanide of potassium. (Konvention der Cyankalifabrikanten.)
* Pool of the manufacturers of potassium ferrocyanide. (Konvention der Kali-Blutlaugensalz-Fabrikanten.) Founded 1897. Covers the whole of the world. This and the former pool (manufacturers of cyanide of potassium) are represented by the "Gold- und Silberscheide-Anstalt vormals Roessler zu Frankfurt a. M."

* Association of manufacturers of salicylic acids and salicylate of soda. (Vereinigung von Fabrikanten zur Herstellung von Salizylsaeure und salizylsaurem Natron.) Four members. The cartel admits in the Government report that it influences in an effective way the world market.
* Pool of manufacturers of quinine and salts of quinine. (Konvention fuer Chinin und Chininsalze.) Agreement between the German and two foreign factories. Founded 1894. Extends over the whole world. Headquarters Frankfurt a. M.
* Pool of manufacturers of oxalic acid. Ltd. (Verkaufsstelle fuer Oxalsaeure G. m. b. H.) Founded 1903. Headquarters Oestrich (Rheingau.) Extends over the whole world.
* Association of manufacturers of copperas. (Vereinigung fuer Eisenvitriol.) Founded 1911.
* Syndicate of manufacturers of cream of tartaric acid. (Weinsteinsaeure Syndikat.) Founded 1911.
* International syndicate of manufacturers of ferro-chrome of iron. (Internationales Ferro-Chrom-Syndikat.) Founded 1912.
* International syndicate of manufacturers of carbonic acid. (Internationales Kohlensaeure Syndikat.) Headquarters Berlin. Founded 1912.
* International syndicate of manufacturers of carbide. (Internationales Karbid-Syndikat.) Founded 1909.

III. MINERAL AND PIGMENT COLORS.

* Pool of manufacturers of white lead. (Bleiweiss-Konvention.) Founded 1904. Thirteen members. All European States. There is also a special sales office of white lead (Bleiweiss-Verkaufs-Kontor) in existence, extending, with 17 members, over the whole of Europe.
* Pool of manufacturers of Lithopon-white. (Lithoponweiss-Konvention.) Founded 1901. Twelve members. Headquarters Schweinfurt. Extends over the whole of Germany and foreign countries.
* Pool of manufacturers of red vermillion of mercury. (Konvention von Fabrikanten roten Zinnobers.) Founded 1882. Headquarters Eisenach. Five members.
* Pool of manufacturers of stannic oxyde. Ltd. (Zinnoxyd-Comptoir.) G. m. b. H. Founded 1888. Headquarters Coeln a. Rh. Seven members. Extends to all countries with enamel works.

IV. DRY DISTILLERIES.

* Pool of manufacturers of wood alcohol. (Holzgeist-Konvention.) Only name of cartel, but no further information given in Government report.
* German association for the sale of tar. (Deutsche Teer-Verkaufs-Vereinigung.) Founded 1897. Headquarters Bochum. Rhineland and Westfalia. Thirty-five members.
* Association for the sale of benzol in western Germany (ltd.). (Westdeutsche Benzolverkaufsvereinigung) G. m. b. H. Founded 1898. Headquarters Bochum, Rhineland, and Westfalia. Twenty-five members.
* United factories of benzine. (Vereinigte Benzinfabriken.) Founded 1901. Headquarters, Bremen. Seventeen members. German market.
* Syndicate for the sale of paraffin oil. (Verkaufssyndikat fuer Paraffinoele.) Founded 1886. Headquarters, Halle a. S. Nine members. Extends to all markets.

V. ARTIFICIAL COLORS AND DYES.

* Alizarine pool. (Alizarin Konvention.) Founded 1900. Four members.
* Indigo pool. (Indigo Konvention.) Founded 1904. Two members.

The members of these two cartels are the largest factories in the chemical industry in Germany. The report of the German Government on cartels says that they either refused to disclose the stipulations of their agreement by saying that they had not by-laws or by saying that these agreements were confidential.

VI. ARTIFICIAL FERTILIZERS.

* Factories of superphosphate (ltd.). (Superphosphatfabriken G. m. b. H.) Headquarters, Hannover. Twenty-two members. Agreements (Kartellvertraege) with 18 other factories. Founded 1904. Extends over the whole of Germany and to foreign countries.

*Association of German manufacturers of fertilizers—Group Silesia-Posen. (Gruppe Schlesien-Posen des Vereins deutscher Duengerfabrikanten.) Founded 1896. Headquarters, Berlin. Eleven members.
*Factories of superphosphate of the Rhineland (ltd.). (Rheinsche Superphosphatfabriken G. m. b. H.) Founded 1905. Cologne (headquarters). Six members. North Germany.
*Pool of south German manufacturers of fertilizers. (Sueddeutsche Duengerkonvention) Founded 1896. Covers south Germany. Fifteen members.
*United manufacturers of fertilizer in Schleswig-Holstein-Mecklenburg (ltd.). (Vereinigte Duengerfabriken Schleswig-Holstein-Mechlenburg G. m. b. H.) Headquarters, Hamburg. Founded 1899. Covers the northwest of Germany.
*Manufacturers of superphosphate in Westfalia and Lippe. (Superphosphatfabriken in Westfalen und Lippe.) Group of manufacturers of fertilizers in the Kingdom of Saxony (ltd.). *Duengergruppe Koenigreich Sachse.) Founded 1899. Freiberg i. Sa. G. m. b. H.
*German fertilizer works Magdeburg (ltd.). Deutsche Duengerwerke Magdeburg G. m. b. H. Covers the middle of Germany.
*Association of manufacturers of Thomasphosphate. (Verein der Thomasphosphatfabriken.) Headquarters, Berlin. Twelve members. Covers Germany, France, England, Belgium, and Russia. Granted export bounties formerly.
*Association for the sale of nitrogenous fertilizers (ltd.). (Verkaufsvereinigung fuer Stickstoffduenger G. m. b. H.) Founded 1908. Headquarters, Berlin.

VII. EXPLOSIVES.

*Southwest German powder syndicate. (Suedwestdeutsches Pulversyndikat.) Founded 1889. Covers southwest of Germany. Three members.
*Pool of German and Austrian manufacturers of ammunition. (Deutsch-Oesterreichische Munitionskonvention.) Covers Austria-Hungary and the German Customs Union. Founded 1903.
*Pool of manufacturers of powder for sporting purposes. (Jagdpulver Konvention.) Six members. Covers Germany.
*Pool of German manufacturers of dynamite. (Deutsche Dynamit Konvention.) Twelve members. No further particulars given.

VIII. FATS AND OILS.

*Association of German manufacturers of stearine candles. (Vereinigung der Stearin-Kerzen-Fabrikanten von Deutschland.) Neuss a. Rh. (headquarters), extends over the whole of Germany. Founded 1899.
*Association of 'erman petroleum producers. (Vereinigung deutscher Petroleum Interessenten.) Founded 1912. Headquarters, Berlin.
*International committee for the protection of the interests of the European oil industry. (Internationales Kmite zur Wahrung der Interessen der europaelschen Oelindustrie.) Brussels, Belgium. Founded 1912.
*Petroleum syndicate of Germany and western Galicia. (Deutsch-Westgalizisches Petroleumsyndikat.) Founded 1909.
*Pool of manufacturers of matches. (Preiskonvention der Zuendholzindustrie.) Founded 1912. A syndicate of manufacturers of matches has been founded and dissolved in 1910.

FOODSTUFFS, ETC.

I. SPIRIT.

*Industrial Spirit Syndicate. (Zentrale fuer Spiritus Verwertung.) Headquarters, Berlin. Founded 1899. Controls the German production of industrial alcohol, alcohol for consumption, also vinegar. The agreements of the syndicate cover exports.

II. STARCH.

*German association for the sale of starch in Berlin. (Deutsche Staerke-Verkaufsgeselischaft Berlin G. m. b. H.) Founded 1901. Controls the north German market. Seventy-nine members.

III. SUGAR.

There exist various sugar syndicates of local importance. Many of the cartels named in the Government report of 1905 have been dissolved. There are, however, new formations.

IV. BEER.

The same observation applies to the cartels formed in the production of beer.

V. VARIOUS INDUSTRIES.

There are cartels of dried vegetables, milk, rice, yeast, high-grade liqueurs, and also various syndicates in the milling industry.

COAL INDUSTRY.

Coal syndicate of Rhineland and Westfalia. (Rheinisch-Westfaelisches Kohlensyndikat.) Headquarters, Essen-Ruhr. Founded 1893. Membership: 1905, 87 mines, with a combined yearly output of 75.5 million metric tons of coal; 1911, 68 mines, with a combined yearly output of 78.2 million metric tons of coal. The yearly output of the syndicate reached in 1910 almost 60 per cent of the whole output of coal in Germany. This is the most important cartel in the German coal-mining industry. Besides the coal syndicate of Rhineland and Westfalia, there exist two coal syndicates in Silesia and Saxony. There are, furthermore, various syndicates in the lignite industry of lesser importance.

The Prussian Government made different attempts to enter the coal syndicate of Rhineland and Westfalia, which proved unsuccessful. There have been also rumors that the Prussian Government planned an organization of this coal cartel by legislation similar to the potash law. But so far this plan has not been realized.

There are also various cartels of coal dealers.

EARTHENWARE, CHINA, PORCELAIN.

United earthenware factories of Bonn (ltd.). (Vereinigte Steingutfabriken Bonn G. m. b. H.) Founded 1905. Seventeen members.

Earthenware works of Rhineland. (Rheinische Steinzeugwerke.) Cologne (headquarters). Seventeen members. Organized 1902.

United earthenware manufacturers of the Oberlausitz. (Vereinigte Oberlausitzer Tonwarenfabrikanten.) Founded 1900. Silesia. Eleven members.

Association of earthenware manufacturers of Saxony and Thuringia. (Verkaufsvereinigung saechsisch-thueringischer Tonondustriellen.)

Association of German manufacturers of tile stoves. (Verband deutscher Kachelofenfabrikanten.)

Association of German manufacturers of porcelain (ltd.). (Vereinigung deutscher Porzellanfabriken G. m. b. H.) Headquarters, Berlin. Founded 1900. Sixty-six members.

International cartel of the porcelain, beads, and button industries. (Internationales Kartell der Porzellan, Perlen, und Knopfindustrie.) Founded 1909.

Cartel of kaolin works of central Europe. (Kartell mitteleuropaeischer Kaolinwerke.) Founded 1907.

Association of manufacturers of fireproof products. (Vereinigung von Herstellern feuerfester Produkte.) Organized 1906.

Association of manufacturers of earthenware in Bavaria. (Bayerischer Tonindustrieverband.) Organized 1906.

Syndicate of clay sewer pipes. (Steinzeugroehrensyndikat.) Headquarters, Cologne. Organized 1911.

BRICK, STONE, CLAY, AND CEMENT.

I. BRICK INDUSTRY.

* Association of German syndicates for the sale of bricks. (Verband der deutchen Ziegelverkaufsvereinigungen.) Founded 1913. Consists of 80 cartels of local character; 132 cartels (of more or less local character) are mentioned in the German Government report on cartels in the brick industry in 1905.

II. CEMENT.

*Cement syndicate of Rhineland and Westfalia. (Rheinisch-Westfaelisches Zementsyndikat.) Founded 1913. Includes 36 of 51 works. Controls production in Rhineland and Westfalia.
*Portland Cement Syndicate of Northwestern and Middle Germany. (Aktiengesellschaft Nordwest-Mitteldeutsches Portland Zement Syn. Founded 1900. Includes 59 firms in Germany and Holland. Headquarters Hannover.
*Association of Portland cement works in Silesia. (Verband Schlesischer Portland Zement Fabriken.) Founded 1893. Headquarters Oppeln. Eight firms. The cartel includes exports amongst its activities.

Besides these are some minor cartels in the German cement industry, mostly of local importance.

III. STONE AND LIMESTONE.

*Association of South-German limekilns (ltd.). (Verband Sueddeutscher Kalkwerke G. m. b. H.) Founded 1003. Headquarters Bruchsal (Baden). Includes 17 firms in southern Germany.
*Association of Westfalian limekilns (ltd.). (Westfaelischer Kalkverein G. m. b. H.) Founded 1911. Headquarters Nuernberg.

Besides these there are still various other cartels in the lime industry, of local importance only. The same may be said of the stone industry, where a cartel covering the whole of the industry has been planned but not yet realized.

Amongst the more important cartels in the stone industry may be mentioned:

*Association of German granite works. (Verband deutscher Granitwerke.) Founded 1913. Agreement with the Scandinavian granite cartel.
*Syndicate of plaster of Paris works. (Syndikat der Gipswerke.)

PAPER INDUSTRY.

New syndicate of colored postal card manufacturers. (Neue Chrompostkartenkonvention.) Founded 1913.
Association of German manufacturers of printing paper. (Verband deutscher Druckpapierfabrikanten.) Founded 1900. Thirty-three members.
Association of pulp manufacturers of Silesia. (Verband schlesicher Holzstofffabrikanten.) Hirschberg (Silesia). Founded 1894. Sixteen members.
Association of south German manufacturers of pulp. (Verband sueddeutscher Holzstofffabrikanten.) Headquarters Munich. Thirty-four members. Founded 1908.
Association of German manufacturers of envelopes. (Verein deutscher Briefumschlagfabrikanten.) Founded 1900. Twenty members.
Association of manufacturers of paper free from wood pulp. (Verband der Fabrikanten holzfreier Papiere.) Headquarters Berlin. Founded 1912.
Association of manufacturers of paper boxes. (Verband der Faltschachtelfabrikanten.) Headquarters Berlin. Founded 1904.
Syndicate of German manufacturers of paper boxes. (Zentralverband deutscher Kartonnagenfabrikanten.) Headquarters Nuernberg. Founded 1908.
Association of German manufacturers of paper bags and paper goods. (Verband deutscher Tueten- und Papierwarenfabrikanten.) Headquarters Solingen. Founded 1911.
Pool of south German manufacturers of paper bags. (Preiskonvention sueddeutscher Tuetenfabrikanten.) Headquarters Karsruhe. Founded 1911.
Association of German manufacturers of wall paper. (Verein deutscher Tapetenfabrikanten.) Headquarters Chemnitz (Saxony). Forty-three members in Germany, four in Austria. Founded 1890.
Wall-paper industry syndicate (ltd.). (Tapetenindustrie A. G.) Altona-Ottensen. Founded 1908.

GRAPHIC ARTS.

*Association of chemicographic works in Germany. (Bund der chemigraphischen Anstalten Deutschlands.) Berlin. Founded 1913.
*Syndicate of manufacturers of bromsilver cards. (Bromsilberkarten Konvention.) Leipzig. Founded 1909.

* Association of manufacturers of chromolithographic postal cards (ltd.). (Vereinigung chromolithographischer Postkartenfabriken.)
* Syndicate of photographic paper. (Photopapierverband.) Berlin. Founded 1911.
* Association of German and Austrian graphic works. (Verband der deutschen und oesterreichischen Reproduktionsanstalten.) Founded 1907. Photographic postal cards.

Glass Industry.

* Crude glass syndicate of Rhineland-Westfalia. (Rheinisch-westfaelisches Rohglassyndikat.)
* Association of German manufacturers of mirror glass (ltd.). (Verein deutscher Spiegelglasfabrikanten) G. m. b. H. Cologne. Seven members. Founded 1894.
* Cut glass syndicate (ltd.). (Facette Glas Convention G. m b. H.) Headquarters Fuerth (Bavaria). Six members. Founded 1899.
* Association of manufacturers of white hollow glass in Western Germany (ltd.). (Vereinigung westdeutscher Hohglasfabrikanten) G. m. b. H. Bonn (Headquarters). Eight members. Founded 1904.
* Association of plate glass furnaces in Rhineland and Westfalia (ltd.). (Verein der rheinisch-westfaelischen Tafelglashuetten G. m. b. H.) Bonn (Headquarters). Two members. Founded 1902.
* Syndicate of German manufacturers of glass marbles. (Syndikat deutscher Glasmaerbelfabrikanten.) Coburg (Thuringia). Nine members. Founded 1904.
* International Association of manufacturers of mirror glass. (Internationaler Spiegelglasverband.) Founded 1908.
* Association of German lamp-glass furnaces. (Verband deutscher Beleuchtungsglashuetten.) Dresden. Founded 1908.
* Association of German pressed glass furnaces (ltd.). (Vereinigung der deutschen Pressglashuettenwerke G. m. b. H.) Dresden. Founded 1908.
* Syndicate of plate glass manufacturers in Saxony. (Verkaufssyndikat der saeschsischen Tafelglasindustriellen.) Dresden. Founded 1907.
* United bottle furnaces (ltd.). Vereinigte Flaschenhuetten G. m. b. H.) Saarbruecken. Three members. Founded 1904.
* United manufacturers of watch glass (ltd.). (Vereinigte Uhrglasfabriken G. m. b. H.) Straussburg (Alsace). Four members; includes France. Founded 1904.

United manufacturers of glass stoppers. (Vereinigung der Flaschenverschluss-Fabrikanten.) Berlin. Twelve members. Founded 1892, reorganized 1905.

* Association of German manufacturers of stained glass. (Verband deutscher Glasmalereien.) Founded 1906.
* Association of German manufacturers of bottles. (Verband deutscher Flaschenfabriken.)
* European Syndicate of manufacturers of bottles (ltd.). (Europaeischer Verband der Flaschenfabriken G. m. b. H.) Founded 1907. Berlin.
* Syndicate of German champagne bottle furnaces (ltd.). Verband deutscher Champagnerflaschenhuetten G. m. b. H.) Stuttgart. Founded 1907.
* Association of manufacturers of window glass. (Vereinigung deutscher Fensterglasfabrikanten.) Bonn. Founded 1907.

Leather and Rubber.

I. Leather.

* Association of German horsehide-leather manufacturers. (Vereinigung deutscher Rosslederfabrikanten.) Founded 1904. Thirty-one members.
* Association of syndicates of German tanners. (Verband deutscher Haeutevereinigungen.) Leipzig.
* Association of German manufacturers of leather goods and traveling necessities. (Verband deutscher Lederwaren- und Reiseartikel Industrieller.) Founded 1907.
* Leather Jobbers Syndicate. (Lederhaendler Konvention.) Founded 1913.

II. Rubber.

* Syndicate of manufacturers of rubber dolls. (Gummipuppen Konvention.) Berlin. Four members. Founded 1904.

* Syndicate of manufacturers of rubber balls. (Ball Konvention.) Harburg a. Elbe. Seven members. Founded 1893.
* German syndicate of jobbers in rubber balls. (Deutsche Ball Konvention fuer Grosshaendler.) Harburg a. Elbe. Fifteen members. Founded 1901.
* German rubber-shoe syndicate. (Deutsche Gummishuh Konvention.) Founded 1900.
* Association of manufacturers of rubber coats. (Vereinigung der Gummimantelfabrikanten.) Hamburg. Founded 1910.
* Syndicate of German manufacturers of rubber cloth. (Verband deutscher Gummi-Webwaren Industrieller.) Barmen. Founded 1913.

Iron Industry.

I. IRON ORE, ETC.

* Ore mines syndicate. (Erzgrubenverband.) Founded 1906. Cologne. Yearly output about 150,000 tons of copper, 300,000 tons of lead, 500,000 tons of zinc, 4,000,000 tons of iron ore.
* Syndicate for sale of hematite ore in Siegerland. Founded 1894. Thirty-five firms. Headquarters Siegen.

II. PIG IRON.

* Syndicate of German furnaces. Organized 1910 (the former pig-iron syndicate was dissolved in 1908). Headquarters Essen-Ruhr.

III. CAST STEEL, CAST AND WROUGHT IRON.

* Steel syndicate (ltd.). (Stahlwerksverband A. G.) Headquarters Duesseldorf. Founded 1890. Reorganized 1904. Combined recently with the Oberschlesischer Stahlwerksverband. Steel syndicate of upper Silesia. (Founded 1895.) Grants export premiums.
* Syndicate of German manufacturers of wheels and axles. (Verein deutscher Radsatzwerke.) Headquarters Duesseldorf. Organized 1888. Nineteen members.
* Association of German tire rolling mills. (Verein deutscher Radreifenwalzwerke.) Duesseldorf. Organized 1888.
* Syndicate of manufacturers of center supports for rails. (Drehstuhl Gemeinschaft.) Eschweiler. Organized 1888.
* Syndicate of manufacturers of slide chairs for rails. (Gleitstuhl Gemeinschaft.) Plettenburg (Westfalia).
* Association of wrought-iron mills of Rhineland-Westfalia. (Vereinigung der Rheinish-Westfaelischen Schweisseisenwerke.) Hagen (Westfalia). Organized 1897.
* Association of band iron rolling mills in Rhineland-Westfalia. (Vereinigung Rheinisch-Westfaelischer Bandeisenwalzwerke.) Organized, 1890.

IV. SHEETS AND PLATES.

* Syndicate of manufacturers of shipbuilding steel. (Schiffbaustahl-Vereinigung.) Essen-Ruhr. Organized, 1897.
* Black plate syndicate. Schwarzblechvereinigung. Cologne. Organized, 1902.
* White plate syndicate. Weissblech-Verkaufskontor. Cologne. Organized, 1892.
* Association of manufacturers of pickled iron sheets. Verband der Fabrikanten gebeizter Eisenbleche. Hagen (Westfalia). Organized, 1892.
* Nickel-Steel Armor Plate Combine.
* Association of manufacturers of thick sheet iron of Upper Silesia. (Oberschlesischer Grobblechverband.) Berlin.
* Association of manufacturers of tin cans in Braunschweig. (Verein braunschweigischer Blechdosenfabrikanten.) Braunschweig. Organized, 1893.
* Association of German manufacturers of tin boxes. (Vereinigung deutscher Blechemballagefabrikanten.) Organized, 1913.

V. WIRE.

* Syndicate of German wire rolling mills. Verband deutscher Drahtwalzwerke. Berlin. Organized, 1901.
* Association of German manufacturers of wire netting (sales office). (Verkaufsstelle des Vereins deutscher Drahtgeflecht-Fabrikanten.)

* Association of manufacturers of wire goods. (Verein der Drahtwarenfabrikanten.) Hagen (Westfalia). Organized, 1903.
* Syndicate of manufacturers of cables in Rhineland-Westfalia. (Syndikat der saemtlichen Drahtseilfabrikanten des rheinisch-westfaelischen Bezirks.) Organized, 1909.
* Association of German cold rolling mills. (Verband deutscher Kaltwalzwerke.) Hagen (Westfalia). Organized, 1908.
* Syndicate of anvil works. (Verband der Amboswerke.) Organized, 1908.

VI. TUBES AND PIPES.

* The Government report of 1905 gives a list of cartels in the German tube industry. The more important ones of these dissolved, however, in the meantime and attempts of reorganization proved hitherto unsuccessful. Amongst the existing cartels in this industry may be mentioned:
* Syndicate of manufacturers of corrugated flue tubes. (Wellrohrverband.) Essen-Ruhr. Organized, 1909.
* Sewer pipe syndicate. (Abflussrohr Syndikat.) Organized, 1909.
* Sales office of ribbed pipes. (Deutsche Rippenrohr-Verkaufsstelle.) Organized, 1910.
* Association of manufacturers of cast pipes. (Deutscher Gussroehren-Verband.) Organized, 1911.
* International agreement of pipe rolling mills. (Internationales Abkommen der Roehrenfabrikanten.) (1907.)
* Bar iron syndicate. (Stabeisenkonvention.) (1909.)

VII. HARDWARE, ETC.

* Association of German stove manufacturers. (Verband deutscher Herdfabrikanten.) (1912.)
* Syndicate of manufacturers of vises. (1907.) Hagen (Westfalia).
* Association of German spring steel works. (Verband deutscher Federstahlwerke.) Organized 1902. Hagen (Westfalia) spring steel for corsets, etc. Exports also.
* Association of enamel works in western Germany. (Verband westdeuscher Emaillierwerke.) Organized 1913.
* Association of enamel works in central Europe. (Verein mitteleuropaeischer Emaillierwerke.) Organized 1907. (Includes enamel works in Germany, France, Italy, Austria-Hungary.)
* Association of manufacturers of tools, hardware, domestic and kitchen utensils. (Verband der deutschen Werkzeug Eisenwaren- Haus- und Kuechengeraetefabrikanten.) Organized 1909. Remscheld.
* Association of German manufacturers of steel bottles. (Verein duetscher Stahlflaschenfabrikanten.) Duesseldorf.
* Sales office of gas pipes Duesseldorf. (Gasrohrverkaufsselle Duesseldorf.)
* Association of German brass works. (Wirtschaftliche Vereinigung deutscher Messingwerke.) Organized 1913. Includes 90 per cent of all German brass works.
* International lead syndicate. (Internationale Bleikonvention.) Organized 1909.
* Association of lead pipe works. (Bleiroehrenverband.) Organized 1901. (Organized 1913.)
* Export association of German zinc works. (Ausfuhr-Vereinigung deutscher Verzinkereien.) Organized 1910.
* Aluminum syndicate. (Aluminium syndikat.) Organized 1910.
* c International association of zinc works. (Internationaler Zinkhuettenverband.) Organized 1910.
* Sales office of the united zinc rolling mills of Silesia. (Verkaufsstelle der Vereinigten schlesischen Zinkwalzwerke.) Berlin. Organized 1904.
* Association of manufacturers of tin foil. (Verband der Zinnfolienfabrikanten.) Berlin. Organized 1899.
* Sales office of the Copper Plate Association (Ld.). (Verkaufsstelle des Kupferblech Verbandes G. m. b. H.) Organized 1904. Kassel. '28 members.
* Sales offices of the German Copper Wire Syndicate (Ld.) (Verkaufsstelle des deutchen Kupferdraht-Verbands G. m. b. H.) Organized 1901. Cologne.

Sales office of the German Copper-pipe Association (Ld.) (Verkaufsstelle des deutchen Kupferrohrverbandes G. m. b. H.) Organized 1904. Cologne.

Clock and Watch Industry.

JEWELRY.

- Clock-hand syndicate. (Zeiger Konvention.) Organized 1902. Villingen (Baden).
- Association of manufacturers of watch chains. (Vereinigte Kettenfabrikanten.) Organized 1905. Pforzheim (Baden). Includes Germany, Switzerland, and the Scandinavian States.
- Association of German manufacturers of silverware. (Verein deutscher Silberwarenfabrikanten.) Organized 1905. Berlin.
- Pool of manufacturers of Gablonzer jewelry. (Preiskonvention der Fabriken Gablonzer Artikel). Organized 1907.

VARIOUS INDUSTRIES.

- German asbestos syndicate. (Deutsches Asbest Syndikat.) Dresden. Organized 1905.
- Sales office of the united manufacturers of electric lamps. (Verkaufsstelle der vereinigten Gluehlampenfabriken G. m. b. H.) Berlin. Organized 1903.
- Sales office of the united linseed oil mills of the Lower Rhine. (Verkaufsstelle der vereinigten niederrheinischen Leinoelmuehlen Krefeld. Organized 1900.

Note.

- Prof. Robert Liefmann, "Kartelle und Trusts," Stuttgart, 1910, p. 29.

Exports from Germany to United States, 1912.

Exports from Germany to the United States in 1912, compiled from official German sources (Auswartiges Handel des Deutschen Reiches). Products of industries wholly or largely controlled by syndicates in Germany.]

Article.	Quantity, hundreds of kilograms (100 kilos=220 pounds).	Value, marks (1 mark=24 cents).
Manufactures of cottons	11,915,300	58,735,000
Upholstery cloth	28,100	207,000
Plush and velvet	278,100	2,512,000
Felt	700	2,000
Nets for curtains	1,800	13,000
Tulle	800	22,000
Cotton cloth	1,068,800	5,024,000
Manufactures of wool	853,400	8,600,000
Upholstery cloth and curtains	1,600	74,000
Plush and velvet	19,003	157,000
Woolen cloth	653,500	6,628,000
Embroideries	100	1,000
Manufactures of silk	2,138,000	30,700,000
Upholstering plush and velvet, partly silk	1,300	88,000
Plush velvet ribbons, all silk	249	33,000
Other plush and velvet, all silk	5,467	265,000
Plush and velvet ribbons, partly silk	5,400	207,000
Other plush and velvet, partly silk	83,500	1,165,000
Ribbons, all silk	16,436	1,008,000
Other cloth, all silk	9,535	321,000
Ribbons, partly silk	57,700	1,033,000
Other cloth, partly silk	475,410	7,272,000
Tulle	157	7,000
Nets	100	2,000
Embroideries	20,385	722,000
Laces	10,124	395,000
Trimmings	1,139,000	13,478,000
Buttons	20,600	290,000
Manufactures of hemp and flax	3,028,500	9,967,000
Handkerchiefs	600	9,000
Upholstering	900	7,000
Plush and velvet	2,000	10,000
Other cloth (flax)	370,500	1,815,000
Other cloth (hemp)	1,700	15,000
Damask	274,000	164,400
Jacquard and otherwise figured cloth	925,500	4,637,000
Embroideries	78,319	1,058,000
Button cloth	14,400	28,000
Other material, not specified	1,100	34,000
Bookbinders' cloth	38,200	91,000
Waterproof cloth	14,400	37,000
Rugs (linoleum)	2,623,900	1,621,000
Carpets (linoleum)	239,300	135,000
Hat cloth	1,900	61,000
Products of the chemical industry	1,187,019,100	146,461,000
Salts, acids, and similar chemical compounds	1,121,977,100	87,110,000
Colors	29,119,000	42,430,000
Varnish	252,400	272,000
Alcohol, ether, artificial perfume, and cosmetics	382,400	2,481,000
Fertilizers	28,707,700	2,615,000
Explosives	399,100	1,099,000
Chemical and pharmaceutical articles	3,330,800	10,451,000
Leather	432,100	6,417,000
Manufactures of leather	345,900	11,956,000
Furs and skins	391,800	10,034,000
Manufactures of rubber (soft)	205,100	1,265,000
Manufactures of rubber (hard)	70,000	639,000
Manufactures of wood	795,800	1,356,000
Manufactures of cork	40,500	749,000
Manufactures of wood, cork, and animal products	5,205,700	6,815,000
Paper and manufactures of paper	56,575,900	23,129,000
Manufactures of stone, minerals, etc	1,763,300	2,117,000

Exports from Germany to United States, 1912—Continued.

Article.	Quantity, hundreds of kilograms (100 kilos=220 pounds).	Value, marks (1 mark=24 cents).
Pottery	21,372,500	18,139,000
Glass and manufactures of glass	7,038,400	9,213,000
Iron and manufactures of iron	33,133,800	20,901,000
Aluminum and manufactures of aluminum	134,500	434,000
Lead and manufactures of lead	149,500	192,000
Zinc and manufactures of zinc	651,800	559,000
Tin and manufactures of tin	1,930,600	6,926,000
Nickel and manufactures of nickel	44,600	191,000
Copper and manufactures of copper	1,355,000	4,667,000
Other metals and manufactures of other metals	393,000	4,394,000
Machinery	9,673,500	17,405,000
Electrotechnical implements	217,200	1,543,000

TRUSTS AND SYNDICATES IN FRANCE.

Trust organization has not attracted as much attention in France as in Germany or the United States, but nevertheless it has developed very widely there and has had a long period of growth.

The iron industry is especially well syndicated. There are many organizations among the foundries of special districts, such as the Northern Foundry Syndicate, the Iron Rail Cartell, and

Syndicate of Longwy (real name, Comptoir Metallurgique (cast iron) de Longwy).—This syndicate is one of the best known in France. Founded 1876 it included then 4 establishments, with 11 furnaces. Its aim was to struggle against the importation of foreign cast iron, to reduce expenses of sale, to study technical improvements in the industry, to make agreements for the purchase of fuel, and to seek every means for widening the market and increasing the prosperity of the Lorraine establishment by improving the well-being of the work people. In 1879 it added to itself the Metallurgique Society of the upper Moselle, and from time to time other establishments were added, until in 1905, at the renewal of contracts, 40 establishments were included in the agreement, practically all large furnaces of the Moselle region. The syndicate is of that type which conducts a central bureau of sale, and limits both production and sale on the part of individual companies. The syndicate controls about one-seventh of the cast-iron industry of France.

Iron Rail Syndicate.—Organized in 1896 this syndicate is the next most powerful after that of Longwy. Its purpose is to control the entire market, especially to protect the less favorably situated establishments of the center and south of France. Its policy is a delimitation of territory and regulation of sale. The territory of sale is divided into two zones, and the sales of companies within these zones are restricted therein on penalty of increased price, but within each zone free competition is left. The syndicate included 20 establishments in 1909. There were only 7 important outsiders, although some of these were large. Even thus the syndicate had an important effect on the industry. The object of the syndicate is expressed as "the purchase and sale on commission, in France and other countries, of iron and steel bars, beams," etc. The principle of common sale is pursued. Later a special syndicate was formed to specialize on foreign sales.

The Sugar Refining Syndicate.—This was the result of protective legislation. The terms are not exactly known, but probably included a policy of price fixing and the allotment of shares of production to the constituent companies. Recently the syndicate disappeared, in view of the Brussels convention. The French syndicate suffered from a too rapid increase of capitalization, on account of which many of the refiners had to shut down or turn to distilling.

Petroleum syndicate.—Organized, 1885, by combination of three large firms, it controlled the exclusive sale in France of the American Standard Oil Co., and had also a monopoly of the sale of Russian oil. France was divided into four zones of sale, and the prices for each zone were definitely determined to repress competition and ruin independence. A rate war ensued. There is still some competition from the Societe Industrielle des Petroles.

Chemical industry—Establishment of St. Gobain.—This syndicate is the foremost manufacturing center of the world for plate glass and chemical products. It includes 30 establishments, of which 22 are in France and 3 in Germany.

Plate glass.—For the manufacture of plate and other glasses it has an understanding with three other houses—the Glass Co. of Jeumont, the Glass Co. of Aniche, and that of Boussons sur Sambre. The syndicate conducts a general bureau of sale with four distinct offices.

The chemical trusts.—The chemical industry is universally syndicated in France. The manufacturers of iodine combined very early to buy raw material at a common price. Provincial syndicates were bound together in a general syndicate which controls the world market. There are also syndicates of alum, white lead, chemical fats, acids, and other products. Arrangements exist for the sharing of markets. A syndicate has also regulated the relations between the manufacturers of candles and of stearine for several years. The aluminum syndicate has become international; dissolved in 1908 it was reorganized in 1912, and now includes French, Swiss, English, and Canadian interests.

The coal trust of the north.—The French coal industry is concentrated in the district of the "Nord," the north of France. Two-thirds of all the coal mined in France is produced in this district. In 1908 a production of 24,000,000 tons was shared among 24 miners' companies in this district, of these the 9 most important produce about 20,000,000 tons. Founded in 1901 for one year, it was then continued to 1914. In 1908 the outside companies had a production of 8,000,000 tons, the members of the cartel twice as much—that is, the cartel controlled 67 per cent of the output. Furthermore, the independent companies follow the price of the cartel. The aim of the syndicate was to assure the regulation of production. To this end it established bounties on exportation in times of overproduction, and assigned to each company a proportion of the total sale.

Paper Association of Limousin.—This was founded in 1899 by the amalgamation of 7 paper mills, to which were shortly added 8 more. It controls 80 per cent of the paper production of the region, has been able to effect a slight increase of price, an increase in the specialization of labor, and a decrease in the cost of production.

The Western Salt Trust.—This syndicate was the result of fierce competition among a large number of comparatively small proprietors. Founded in 1901, with its headquarters at La Rochelle, with a variable capital and membership, it aims to concentrate the sale of salt of the western sale district and to keep level prices and wages. Each member sells all salt produced to the syndicate. A minimum price is established and production is limited. By these means the price was quickly forced up from Frs. 5.00 to Frs. 25.00 per ton and maintained even during overproduction. In 1907 the Western Salt Society was founded to back the syndicate financially.

The Rubber Trust (Chambre Syndicale Francaise du Caoutchouc).—This syndicate was founded in 1883, and included nearly all the manufacturers of india rubber, gutta-percha, oilcloths, imitation leather, etc. In 1885 it was reorganized, after the law of associations of 1884. It is interested in tariff revision, treaties of commerce customs, and international postage conventions.

TEXTILE SYNDICATES.

Cotton Spinning Cartels.—These have made their policy regulation of production by means of bounties on exports in times of overproduction, maintenance of price, and the limitation of production. In this policy they were especially successful in the period 1899–1907. In 1899 the French cotton-spinning committee was formed to remedy the depression resulting from the heavy stocks of 1899, and reorganized for the same purpose in 1905. In its attempt to reduce production the trust was not always successful, on account of the opposition of the manufacturers. In such cases restriction could only be encouraged by penalties for production over the maximum. The policy of bounties on exportation proved more efficacious, as is shown by the sudden increase of exports, in 1899, in the accompanying table:

	Kilograms.
1898	[illegible]
1899	2,196,000
1900	1,659,000
1901	1,282,000

In the cotton famine of 1904, caused by the action of American speculators, the trust seems to have been successful in restricting production and keeping prices at a level.

A similar cartell exists in the linen industry. It was founded in 1887; reorganized in 1899. It followed the same policy as the cotton-spinning industry.

There is also a powerful cartel in the silk industry.

Dyers' Trust.—The so-called Dyeing Trust of Thaon occupies a strong position in the finishing, dyeing, bleaching, and printing and exercises an effective restraint on competing firms. It was formed by the amalgamation of two large firms—that of Thaon-Givars and of Notre Dame de Bondeville—with a combined capital of 4,000,000 francs.

CONCLUSION.

These examples illustrate the strong tendency toward the development of cartels which exists in France to-day. Thought especially strong in the coal and metal industries and in the Lyonnaise silk industry, where they control prices and production, the cartels are found in numerous other industries. Their general purpose is to diminish competition and to maintain remunerative prices. In pursuit of this aim they use various tactics, according to the nature of the industry and the cohesive strength of the combine. In their simplest form the cartels confine themselves to fixing common prices. In their next stage of development they attempt to control production as well as price. The policy here is usually one of limitation of production, fixing of common prices, though liberty is sometimes left to set individual prices. The next step is to limit the price of raw material, a price being fixed which the members of the syndicate agree not to exceed. Fourthly, the cartel makes arrangements to share profits, and if it is very strongly organized it can even proceed so far as to share profits and losses above and below normal production in proportion to the share of production of each individual firm. In its most complete and well-organized form the cartel establishes a common bureau of sale or comptoir de vente, through which all the sales of the trust are made, the business being distributed according to a standard such as the proportionate production of each firm or the number of shares held in the combine or the geographical position of the firm with reference to the orders.

TRUSTS AND SYNDICATES IN ENGLAND.

The Portland Cement Trust.—The Associated Portland Cement Manufacturers was organized in July, 1900. It included 27 out of 31 firms and had agreements with other firms. The number of outsiders has since increased, but the trust remains a dominant factor in prices when it is secure from foreign competition. The policy of the trust is to keep the prices above the foreign prices plus the cost of freight which would be involved in bringing foreign cement to England. While its powers are subject to certain limitation, it exerts a great influence in the trade.

The Steel Associations.—The steel industry is largely divided between two main rivals, the Scotch Steel Makers' Association and the North of England Makers. These have entered into an agreement which secures to each exclusive rights to certain territories and maintains prices there.

Scotch domestic prices.

	Jan. 1.	Mar. 10.	June 8.	Sept. 16.
	L. s. d.	L. s. d.	L. s. d.	L. s. d.
Boiler plates	7 7 6	7 2 6	6 17 6	7 2 6
Ship plates	6 12 6	6 7 6	6 2 6	6 10 6

Scotch export prices.

	Jan. 1.	Apr. 1.	July 1.	Sept. 1.
	L. s. d.	L. s. d.	L. s. d.	L. s. d.
Boiler plates	6 18 19	6 18 9	6 15 0	6 17 6
Ship plates	6 0 0	5 15 0	5 12 6	5 15 6

There was much complaint of "dumping" in Ireland, the products of the two companies were sold there at much lower prices than in English markets where the price could be upheld. Much of the exports goes to India, Japan, Australia, and Canada.

Tin-plate combine.—This was organized in 1906 as the South Wales Steel Makers' Association. The production is concentrated in South Wales. Though there is a definite organization, it has been difficult to maintain the price agreed upon on account of German competition.

At present a fair part of the steel and iron trade is organized on monopolistic lines, including such industries as ship and boiler plates, galvanized plates, tin-plate bars and rails, but the entire crude-iron and the manufacture of billets, blocks, iron bars, strap-iron angles, tubes, etc., were free from monopolistic organization as late as 1900, although such organization could be expected at any time.

Wall Paper Trust.—In 1900 wall-paper manufacturers entered into an agreement, including 31 wall-paper factories. This was called the Wall Paper Manufacturers (Ltd.). This company also had three other agreements with outside firms. It controlled 98 per cent of the production of wall paper and other decorative materials. In 1908 there were only seven outsiders. The combine has been instrumental in preventing such a decline in prices as might result from home competition.

Cable Makers' Association.—Organized 1908, with the object of maintaining a minimum price and thereby avoiding deterioration of quality, such as would result from free competition. The combine controls 90 per cent of cable production. Recently there have been increasing imports from foreign countries, and a counter organization of consumers has been formed.

Locomotive Trust.—English locomotives enjoy a practical monopoly of the English market on account of the peculiar requirements of the English railroad. In 1903 the North British Locomotive Co. was formed by the amalgamation of free undertakings, and has held a dominant position ever since. In 1908, 11 firms, including this company, combined to secure economy in working and controlled the English market, although several railroad companies have built their own locomotive works.

Whisky Trust.—This one of the commodities in which England not only maintains a monopoly in the home market, but, on account of the excellence of the product, has secured a flourishing export trade which suffers from little competition on the part of other countries. In 1877 the Distillers Co. (Ltd.) was formed by the amalgamation of six Scotch firms. In 1902–3 this amalgamation absorbed three more distilleries and a half of the most important Irish distilleries. In 1907 the Vauxhall Distilling Co. was acquired. Thus, finally 17 distilleries in England, Ireland, and Scotland were included in the combine. In 1907 the Scotch combine was strong enough to raise the price, thus making evident its dominating position over the whole whisky production of Great Britain.

Industrial spirit trust.—This had its origin in the fusion of seven Scotch firms into the Distillers' Co. in 1877. For many years concentration has been at work in the industry. After 1903 foreign competition declined and a strong combination soon developed. In November, 1907, the Industrial Spirits Supply Co. was organized. This included 7 firms, 1 outside firm entering into the agreement. Definite regulation of output and sales replaced previous loose agreements by means of a common sales bureau, through which the company managed the entire sales of industrial spirits produced by the allied companies. The production of each company was restricted according to the number of shares held and orders were distributed after considering freights. There has since been an agreement among buyers of methylated spirit as to minimum prices, so that the industries definitely organized from the raw material up. There is still a possibility of foreign competition, which is the sole restriction on price manipulation by the combine.

International tobacco monopoly.—This is an Anglo-American trust. In 1901 the Imperial Tobacco Co. was formed, including the 13 chief English firms, for the purpose of struggling against American competition. In 1902 this struggle became more acute. The English company bought up several more smaller firms, while the Americans organized Ogdens Ltd. and the British Tobacco Co. Thereupon an agreement was entered into between the American Tobacco Trust and the English and American companies in England, forming a third company for export trade—the British-American Tobacco Co.—of which The Imperial Tobacco Co. was to hold one-third of the shares and the American

branch two-thirds. Branch trusts have since been organized in Australia, Canada, and South Africa.

British and international steel rail syndicate.—This industry was concentrated in a few hands much earlier than the rest of the heavy iron industry, a process which went on simultaneously in all countries. In 1883 the International Rail Syndicate was formed in conjunction with German and Belgian manufacturers. In 1905 the United States, England, Germany, Belgium, and France were included in a steel rail agreement. In May, 1907, this agreement was renewed for five years and was joined by Russia. Under the provisions of the syndicate England enjoys the fullest security from foreign competition, from which she had suffered severely in the period before the international agreement, especially from "dumping" on the part of American firms. The syndicate has had a marked influence on English prices. In 1907 there was a rise from £6 15s. to £7, while American home prices were only £5 12s. In 1909 there was an amalgamation with two important rail makers, by which the exclusion of domestic competition was more than ever assured.

Soda trust.—In 1890 the United Alkali Co. was formed, including 48 firms. These used the so-called Le Blanc process. They suffered from much competition from German manufacturers who used a cheaper process, and especially from the great English Brunner Mond Co., which used the German process. In 1900 the first steps were taken toward an international agreement, and in 1906 a really strong agreement was entered into which included the English Alkali Co. and certain continental manufacturers and the Brunner Mond Co., which was allied with the Solvay Co., which was at the head of the German Cartel.

Salt Trust.—The English salt industry stands next to that of the United States in importance and enjoys the monopoly of home trade and has an important export trade. In 1888 the Salt Union was formed by a combination of 64 firms with combined capital of £5,000,000 and headquarters at Liverpool. This combine controlled 90 per cent of production and effected an enormous increase in price, which, however, declined again in the nineties. In 1907 the Salt Union controlled a production of 909,000 tons out of a total output of 1,084,050 for the United Kingdom. In 1900 a combination was brought about between the Salt Union and outsiders, which was called the Northwest Salt Co., and now regulates the sales of the constituent concerns. A quota of production is allotted to each maker on a tonnage basis. Each firm is represented in the syndicate by a director, the Salt Union by two. The combination has had an appreciable effect on home prices. It has an almost absolute power over prices and treats different markets differently according to the interests of the company. There have been many complaints of "dumping" on the other side of the Atlantic.

The Fine-Cotton Spinners and Doublers' Trust.—Owing to the superiority of the English product in this industry, it has been very firmly entrenched against foreign competition. This is true in general of textile products in England with the exception perhaps of silk weaving, in which there has been increased competition recently in the cheaper qualities. The low price at which the English manufacturer has been able to sell is also responsible. In 1898 the Fine Cotton Spinners and Doublers' Association was organized by an amalgamation of 31 firms. This combine has been most successful and soon practically controlled English production.

Sewing-Cotton Trust.—In 1895-96 four sewing-cotton firms amalgamated with J. & P. Coates, with whom they had been allied for years by sales agreements. In 1897 the English Sewing Cotton Co was formed by 20 smaller outside firms, and to these more firms were added in 1899, the total capitalization of the company being £3,000,000. There were still two rivals, but Coates held shares in these. At the same time there was formed the American Thread Co., but in this the English associations held a commanding interest. The English Thread Trust thus became international and was extended to include branches in Spain, Canada, and Russia. Conflicts about sales between the English companies led to the foundation of the Central Thread Agency to distribute sales.

Bleaching and Dying Trusts.—In 1900 the Bleachers' Association was formed, including 53 firms. In 1898 the Bradford Dyers' Association was formed. Both of these resulted from local monopolies. In 1903 the monopoly of the Dyers' Association was made complete, much more complete than that of the Bleachers' Association. The Dyers announced their avoidance of a policy of raising prices and attacking outsiders.

In 1900 the Cotton and Wool Dyers' Association was formed, comprising 46 members. This combine was much less successful financially and in fixing prices than the Bradford Dyers.

Calico Printers' Trust.—In 1899 an amalgamation was brought about in the calico printing industry, including 46 firms. These firms were individually of varying strength, but together they controlled the production of 85 per cent of the calico made in England. They thus become a power with which no single firm would dare to compete, and since the English calico trade is secure from foreign competition they had a monopoly in the home market and were able to fix the world's price.

Coal Trust.—In 1890, 83 of the principal coal houses of London combined with a capital of £2,800,000 under the name Cory & Son. The transport of most of this firm was carried on by water. In 1899 they fused with the important house of Richet Smith & Co., whose business was carried on by water.

Soap Trust.—About 1908 an amalgamation took place in the soap industry, by which 11 houses were combined "to realize economies of production and to improve the manufacture by a cooperative effort." Each establishment was to retain its independence except for the establishment of "zones of sale," or territories in which sale was restricted to special companies.

Dynamite Trust.—This is an international trust, founded in 1886 to stop the competition between English and German companies, with a capital of £2,000,000. It included the Nobel Explosive Co., Glasgow; the French Societe de Dynamite; the Dynamite Co., of Hamburg; the dynamite factory at Opladen; and the dynamite factor at Dresden. In 1899, with the invention of smokeless powder, the principal German houses engaged in the manufacture of that powder were included in the agreement. This took, in the beginning, the form of a simple understanding, in which each house preserved its autonomy. Later it took the form of a more definite amalgamation, in which the profits were divided proportionately between the dynamite and smokeless-powder manufacturers.

Diamond Trust.—In the South African diamond industry, production was practically monopolized by the De Beers and the Premier Diamond Co. The De Beers Co. was formed with a capital of £10,000,000 by a combination of the De Beers Mining Co. and the Kimberley Central Diamond Mines. In 1899 these absorbed various other companies, especially the South African Exploration Co. In 1900 they effected a more complete amalgamation by absorbing the New Bultfontein Mining Co., whereupon part of the mines were closed and prices raised.

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

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TRUST LEGISLATION.

SERIAL 7, PART 27.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, March 13, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. During the progress of these hearings numerous letters have been received which discuss various provisions of the tentative trust bills under consideration.

I have answered these letters to the effect that the suggestions and criticisms made by the writers thereof would be brought to the attention of the committee. I know of no better way to do that than to offer them for the record.

Without objection these letters will be printed in the record at this point.

(The letters referred to are as follows:)

INTERLOCKING DIRECTORATES

[Statement of Mr. Rue, of Philadelphia, Pa.]

The proposed bill in regard to the interlocking of directors, so called, is most drastic and far reaching in its effect, and while intended to conserve the people's interests, will, if enacted into a law, really deal a serious blow to those interests. Hasty action on the part of Congress is to be deprecated. Most careful consideration should be given as to the probable effect of this bill, the importance of the issues at stake and the great interests involved.

The country is now embarking on a new financial sea and no charts exist with which to guide our course. Vast changes in banking are rapidly taking place and will continue as the years go on. If there ever was a time when the management of national banks of the country should be in strong hands it is now. If there ever was a time when men of broad vision, wide experience and sound judgment, men in touch with the commerce and trade of the world, were needed in the directorate of national banks it is now. It would therefore seem the height of folly at this particular juncture to strip the national banks of their ablest men, and thus "swap horses in midstream."

The national banks have with great unanimity accepted the new banking system. No chain is stronger than its weakest link, and if the new system is to be the success anticipated, and provide the country with a better system of credit, as well as elasticity of currency, then the unit banks must be made just as strong as possible. If the ablest men are to be taken out of the directorate of national banks, these men will naturally go to the State institutions, which if the new bill becomes a law will undoubtedly remain out of the new system. This will result in building up a great system of State banks under the direction of strong men as a rival to the new national system.

There seems to be a lack of the proper conception of what a national bank is; that is, who owns it and to whom its resources belong. One might gather from the statements frequently made in public that it was an institution apart from the people, did not belong to them, and was inimical to their interests, and so an object of suspicion, which needs to be watched and curbed in its operations and transactions. No falser conception of its true position in relation to the people was ever made. Let us analyze for a little.

The stock of national banks—the older ones in particular—is owned largely by women who have inherited it from their fathers and husbands. Another large proportion of stockholders are executors and trustees of estates, the beneficiaries of which are largely women and orphan children, and charitable institutions, such as homes, hospitals, asylums, etc. The balance of stockholders is principally made up of small investors who hold the stock because of their belief in its safety.

Now, as to the depositors, the deposits of these banks belong to the people, from the man who works daily in his overalls in the humblest capacity to the skilled mechanic, the clerk, the store girl, those who work in factories, the farmer, small business man, the manufacturer, great business corporations, and the merchant prince. Our savings funds and trust companies, who hold the savings of the people and the trust estates of women and children usually have their current funds deposited with national banks, so it can be truly said that the banks are owned by the people and their resources belong to the people, hence any legislation along the lines proposed in the bill is against the interests of the people at large, and when its full scope and effect are thoroughly understood it is hardly conceivable that Congress will enact it into a law, at least not without considerable modification.

LAGRANGE, GA., *January 19, 1914.*

Hon. HOKE SMITH,
Senator from Georgia,
Washington, D. C.

DEAR MR. SMITH: While really there is confidence in the program of the President and Congress, there are few who can see at once all possible effects of legislation. For this reason I am writing in connection with the proposed trust legislation.

The energies of few strong men are or should be confined to one corporation; else the greatest development would have been and will be retarded. This is still more important when applied to a group of men working together for the development of their section. No legislation, it seems to me, should be passed which does not allow, at least within reasonable limits, the greatest development which will follow from the efforts of any group of men.

The question of the limits is a vital one, of course.

Our own situation presents an illustration. A group of men headed by Mr. Callaway have built and are operating five cotton mills—three at Lagrange, one at Manchester, and one at Milstead; several banks, a national and savings bank here and State banks elsewhere; warehouses, wholesale houses, and other enterprises.

All of these enterprises were built up by practically the same group of men. Necessarily, they will control them. Their directorates are to a large extent interlocking as a result of the fact that the same men organized them. Certainly some of the same men are on all these directorates. If there is any instance in connection with any of these corporations where this has resulted in harm, I have been unable to see it after carefully going over the matter. I presume that no proposed legislation would

affect any of these companies or directorates unless on the claim of defeat of competition.

The strongest illustration among these enterprises in which it could possibly be claimed that competition was affected would be in the case of Unity Cotton Mills, Elm City Cotton Mills, and Milstead Manufacturing Co., all three of which make cotton duck. They do not compete now, in the ordinary sense of the word, but the present arrangement of control was really made to secure competition in this way:

When the Unity Mills was first built what is known as the Duck Trust largely controlled the cotton-duck business. Customers whom we endeavored to sell for Unity refused us business because we had only one mill, and would be subject to fire, strike, or other disasters, whereas the Duck Trust could supply them from other mills if one was in trouble—because we could only take a part of their orders and the trust in some cases refused to sell unless they sold all the demands of the customers; and the customers did not feel safe in giving contracts to Unity alone. We were told by some customers directly that if other mills were associated with us and better protection secured for the certain execution of the contracts we should be given orders. The arrangement between these mills resulted, largely in order that we might compete, instead of any effort at all to defeat competition between the three mills.

With these three mills working together we are in no stronger position in the market than the Shawmut Mills at West Point, Ga., which has 30,000 spindles in the one mill, while our three mills have 10,000 spindles each; while the trust is still stronger than Shawmut. By the present arrangement we do not and can not dominate the market.

If there is any wrong, from any possible viewpoint, in our present arrangement we do not know it, and I have never heard it suggested. However, laws framed at big business, where they may be evils, might be so expressed as to affect smaller enterprises which are beyond criticism.

The suggestions I make, therefore, are that any trust legislation should be carefully framed, so as not to injure even unintentionally those who are doing right in an effort to reach those who are doing wrong.

Precaution should be taken not to prohibit the development of various corporations which naturally follow from the effort of any big man or set of men, even though these corporations shall be controlled by this same set of men who organized them.

Lastly, when applied to manufacturing competition, cooperation of corporations should not be prohibited unless the result is to dominate the market.

In regard to holding companies, we have one owning 51 per cent of the stock of Unity Cotton Mills. This was organized to preserve the independence of the mill, where a man, unfriendly to the management and connected with the Duck Trust, was trying to get control. By operating under the same management the stock is now worth 300. The legislation suggested probably would not affect this holding company. I see no reason why it should.

It might emphasize my position when I say the so-called Duck Trust, owning or controlling a number of mills, can not and does not dominate the market, but simply affords a strong competitor.

I am sure you will give this subject the same careful thought as you have given other important questions; but I wished to call your attention to the possible effect on small enterprises which might be overlooked in considering the effect on great corporations in framing legislation.

The very purpose of legislation might be defeated by preventing the combining of small enterprises to give them the strength to compete.

Incidentally, Uncle Sam has two strong doses to assimilate in the tariff and currency laws. The mental anxiety of considering another dose may prevent the best results from those already taken. The old man might decide he needed another and milder doctor.

Yours, very truly,

HATTON LOVEJOY.

[The Second National Bank. Rudolph F. Rabe, president; C. Henry C. Jagels, vice president; A. N. Terbell, cashier; D. F. Nichols, assistant cashier.]

HOBOKEN, N. J., *January 23, 1914.*

HON. HENRY D. CLAYTON,
Member of Congress, Washington, D. C.

DEAR SIR: Referring to the proposed legislation regarding interlocking directors of banking institutions, which is now being considered by the Committee on the Judiciary, of which you are chairman, I take the liberty of presuming upon your time and kindness and ask you to consider my objections to the proposed bill as it is printed in to-day's newspapers.]

I am in accord with the principle that the interlocking director system of banks and trust companies, which, by geographical location, should be competitors for business, is wrong in principle and should be corrected.

The proposed bill, however, is so drastic that while it will correct the evil aimed at it will destroy the business careers of many innocent individuals, and at the same time create a condition in business affairs that may become of serious menace to the country.

In the year of 1887 I entered the employ of the Second National Bank, of Hoboken, N. J., and by gradual stages advanced to the position of vice president.

In 1907, together with some other business men, I organized a trust company in the town of Union, an adjoining municipality, and gave to it five years of hard work without remuneration.

Both of these institutions have been prosperous, but it has been hard work and has taken the best efforts that it was within my power to give.

A little over a year ago I was requested to assume charge of a trust company in Jersey City that, through mismanagement, was leading a precarious existence. I examined into the situation, and, deciding that the opportunity for developing a strong financial institution was a good one, I interested a number of business men that had confidence in my ability to purchase the offered stock.

After a year of hard work the trust company is now in a flourishing condition and has the confidence of the community.

I am devoting my time and energies to these three institutions. They are located in three different municipalities, they are not and never can compete for business, and each and every one of them are in active competition with any number of other national banks and trust companies.

The bill as proposed will not only destroy the work of years so far as I am concerned, but will also make it, so far as the Second National Bank is concerned, a difficult matter to secure a board of directors that will measure up to the requirements of our community.

We have eight directors who own more than 75 per cent of the stock. They are all representative business men of financial worth and standing.

During the course of their business careers they have purchased stock interests in other financial institutions; one of them is a director in a State bank in this city, as was his father before him. Some of the others are directors in other banks located in other communities where they have home interests. With the exception of the one mentioned, not one of them is a director of a financial institution in this city; yet the bill as drawn would require them to sever all connection with either this bank or with the one located in another community.

Should they elect to retire from this bank, it will be a very difficult matter to secure others in their place. Our list of stockholders is limited, some being estates, others women, and others not available or suitable for the responsibilities of the position. They own their own stock, they can not be compelled to sell it, and still this bill would deprive them of the right to exercise the management of property for which they are responsible.

Surely the law does not contemplate or desire the election of dummy directors, but would it not have that effect?

To correct the evils of interlocking directors, I would respectfully offer for your consideration the following:

No individual to be a director in two or more banks in the same municipality.

No bank or trust company to own stock in a competing bank or trust company in the same municipality.

Every bank or trust company director to take an oath that he is the bona fide owner of the stock standing in his name and that it is not owned indirectly by any other financial institution.

Respectfully submitted.

C. H. C. JAGELS.

[Boisseain & Co., 24 Broad Street.]

NEW YORK, *January 23, 1914.*

HON. HENRY D. CLAYTON,
Chairman Judiciary Committee, Washington, D. C.

DEAR SIR: I have read with much interest in this morning's papers the bill about to be introduced in the House of Representatives and which is now, I believe, before your committee, relative to the interlocking directorships and, from my reading of the same, I think it will work considerable hardship on corporations and particularly on the people who are interested in corporations. Take my case for instance. I

represent a number of foreign investors and am a director of the Kansas City Southern Railway Co., which, as you know, runs in the southwestern part of the country. I am also a director and represent foreign interests in the Pittsburgh Coal Co., Pennsylvania. As I read the bill, it prevents me from serving as a director in the Pittsburgh Coal Co., if I remain a director in the Kansas City Southern, although the Pittsburgh Coal Co. does not sell the Kansas City Southern any coal, and I doubt if the Kansas City Southern ever saw any coal from Pittsburgh. All the coal that it uses comes from the southwest. The mere fact that one is a coal company and the other is a railroad company should not preclude me from representing foreign holders in both of these companies. I think the bill as it now stands, if it becomes a law, will have a serious effect on investors, especially foreign investors, who look, in a great measure, to the personnel of a board before becoming interested in a corporation. I doubt very much whether there are enough of intelligent men in the country to fill the places which will be made vacant if this new bill becomes a law.

I hope that, before the bill is introduced, this question will receive the serious consideration of your committee and the bill will be so changed as to make it fit the case I have above stated.

Very truly, yours,

A. J. MILLER.

[Greenville Banking & Trust Co. Edward S. Pierson, president; Henry H. Holmes, Benjamin L. Stowe, vice presidents; Oliver P. Vreeland, secretary and treasurer; Lewis S. Harvey, assistant secretary and assistant treasurer.]

JERSEY CITY, N. J., *January 23, 1914.*

Representative JAMES A. HAMILL,
Washington, D. C.

MY DEAR SIR: In connection with the proposed bill prohibiting interlocking directorates, I would call to your attention the following:

First. Savings banks should not be included in its application. Only a narrow range of investments is permitted for savings banks, and the funds can not be misused, even if the trustees of such banks are inclined to use the funds, under their control, to their personal advantage with respect to control of railroads and other interstate corporations. If the savings banks of the larger communities in New Jersey were stripped of their trustees who were directors in national banks, State banks, trust companies, or railroad companies, there would hardly be a trustee left, and the management would be materially weakened.

Second. By including State institutions, such as State banks and trust companies, it will have a tendency to keep such institutions out of the new Federal banking system, and this is very undesirable, as all institutions should be encouraged to join.

Third. Outside of two or three great centers of the country, like New York City, the effect of the whole bill will be bad and tend to weaken rather than to strengthen our financial institutions.

General. The object of such a bill is naturally to prevent unlimited control through individuals or a set of individuals, and the scope of the bill should not be greater than sufficient to accomplish the desired object.

The whole country is with the administration in the excellent constructive legislation to date, but the administration could make a bad slip and undo a great deal of good accomplished and be divorced largely from favorable public opinion if a bill is put through on this subject and such a bill goes too far.

I hope that, representing, as you do, the welfare and interests of the people of the State of New Jersey, you will step very cautiously in this matter and not favor any measure the effect of which you are not certain of.

If an interlocking-directorate bill is to be passed, I believe that it would accomplish its full object with respect to financial institutions if it prohibited a person from being a director in more than one national bank, or one bank of a class. Under such a bill a man could be a director in one national bank, one State bank, one trust company, and one savings bank. This would be a reasonable limitation of financial power and control, and would not work hardship or disaster to the banking interests.

I certainly would be pleased to receive a line from you after you have read this letter.

Very truly, yours,

EDWARD S. PIERSON.

[The First National Bank. F. G. Corker, president; W. B. Rice, vice president; W. S. Phillips, vice president; A. W. Garrett, cashier; B. M. Lewis, assistant cashier.]

DUBLIN, GA., *January 27, 1914.*

HON. DUDLEY M. HUGHES, M. C.,
Washington, D. C.

MY DEAR SIR: I am a director in the Wrightsville & Tennille Railroad Co. This company has 100 miles of track, and its lines of track do not go outside of the State of Georgia. I do not know whether or not the proposed interlocking-directorates bill would affect me, as I am an officer of a national bank. It seems to me that, if the bill does not already do so, it should eliminate railroads whose lines do not extend beyond the borders of one State. The purpose of the bill would be fully met, in my judgment, by excepting the intrastate lines from the limitations of the bill. I would appreciate your careful consideration of this, as I am sure that the spirit of the law could be met without including the small railroads.

Very truly, yours,

F. G. CORKER.

[The Norfolk National Bank. C. E. Burnham, president; F. J. Hale, vice president; E. W. Zutz, vice president; L. P. Pasewalk, cashier; Carl Wilde, assistant cashier; C. J. Hulse, assistant cashier.]

NORFOLK, NEBR., *January 28, 1914.*

HON. DAN V. STEPHENS,
Washington, D. C.

MY DEAR STEPHENS: Referring once more to interlocking directorates, under date of the 22d instant, dispatches from Washington, in giving to provisions as to this part of program, reads as follows:

"It would provide further no person should at the same time be an employer in two or more banks, banking associations, or trust companies, which are members of any reserve bank operating under the provisions of the new currency law; that no private banker or person who is a director in any State bank or trust company, not operating under the new currency law, shall be eligible to be a director in any bank operating under the act."

Then follows the penalty and time given for adjustment to new conditions. This to my mind is a direct blow to sound banking that the State of Nebraska is noted for. You know of your own experience that the men like Gallagher, of O'Neill; McGivern and May, of Fremont; Southwick and Wallace, of Lincoln; the Stuarts, of Madison; Woods, of Spencer, and many others who are interested in various banking institutions and who, while directing their policies, yet not owning control of any one of the institutions they are connected with, stand for the best in banking and there is no attempt to cause any restraint in trade. That these parties should be compelled to dispose of their interests in banks that in many instances they have built up to a high standard and by their association have established with the customers of such banks a confidence that in times of stress is very valuable to the business world, seems rank injustice and may prove injurious to the whole fabric of banking.

With the idea of controlling big business we are in full sympathy with the effort of Congress and can understand that men of pronounced ability to control large sums of money should not be directors in banks, manufacturing plants, wholesale houses, and public utilities in the same cities or localities, as is the case in New York and many of the larger cities. But it occurs to me that Mr. Untermyer comes near the solution of the problem, and the recommendations that he makes strike at "big business" without affecting honest endeavor.

There has just come to my hand a copy of his address delivered before the Illinois Manufacturers' Association at Chicago, January 5, 1914. I want to call your attention to some of his recommendations as to this vexing problem as affecting generally banks and all classes of interstate corporations.

First. No person should be eligible as an officer or director of a national bank who is an officer or director of any actually or potentially competing bank or trust company in the same city, town, or village.

Second. No State bank or trust company located in any city of 100,000 inhabitants or over should be permitted to use the mails or telegraph in interstate business which has upon its board of directors any person who is also an officer or director of any such competing bank or trust company.

Third. No national bank shall own or hold, and no State bank or trust company located in any city of 100,000 inhabitants or over should be permitted the use of the mails or telegraph in interstate business that owns or holds any of the shares of stock of any other bank or trust company.

Fourth. No railroad or industrial corporation should be granted a license to engage in interstate business, and it should be made unlawful for it to continue in such business if any of its officers or directors are officers or directors of any actually or potentially competing business or if any of its shareholders are the registered or beneficial owners of more than 5 per cent of the share capital of any such competing corporation.

Fifth. No person engaged in business as a private banker taking deposits should be an officer or director of a bank nor should any person interested in the business of furnishing railroad supplies be an officer or director of a railroad corporation nor should any officer or director be permitted to make a profit or commission on any transactions with the corporation of which he is such officer or director.

Sixth. The "dummy" director should be eliminated by requiring every director to have a substantial beneficial interest in his own name and right free from claim. He should be in the actual and exclusive possession of the certificate of stock.

Seventh. It should be the duty of all the officers and directors of every such corporation to file annually a sworn statement showing compliance with the above conditions.

You will at once see that Mr. Untermyer's idea is to control business of such magnitude as work against the public good. No thought seems to enter his mind that it is detrimental to the public welfare for banks managed as they are in the rural districts to have the same officers, directors or stockholders.

I trust that you will impress upon the minds of the committee that there is a vast difference in interlocking directorates, or, in other words, that it is possible for men of honor to hold stock in more than one bank and be upon the board of directors to manage and guide them along lines of conservatism, soundness, and stability, making them of direct benefit to the locality which they serve. All should not be tarred with the same stick and be held up as inimical to good business interests.

Pardon this long letter, but I am interested, and feel sure you will find others of my opinion, and I trust you will do all that you can to have the goats separated from the sheep.

Yours, truly,

C. E. BURNHAM, *President.*

[The Union & New Haven Trust Co., Eli Whitney, president; Thomas Hooker, vice president; Henry L. Hotchkiss, vice president; W. Perry Curtiss, vice president and treasurer; Edwin L. Chapman, assistant treasurer; Dean B. Lyman, assistant treasurer; Henry L. Galpin, secretary. Directors: *Alex Adler, Amos F. Barnes, *John W. Bristol, W. Perry Curtiss, *Harry G. Day, *Clinton B. Ensign, *Henry F. English, H. L. Galpin, John Edward Heaton, *James S. Hemingway, *Thomas Hooker, *Henry L. Hotchkiss, *H. Stuart Hotchkiss, *Elliott H. Morse, A. Heaton Robertson, *E. G. Stoddard, Henry H. Townshend, *Henry C. White, *Eli Whitney.]

NEW HAVEN, CONN., *January 29, 1914.*

Hon. THOMAS L. REILLY:
House of Representatives, Washington, D. C.

DEAR MR. REILLY: I notice that there are to be hearings before the proper congressional committee on the bill recently introduced and referring to interlocking directors.

We all understand, of course, that Congress is aiming its guns at certain New York practices, but I wish to call your attention to the effect of such a law upon all institutions, for instance, here in New Haven.

I am sending you herewith a statement, on one side of which appears a list of our directors. All of the names which I have checked(*), 13 in number, would be disqualified for membership on our board should this law pass in its present form. The Union & New Haven Trust Co. carries on a general banking business and to that extent is in competition with the other banking institutions in this town. We maintain also a very large trust department, and while the men whom I have indicated are directors in other banks, they are valuable men for our board, particularly because of the advice and help they can give us in the management of our trust department. You are well enough acquainted with New Haven and with New Haven names to know that the men checked on this list are reliable men, a valuable addition to the board of any institution. They are not serving as members of our board or of any other board for profit; not one of them can be accused of attempting to restrict loans to any person or firm through duplication of their interests on bank or trust company boards.

I have nothing to say concerning the law in so far as it may apply to the large cities, but I do feel that it would work a serious injustice to small towns. The law should not be applied, certainly outside of reserved cities.

I would be glad to have you think this matter over carefully, as you no doubt are doing, and we would appreciate a word from you on the point we have raised.

Very truly, yours,

W. P. CURTISS, *Treasurer.*

[The People's National Bank. William A. Linn, president; Cortlandt Linkroum, vice president; Edgar H. Lee, cashier; T. H. Brush, assistant cashier.]

HACKENSACK, N. J., *February 2, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: In the discussion of the proposed law forbidding interlocking directorates it will doubtless be shown that there are such directorates which serve a harmless and natural purpose. There are, for instance, throughout the country small banks and trust companies, directors of which sit in more than one of these boards. A trust company may be organized in a smaller town by people interested in a bank (we have no such interest) because trust companies can do a class of business which is forbidden to banks. To require such institutions to separate themselves entirely, so far as their boards of directors are concerned, would be a hardship, because such interlocking directorates have no monopolizing tendency.

Neighboring banks in country districts sometimes have the same directors' names on both boards because the newer one may need experienced assistance in its management. Such is the case of the First National Bank of Ridgefield Park, N. J., three miles from Hackensack. The community there wanted banking facilities, and some of the persons interested in our bank discovered that promoters were trying to organize a bank at Ridgefield Park. In order to prevent the establishment of a weak bank there, we offered our assistance, and some of us took stock and became directors, and the success of the new institution has been due in a large measure to the advice we could give it. The arbitrary removal of directors of this bank from that directorate would do it a real injury. There are nonbanking corporations which are in the same situation.

It would seem to me that the proposed law might contain a provision giving some Federal authority the right to decide whether interlocking directorates in any case are improper and to leave undisturbed those which are serving a good purpose.

Very truly, yours,

W. A. LINN, *President.*

[United States Savings Bank. Wade H. Cooper, president; Wm. D. Barry, vice president; Wilbur H. Zepp, cashier.]

WASHINGTON, D. C., *February 3, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives,
Washington, D. C.

MY DEAR JUDGE CLAYTON: In your bill to prohibit certain persons being or becoming directors, officers, or employees of national banks or certain corporations, it is provided that no person shall at the same time be a director or other officer in two or more Federal reserve banks * * * "and a private banker, and a person who is a director in any State bank or trust company, not operating under the provisions of the said act, shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid act."

If you will pardon me for making the suggestion, it seems to me that this provision will be a fatal blow to a lot of small banks in the South and West in small towns which are only existing for the accommodation of their respective localities, by the grace of some individual who may be an officer or director in some national bank.

I understand that there are a number of institutions that exist in your own State of Alabama, under the conditions above referred to; and I know a man in Georgia who is regarded as a public benefactor, owing to the fact that he has organized 40 or 50 small banks in that State and in the State of Florida, and I am informed that a Mr. Jenkins, of Virginia, has done a similar work for the State of Virginia.

My brothers and I operate in North Carolina, South Carolina, and Georgia a number of banks ranging in capital from $250,000 down, but I think we could manage to get along in some manner, though there are communities where it would be a great blow to enact into law the provision above referred to, as there are few men in certain localities capable of directing even smaller institutions.

And your idea is to strike at the centralization of money, and I can not see that the smaller institutions are responsible for this in the slightest; and it seems to me that an amendment might be offered exempting banks in towns of 5,000 inhabitants, or banks of $25,000 to $50,000 capital.

If you deem it proper I would not object to appearing before your committee with reference to this feature of this bill, at such time as it is suitable.

With high considerations, yours, truly,

WADE H. COOPER, *President.*

[Miller & Fincke. F. G. Fincke, C. A. Miller, James F. Hubbell.]

UTICA, N. Y., *February 5, 1914.*

Hon. H. D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: The law committee of the New York State Savings Banks' Association has directed me to communicate with you in regard to a bill entitled "A bill to prohibit certain persons from being or becoming directors, officers, or employees of national banks or of certain corporations."

I have been, as yet, unable to ascertain the serial number of the bill and can therefore only refer to it by the title. I inclose herewith a very short brief which covers the ideas of the Savings Banks' Association in regard to this measure. May I ask you to glance over it and to advise me as to whether it will be necessary or desirable for us to send a delegate from the association to Washington to explain our views personally and at greater length?

I understand that this bill is before the committee of which you are chairman. If for any reason I am in error in this particular, will you be good enough to advise me?

Yours, very truly,

CHAS. A. MILLER,
Counsel for the Savings Banks' Association of the State of New York.

In the matter of a bill to prohibit certain persons from being or becoming directors, officers, or employees of national banks or of certain corporations.

I.

The Savings Banks Association of the State of New York, which includes 127 of the 140 mutual savings banks in the State, desires particularly to call to the attention of the committee the following language contained in section 2 of the bill relating to interlocking directorates:

"And a private banker and a person who is a *director in any State bank* or trust company, not operating under the provisions of said act, shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid act."

II.

Is this language intended to prohibit a "trustee" of a mutual savings bank from being a director of a bank operating under the Federal reserve law?

If this is the intent of Congress, then the language might well be made explicit. Our mutual savings banks have no "directors." They have "trustees" who perform all the usual functions of "directors." Probably the courts would construe "trustee" and "director" as synonymous terms. But why leave the matter open to construction when it can be settled definitely now one way or the other.

Again, the banking law of the State of New York classifies the institutions regulated by it into "banks" (including only banks of discount), "savings banks," "trust companies," etc. Under this classification the word "bank" when used in our banking law always means "bank of discount," and never includes a savings bank. But will the Federal courts recognize this distinction and construe "State bank" as used in the quotation above as meaning state bank of discount or will they hold "bank" to be broad enough to include every kind of institution operating under State banking laws?

At all events, let questions of this character be settled one way or the other by the legislative body and not left in uncertainty until construed by the courts.

III.

If the language quoted is not intended to prohibit savings bank trustees from remaining as directors in national banks, then this intention should be made so plain that no court can by construction create a highly penal offense which Congress has not intended to create.

As the reasons which make it desirable to prohibit interlocking directorates in State banks of discount and national banks, or in two or more national banks do not apply (as I shall show later) to our mutual institutions, and as many reasons exist for encouraging the presence on our boards of trustees of persons of practical banking

experience, I assume that the author of this measure does not intend to include our trustees in this prohibition. If I am right in this, then it only remains for me to suggest again the desirability of making that intention so clear as to make a contrary interpretation impossible.

This could well be done by an excepting clause somewhat like the following: "and a person who is a director in any State bank, *other than a mutual savings bank having no capital stock*, or trust company, etc."

The words in italic are those which we urge the committee to add, if, as we suppose, there is no intention to include our trustees in this prohibition.

IV.

If, on the other hand, the authors of this bill or the committee having it before them intend to prevent a savings bank trustee from serving as a director of a bank operating under the Federal reserve law, we desire to submit the following considerations, which seem to us savings bank men to show that such a prohibition is undesirable.

A. The object of forbidding interlocking directorates is to prevent dangerously large aggregations of capital (like chains of banks) and to prevent directors from being swayed in their management of one institution by their personal interest in another.

Neither of these reasons can exist in the case of mutual savings banks. They could not become part of a large and possibly dangerous aggregation of capital, because the New York State law already *forbids any savings bank trustee to be a trustee in another savings bank*. It also forbids a majority of the trustees of any savings bank to be directors of any one bank or national banking association. It would therefore be impossible to form a chain of savings banks or to make a savings bank a link in a "chain of banks." Moreover, our trustees are forbidden by law to have any personal interest in the savings banks which they control. They can not become depositors therein nor can they receive fees for their services as trustees. If they borrow money from the savings bank they cease ipso facto to be trustees. Under these circumstances it is hard to see any impropriety in these men acting as trustees and bank directors simultaneously. It is hard to see how, even if so disposed, they could abuse their position to the disadvantage of either institution.

We concede the evil which this act is trying to remedy. We understand how wrong it is to allow one man, by the money power bestowed by the depositors in many different financial institutions, to manipulate things so as to increase still further his power and, perhaps, to misuse this power to his own personal profit, but we can not understand how savings banks could be worked into any such scheme. We assert without fear of contradiction that the mutual savings banks of the State of New York not only never have been employed in this manner, but that even the suspicion of such a thing has never arisen.

B. The exclusion of directors in Federal banks from the boards of trustees of mutual savings banks would work incalculable harm to the mutual savings bank system.

Especially in the smaller cities and villages the boards of trustees of our mutual savings banks are largely composed of directors in the various national banks of the community. This is natural and proper.

In order that our savings banks should be well managed, it was necessary that the trustees charged with their administration should be (1) men of standing in the community, (2) men well versed in financial matters with a knowledge of investments, (3) men of sufficient means to be able to afford to give a portion of their time to a public and philanthropic cause without any hope of financial return. Now, in any rural community where will you find men answering these requirements, except upon the boards of directors of the national banks of that community? We can not fill our boards of trustees with physicians and clergymen, for the depositors, no matter how they may be impressed with their pure motives and benevolent intention, will hardly trust their business judgment or their financial experience. We can not fill our boards of trustees with plumbers and carpenters, because they would not always command the confidence of the depositors. The men of high business standing, of proved integrity, of financial experience, and of reasonable means, in the smaller communities especially, have for years been preempted by the national banks. To bar them from serving the provident poor as savings bank trustees, is to decree that the provident poor will not be well served.

But it may be urged that many of these men will give up their directorships in Federal institutions rather than resign their places in savings bank boards. Will they give up their control of the institutions where their money is invested, where they are stockholders, where perhaps they may be borrowers, for the sake of continuing to serve the savings bank where they have no financial interest and where they can receive no financial benefits? I think not; it couldn't be human nature.

The savings bank with which I am directly connected has 13 trustees. Of these 10 are directors in national banks which have come in under the Federal reserve law. In

two years, if the interlocking directorate bill becomes a law, only three of these men will be eligible. If all leave the savings bank the only remaining members of the present board would be an aged lawyer of over 80 years, a retired merchant of almost the same age, and a leather dealer of small means. Where are we to find the 10 new trustees? There are four national banks in this city, and each has been diligent to seek out the men of standing, ability, and property for its directors. This means that in this small town, 61 men of the highest standing are preempted by the national banks, and, if this bill is to have the force we fear, will be prohibited from acting as trustees of our savings bank. I can almost say that after these 61 men are barred there will remain no one, certainly no 10 men who are fit to be intrusted with the management of a savings bank.

The deposits in the savings banks of the State of New York amount to upwards of $1,700,000,000, and we submit that to turn the custody and investment of this vast sum over, in two years, to men of no banking experience is to commit a crime against the people of small means whose industry and providence have enabled them to put this money away where they believe it will be safe.

V.

In conclusion, the savings banks of New York State submit:

1. That the bill under consideration should be so amended as specifically to exempt them from its operations.

2. That if your committee be unwilling to concede this, at this time, that you should permit us to come to Washington and be heard on this subject.

Respectfully submitted.

CHAS. A. MILLER,
Counsel for the Savings Banks Association, of the State of New York.

UTICA, N. Y., *February 6, 1914.*

[The Savings Banks' Association of Connecticut. Edwin S. Hunt, president; P. Leroy Harwood, treasurer; Arthur T. Nettleton, Secretary.]

NEWTOWN, CONN., *February 10, 1914.*

Hon. HENRY D. CLAYTON,
House of Representatives, Washington, D. C.

DEAR SIR: I take the liberty to inclose you herewith copy of a resolution adopted by the executive committee of the Savings Banks' Association of Connecticut relating to the bill prohibiting interlocking directoratets.

Our mutual savings banks in this State, as you know, have no capital stock outstanding, are not operated for profit, the directors or trustees of which can not be borrowers or sureties for borrowers, and who serve without compensation.

May we express the hope you will give this matter of exemption of our banks careful consideration and greatly oblige,

Yours, very respectfully,

ARTHUR T. NETTLETON, *Secretary.*

RESOLUTION ADOPTED BY THE EXECUTIVE COMMITTEE OF THE SAVINGS BANKS ASSOCIATION OF CONNECTICUT FEBRUARY 4, 1914.

Whereas the mutual savings banks of Connecticut and the East generally differ from all other banking institutions of the country in that they have no capital stock and are conducted solely for the benefit of their depositors, to whom all the assets and profits belong; and

Whereas the directors or trustees of said banks serve without compensation and can not under the laws of the State be borrowers from said institutions; and

Whereas H. R. 11322 relating to interlocking directorates will deprive said banks of Connecticut probably at least of a majority of their present directors or trustees, owing to the fact that said persons are also directors of national and other banks that will become members of the Federal Reserve Association; and

Whereas the passage of said act will make it very difficult, if not impossible, for said mutual savings banks to secure directors or trustees of the requisite financial experience and standing in their respective communities; therefore be it

Resolved, That in our opinion said H. R. 11322 should be amended so as to exclude said mutual savings banks having no capital stock from the operation of said act.

Attest.

ARTHUR T. NETTLETON, *Secretary.*

[International Paper Co. Philip T. Dodge, president.]

30 BROAD STREET,
New York, February 13, 1914.

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives,
Washington, D. C.

DEAR SIR: Referring to the proposed legislation forbidding interlocking directorates and forbidding the holding of the shares of one corporation by another, I beg to submit for your consideration the fact that many American corporations doing an interstate and foreign business are compelled to establish and own subordinate companies. For example: An American machine-manufacturing company, selling its product partly in France, Germany, and Italy, is compelled to maintain a company in each of these countries in order to avoid the taxation on its entire American capital in each country, and this without regard to the small volume of sales in such country. Again, a company manufacturing paper in the United States from wood is compelled to operate partly in Canada and partly in different States of the Union. In various States it is necessary to have subordinate companies with special State charters to permit the driving of the timber on the rivers toward the mills, which are frequently in other States. In each of the Canadian Provinces where wood is cut and prepared for shipment it is necessary in order to secure licenses and legal standing and to prevent double taxation to have lumber companies and also driving companies with charters to operate on the rivers. These various subordinate companies are organized against the inclination of the parent company and against its best interests and because the business can not otherwise be carried on.

I am the executive of two large American companies having many million dollars employed in legitimate business. We are seeking only the prevention of laws which would interfere with such business. The parent company must hold stock in and control foreign operations which are incidental to its main business. It must have directors in the various companies which do business with each other and which are really legitimate branches of the parent company. Any law preventing this would compel the placing of the subordinate companies in the hands of incompetent men, clerks or others, who would be mere dummies.

Yours, very truly,

INTERNATIONAL PAPER CO.
P. T. DODGE, *President.*

[Law offices Gifford, Hobbs & Beard, Hanover Bank Building, 5 Nassau Street, 11 Pine Street. James M. Gifford, Charles B. Hobbs, Anson McCook Beard, John D. Fearbake, Alfred P. W. Seaman.]

NEW YORK, *February 16, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Committee on Judiciary of the House of Representatives,
Capitol, Washington, D. C.

DEAR SIR: In considering the prohibition of interlocking directorates, please bear in mind one common practice in this regard, which seems wholly innocuous from every point of view, and the prohibition of which would work unnecessary expense and hardship upon legitimate business.

I have reference to the following common case: A manufacturing concern, with a large capitalization, selling its goods in the various States of the Union, desires to open and maintain sales offices in these different States. If this large corporation attempts to qualify itself for the purpose of running such offices, it is met by tax and license fees in many States which are practically prohibitive. This corporation, therefore, forms a small subsidiary company of similar name, using its own assets for that purpose, and equips this company with such working capital as it may need, and generally makes its board of directors the same as the parent company. While there are, therefore, technically two corporations in existence, you will notice that the smaller company is not an outsider that has been bought up or acquired, but is simply a part of the same corporation, has no assets or interests outside of those owned by the parent company, and is brought into existence so that it can be qualified as a sales organization in the different States. This certainly is not a combination in restraint of trade; and yet a general provision that there shall be no interlocking directorates would possibly prohibit this desirable and entirely harmless arrangement. It is simply a matter of incorporating the selling organization of any particular business, so that such selling organization can enter the different States and do business.

There can be no good reason for interfering with the creation of associate corporations through which industrial concerns, which require large capital in the produc-

tion of commodities, shall be relieved from dragging the weight of this capital through all the jurisdictions of the United States. On the contrary, the sale of goods through such smaller corporation should be facilitated. This custom does not constitute a subterfuge, nor does it result in any injustice to the various States. There is no necessity of securing authorization for the large corporation to do business in each of the 50 States when the selling organization, which needs no credit, as the goods which it sells are furnished by the parent company, can quite as efficiently serve this purpose with a nominal capitalization.

When you realize that the basis of taxation in some of our States is the authorized capital stock of a company, and that the United States Supreme Court has recently decided in the case of Massachusetts that such taxation is not unconstitutional, you will realize that the corporation with a large authorized capitalization must do something of this sort to find outlets in the different States for the sale of its goods; and there is no possible theory upon which these two corporations should be considered as a combination; and, on the other hand, there is every good business reason for having the management of these two concerns identical, because their interests are the same and the business is an entity.

Yours, very truly,

CHAS. B. HOBBS.

[The First National Bank of Augusta. Charles S. Hichborn, president; T. A. Cooper, cashier.]

AUGUSTA, ME., *February 21, 1914.*

CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE,
Washington, D. C.

DEAR SIR: I very much hope that in the framing of the bill touching interlocking directorates, some provision shall be made to care for the interests of the banks in the smaller communities. It is often found very difficult to get the right men to serve on a board of directors. In perhaps a majority of cases in the smaller localities, in order to have the best men available, it would be necessary to choose the same men on both National and State banks, if both institutions should there be represented.

The evils which it is undertaken to correct do not exist to any appreciable extent in small communities. I earnestly suggest, therefore, that in the drafting of a bill like this some provision shall be made by which it shall not be applicable to cities of small size, and that it shall be permissible for a man to be a director in one National and one State bank in the same town.

I hope that you will give it favorable consideration. Indeed, it would seem that one might with all propriety be a director in more than one national bank if they were not in the same locality. However, I do not urge that with equal force.

My especial desire is not to have the small banks in the small cities so hampered so as not to be able to get the best men and so give the best possible service.

Very truly, yours,

C. S. HICHBORN.

[The First National Bank. A. E. Carlton, president; Larry Maroney, vice president; J. De Longchamps, cashier.]

CRIPPLE CREEK, COLO., *February 25, 1914.*

MY DEAR SIR: Press reports advise of a bill before your committee prohibiting interlocking directorates. In practice a measure of this character will seriously handicap the conduct of small banks, particularly those located in adjacent communities.

In the Cripple Creek mining district, which is practically one camp, we have two towns located 6 miles apart. A bank to properly serve this community must have an office in each town. The interests of myself and associates cover enterprises spread over the entire district and of necessity we conduct separate banks in each community. A law preventing any of the individuals serving on one board from serving on the other would be a great detriment to the safe conduct of the business, particularly as men of responsibility and experience are somewhat limited as to number.

Public opinion seems to have had a salutary effect upon this situation. Would it not be well to allow conditions to remain as at present, with the confidence that the situation will not demand statutory enactment?

Very truly, yours,

A. E. CARLTON.

To Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

[Smith & Beckwith, attorneys. Alexander L. Smith, George H. Beckwith, Gustavus Ohlinger, Edward O. Kirby.]

TOLEDO, OHIO, *February 26, 1914.*

Hon. HENRY D. CLAYTON,
Chairman House Judiciary Committee, Washington, D. C.

MY DEAR SIR: My attention has been called to the interlocking directory bill pending before the Judiciary Committee. The first section of that bill makes it unlawful for any person who is "a director or other officer or employee" of any railroad corporation doing an interstate business to be a director in any bank. I am the general solicitor of the Ann Arbor Railroad Co., one of the weaker lines of railroad in the Middle West. It is not in a position to employ counsel to give their whole time to the railroad service, and I am engaged in general practice as well. I am also a director in a national bank in Toledo. This connection is an agreeable and profitable one for me and I feel sure that neither the bank nor the railroad company would desire me to sever my official relations with them. If this law goes into effect, I suppose I should have to sever my connection either with the railroad company or with the bank. This would impose a special hardship on the weaker lines of railroad who are in like case with the Ann Arbor in reference to the employment of counsel. It would be a serious hardship on me personally.

Does not the prohibition of this clause go beyond the requirements of the principle which underlies the bill? Surely no one would want to interfere with perfectly legitimate and proper business relations.

Very truly,

ALEX. T. SMITH.

The Stearns & Foster Co., cotton felt mattresses. Seth C. Foster, president; Wm. S. Stearns, vice president; Edwin R. Stearns, treasurer; Wm. R. Foster, secretary.]

LOCKLAND, CINCINNATI, OHIO, *March 6, 1914.*

MY DEAR LEE: Pardon me for again troubling you with my ideas on legislation, but I am much interested in what Congress may do in regard to holding companies. A great many of them are, of course, built up on pure "financing" and for the purpose of capitalizing whatever may exist in the good will of the constituent companies. These holding companies, with their enormous capitalization of stocks and bonds, are a fraud on the public, as these stocks and bonds represent no money put into the holding companies. All they represent is the risk in the enterprise, and the promoters get all the profit and none of the risk.

There are, however, a great many companies that seem to me legitimate. Small gas plants and small electric plants seldom are or can be well managed. They can not in the nature of things obtain the services of men of experience. They seldom can command the necessary capital to be run economically, and where men with capital and experience can combine a number of small weak plants into one large company, not only is a waste of capital prevented, but the entire community is benefited by being better served. And if the public utility commission does its duty, there is no reason why a lot of water in the shape of stocks and bonds should be foisted on the public. And there is no reason why the promoters should get back from the sale of the bonds of the new company all the money they originally put into the properties and still retain an enormous amount of stock in the new company—all of which represents not one dollar of cash invested by them, but is simon-pure "water."

Honestly formed and managed, a holding company should prove a great blessing. Some of them are honestly managed, but many are not. I can not well explain my ideas on the subject in any better way than to give an example of a company, the financing of which I consider a fraud on the investing public and deserving of the greatest censure.

THE CENTRAL STATES ELECTRIC CORPORATION.

The name of this company is a misnomer. It has no plant. It produces no electricity. It does no business at all. It simply has a charter and a set of officers (who do nothing but hold a few meetings), and it is selling to the dear public—

5 per cent gold notes	$6,000,000
7 per cent preferred stock ($30,000,000 authorized)	4,484,800
Common stock	5,381,700
Total	15,866,500

The security on which these notes and stocks are based is 6,539,600 common stock of the Cleveland Electric Illuminating Co. (being about 75 per cent of the capital stock of that company) lodged with the Guaranty Trust Co., of New York.

The history of the formation of the Central States is interesting.

The Cleveland Electric is one of the most efficient and conservatively managed corporations in Ohio or in the country. Its plant is kept at the topnotch of efficiency. At the end of every month it charges 10 per cent of the month's gross earnings to depreciation. Its charge for residence lighting is among the lowest of American cities. Its charges for power are so low that it is obliged to provide a million to a million and a half new capital every year for increase of plant. And in spite of the fact that it is assessed for taxation at the full value of all its stocks and bonds, it regularly earns 12 per cent on its common stock, and has for the past 10 years.

Of its 8,804,400 common stock, about 60 or 70 per cent was held by three or four wealthy men in Cleveland, who were tired of their contention with the city authorities.

One of these men was asked by a New York promoter what he would take for his stock. He replied 130, and the promoter accepted it. The other men then said they would sell also. You will find their names on the board of directors of the Central States Co. The promoter then circularized every stockholder of the company, saying that he had bought 60 per cent of the stock at 130 and offering to take the shares of others at the same price, if tendered within a certain time. This produced a veritable panic, and this panic was intensified when one of the most prominent investment bankers of New York City, who had always financed the company and through whom nearly every stockholder had bought his stock, was induced to send out a circular advising all stockholders to accept.

Although Mr. Williams's plans were known, I do not think there was a single financial paper or investment banker or brokerage firm that criticized the scheme, save one. There was one broker who had the courage to openly denounce the scheme as illegitimate. Having a list of the stockholders, he immediately circularized them all, advising them that they were perfectly secure; that Mr. W.'s overwhelming holding of stock could not be used to their disadvantage; that under Ohio laws he could not issue bonds in excess of the capital stock, and that his hands were tied by the public utility commission of Ohio.

As a result of this very few of the stockholders sold; but it was due to the good sense and courage of this one man that all of them were not frightened into selling an investment they had held for years and were perfectly satisfied with.

So much for the effect of this kind of financing on the stockholders of the Cleveland Co. Now, for its effects on the Cleveland Co. itself.

Nearly every year the company offers its stockholders the right to subscribe from 10 to 20 per cent of their holdings in new stock at par. The stock itself sells from 135 to 140. It is a great object to get it at par, but it takes money. If Mr. W. is to take his share, he must hence get money. Where is it to come from?

His 5 per cent notes are nearly all sold, if not all sold, so he can not get it from the notes. He must fall back on his $30,000,000 preferred stock and sell what he dares to, or if he can not, he must bring pressure on his board of directors of the Cleveland Co. to declare extra dividends.

Is it right that a $17,500,000 corporation in Ohio should be under pressure of a New York financier to declare large dividends simply to satisfy his needs?

Now, look at it from another point of view. I am not unreasonable, I think, in supposing that all or the greater part of the 5,381,700 common stock of the Central States is serenely resting in the pockets of Mr. Harrison Williams and his numerous associates now on the board of the Cleveland Electric. To realize their profits they must make their common valuable in some way, so they can sell it, say by declaring a dividend on it.

So the Central States lately declared a small dividend on its common, and not long ago I heard that the common was selling at 45.

Congress may decide whether the public need protection against buying common stock of a company of this kind, but I am looking after the welfare of the Cleveland Electric. Who can say what influence Mr. Williams's desire or necessity for a dividend on Central States common had on the payment of an extra 5 per cent dividend by Cleveland Electric in January, making 13 per cent for the 12 months?

I overlooked another point. If Mr. Williams's needs are not met by extra dividends, look at the temptation to consider that 10 per cent of earnings for depreciation is much larger than necessary and to vote to cut it down to 5 per cent; or, if he wants the Central States to stop dividends to consider it too small, and to raise it to 15 per cent.

But we have not yet fathomed the financial ingenuity of these men. They are selling their common stock and stand to make a profit of several million. But even if they sell all their stock, why should they lose control of the company?

Before they sold any common stock, they placed it in a voting trust until June 11, 1917, so they could sell their stock without parting with control.

And who are these gentlemen who have made themselves voting trustees? They are Harrison Williams, A. W. Burchard, vice president of the General Electric Co.; Edwin M. Bulkley, of Spencer, Trask & Co.

What will happen in a few years? They will have sold all their stock and garnered their hard-earned millions. Then some time of panic or financial stress comes. How easy to arrange it so that the Central will be short of money and that dire necessity will compel one or two dividends to be dropped. A few shares of stock are put on the market by one of these gentlemen and sold at a ridiculously low price (to one of his own partners in crime). Then, with a low market price fixed and continued as long as necessary—accompanied by discouraging reports of future prospects, the greater part of the stock can be quietly bought back, and dividends resumed on it after a decent interval.

As a stockholder in the Cleveland Electric Co., I would like to see its control taken out of the hands of a bunco New York watered stock-gambling company. To think that an Ohio corporation with $17,500,000 real money invested in it should be practically under the control of three such men, without the investment of $1 of their own money; to think that they should be allowed to make a profit of several millions in bringing about such a state of affairs; to think that the laws should allow a bunco company to be formed in New York and allow it to issue and sell to the public $15,866,500 of stocks and notes based on nothing but $6,539,600 of the stock of another company in Ohio—all this makes me feel it is time for a French Revolution.

I do not believe such a corporation could have been formed in Ohio. I am inclined to believe the public utility commission would have had a say in the matter.

I may be telling you somebody's secrets, but everything I have said is fact and nothing but fact. Such a very large amount of this stock was held in our office at the time these things were going on that I was obliged to keep track of them, and I can prove every statement I have made.

May I ask you to see that this gets into the hands of the committee considering the bill on holding companies and voting trusts? I am sorry I had to make it so long, but the committee may find it of some use.

I inclose you a circular of the Central States. It is very cunningly drawn. I would call your attention to the last row of figures at the foot of page 3, where Williams gives the amount applicable to depreciation and common dividends, instead of giving the amount which had actually been deducted for depreciation and the difference which was available for dividends.

I have not the data to write you about the Kentucky Utilities Co., but will do so to-morrow.

Yours, truly,

E. R. STEARNS.

Mr. A. LEE THURMAN,
Solicitor Department of Commerce,
Washington, D. C.

[Advance Memoranda—Subject to correction.]

CENTRAL STATES ELECTRIC CORPORATION TEN-YEAR 5 PER CENT SECURED GOLD NOTES.

Dated June 1, 1912. Due June 1, 1922. Interest payable June 1 and December 1. In coupon form $500 and $1,000 each, with privilege of registration as to principal. Redeemable as to all on any part, or any interest date, on 30 days' notice, at 101 and accured interest. Convertible at par at any time at the option of the holder into 7 per cent cumulative preferred stock of Central States Electric Corporation at 105, with adjustment of accrued interest and preferred stock dividend. Authorized, $6,000,000. Outstanding $5,381,500 [including $892,500 about to be issued]. Guaranty Trust Co. of New York, trustee.

The salient features of these notes are set forth in the accompanying advance proof of a letter from the president of the corporation, which he summarizes as follows:

(1) These $5,381,500 notes are secured by over 74 per cent of the entire outstanding amount of the Cleveland Electric Illuminating Co. common stock conservatively valued at over $8,500,000, or about 158 per cent of par value of notes issued against it. Further amounts of notes can only be issued at the rate of $77.3224 par value of notes for each $100 par value additional common stock of the Cleveland company deposited.

(2) It is provided in the agreement securing these notes that at least 60 per cent of the total outstanding common stock and more than 50 per cent of the total outstand-

ing capital stock of the Cleveland company must at all times be deposited with the trustee as security for this note issue.

(3) These notes are followed by $4,484,800 Central States Electric Corporation 7 per cent preferred stock and $5,381,700 common stock, which issues it is expected will be still further increased with the growth and expansion of Central States Electric Corporation.

(4) The net income of the Cleveland Electric Illuminating Co. for the year ended December 31, 1912, applicable to depreciation charges and common-stock dividends is reported as $1,079,819, as set forth in the accompanying letter, against a maximum charge on the total authorized issue of notes of $300,000.

(5) The Cleveland Electric Illuminating Co. has reported uninterrupted annual increases in both net and gross earnings since 1894, while the policy of the company during that period has been to steadily lower the rates charged for electric current.

(6) Regular dividends have been paid upon the preferred stock of the Cleveland Electric Illuminating Co. since the organization of the company in 1893. The common stock has received uninterrupted dividends at the rate of 8 per cent per annum since 1904.

(7) The franchises under which the Cleveland Electric Illuminating Co. furnishes electricity are in the opinion of counsel unlimited as to time. The plant is modern in all respects, with a total capacity of approximately 135,000 horsepower. All of the transmission system is underground.

(8) The population of Cleveland and its suburbs served by the Cleveland company is estimated to be 700,000, and the territory is showing very rapid and substantial growth.

The trust agreement was drawn by Messrs. Hawkins, Delafield & Longfellow and approved by Messrs. Stetson, Jennings, & Russell and Messrs. Masten & Nichols.

SPENCER TRASK & Co.,
43 Exchange Place, New York.

(Branch offices: Albany, N. Y., State and James Streets; Boston, Mass., 50 Congress Street; Chicago, Ill., 72 West Adams Street)

CENTRAL STATES ELECTRIC CORPORATION.

APRIL —, 1913.

Messrs. SPENCER TRASK & Co.,
43 Exchange Place, New York City.

GENTLEMEN: Referring to Central States Electric Corporation 10-year 5 per cent secured gold notes, I beg to state that $5,381,500 par-value notes constitute the entire outstanding amount of an authorized issue of $6,000,000, dated June 1, 1912, and maturing June 1, 1922, with interest payable semiannually in New York City, at the rate of 5 per cent per annum on June 1 and December 1. The notes are in coupon form of $500 and $1,000 each, with privilege of registering the principal. All or any part of this issue may be redeemed by the company on any interest date on 30 days' notice at 101 and accrued interest. At the option of the holder, notes of thi issue may be converted at any time at par into 7 per cent cumulative preferred stock of Central States Electric Corporation at 105, with adjustment of interest and dividend.

Security.—This issue of $5,381,500 notes is a direct obligation of Central States Electric Corporation (organized under the laws of the State of Virginia) and is secured by a trust agreement made with Guaranty Trust Co. of New York, trustee. In addition, these $5,381,500 notes are secured by deposit with the trustee of $6,539,600 par-value common stock of the Cleveland Electric Illuminating Co., being over 74 per cent of the total outstanding amount of said common stock ($8,804,400), conservatively valued at over $8,500,000, or about 158 per cent of the principal of these notes.

The remaining notes of this issue can not be brought out except by depositing with the trustee additional The Cleveland Electric Illuminating Co. common stock at the rate of about $77.3224 par value of notes for each $100 par value of stock.

It is provided in the agreement securing these notes that at least 60 per cent of the total outstanding common stock, and more than 50 per cent of the total outstanding capital stock of the Cleveland company, must at all times be deposited with the trustee as security for this note issue.

Capitalization.—The Cleveland Electric Illuminating Co. has outstanding $8,804,400 common stock and $800,000 preferred stock, of a total authorized issue of $10,000,000.

The Cleveland company also has outstanding $6,500,000 first mortgage 5 per cent bonds due April 1, 1939, which are part of an authorized issue of $30,000,000. The mortgage securing this issue provides that further issues of these bonds shall be limited to 80 per cent of the cost of additional equipment or property, and then only when the net earnings of the company for the preceding year equal at least twice the

interest charges for one year on the total amount outstanding, including the new issue.

The capital stock of Central States Electric Corporation consists of $4,484,800 par-value 7 per cent preferred stock (authorized $30,000,000) and $5,381,700 par-value common stock (authorized $10,000,000), which issues it is expected will be further increased with the growth and expansion of Central States Electric Corporation.

Management.—The directors of Central States Electric Corporation are as follows:
Russel Armstrong, vice president, Federal Utilities (Inc.).
R. E. Breed, president, American Gas & Electric Co.
Edwin M. Bulkley, of Spencer Trask & Co., bankers.
Anson W. Burchard, of the General Electric Co.
De Forest Candee, president, Federal Utilities (Inc.).
Geo. A. Galliver, president Central States Electric Corporation and vice president Republic Railway & Light Co
Alfred Gregory, of Hawkins, Delafield & Longfellow, attorneys
Parmely W. Herrick, of Herrick, Parmelee & Crawford, Cleveland, Ohio.
Samuel Scovil, vice president the Cleveland Electric Illuminating Co.
Robert Lindsay, general manager the Cleveland Electric Illuminating Co.
William L. McKee, vice presedent Central States Electric Corporation.
Robert C. Morse, of Jackson & Curtis, bankers, Boston, Mass.
James Richardson, of Richardson & Clark, bankers, Providence, R. I.
J. F. Wessel, consulting engineer, Youngstown, Ohio.
Harrison Williams, member executive committee in a number of public utility companies.

Property.—The franchises under which the Cleveland Electric Illuminating Co. furnishes electricity in Cleveland and surrounding territory are, in the opinion of counsel, unlimited as to time.

The Cleveland Electric Illuminating Co. has two power stations, the original plant on Canal Street and a new plant located on the Lake Shore at the foot of East Seventieth Street, Cleveland, Ohio. Both of these plants are advantageously located. The Canal Street station is equipped with generating and substation apparatus, and is advantageously located for supplying electricity and exhaust steam to the downtown business district, for which purpose it is being used at the present time. The new Lake Shore plant is equipped with the most modern generating apparatus, and is now generating about 90 per cent of the electricity supplied by the company. The present electrical apparatus of the company consists of 101,000 kilowatts, or approximately 135,000 horsepower. The property owned is sufficient to permit of extensions to the Lake Shore plant to an ultimate capacity exceeding 200,000 horsepower.

The transmission system of the Cleveland Electric Illuminating Co. is all underground, at 11,000 volts pressure, connecting the generating stations with seven existing substations and one in process of construction. The generating and substations are all advantageously located and of fireproof construction throughout. From these substations emanate underground and overhead lines for distribution, extending over a territory including Cleveland and its suburbs, aggregating in excess of 75 square miles, with an estimated population of 700,000. In this distribution system are all necessary lines, transformers, services, meters, and house connections for about 47,000 consumers.

The Cleveland Electric Illuminating Co. is supplying the Cleveland Electric Railways Co. with additional power needed by it, under a 10-year contract recently executed.

Earnings.—The earnings of the Cleveland Electric Illuminating Co. have shown uninterrupted annual increases in both gross and net since 1894.

The earnings of the company for the past five years are reported to us as follows:

	1912	1911	1910	1909	1908
Gross earnings	$3,192,651	$2,683,145	$2,293,732	$1,865,578	$1,642,016
Operating expenses and taxes	1,737,528	1,470,448	1,284,684	1,078,655	898,614
Income over operating expenses and taxes	1,455,123	1,212,697	1,009,048	786,923	744,302
Interest charges, preferred stock, dividends, and amortization of bond account	375,304	297,815	271,034	230,540	226,499
Applicable to depreciation and common-stock dividends	[1] 1,079,819	914,882	738,014	556,383	517,803

[1] In addition to the regular charge there was set apart out of this balance a sum of $50,000 as a further credit to "unamortized debt discount," per resolution of board of directors, Jan. 22, 1913.

Annual interest requirements on the total authorized issue of $6,000,000 Central States Electric Corporation 10-year 5 per cent secured notes, $300,000.

From the above it will be seen that for the five years gross earnings, but on largely increased capital year by year, increased approximately 95 per cent, while the policy of the company during that time has been to steadily lower the rates charged for electric current. Regular dividends have been paid upon the preferred stock since the organization of the company in 1893. The common stock (which now amounts to $8,804,400) has received uninterrupted dividends at the rate of 8 per cent per annum since 1904. For the last fiscal year the amount available for depreciation and common-stock dividends amounted to $1,079,819, as shown in the above statement, against a maximum charge on the full authorized issue of $6,000,000 par value Central States Electric Corporation notes of $300,000.

Territory.—Cleveland is the largest city in the State of Ohio, the third largest west of the Alleghanies, and the sixth in the United States, during the last decade having passed both Baltimore and Pittsburgh. Owing to its advantageous location on Lake Erie and the Cuyahoga River, and its proximity to the coal and iron fields of Ohio and Pennsylvania and to the iron-producing regions of Lake Superior, Cleveland is an important collective and distributing point, enjoying a large lake-port traffic and the facilities of nine railroads. The city ranks next to Chicago as the greatest manufacturing center on the Great Lakes.

Yours, very truly,

GEO. A. GALLIVER, *President.*

The statements made in this circular are from official sources, or from those which we regard as reliable, or are the expression of our belief.

SPENCER, TRASK & Co.,
43 Exchange Place, New York.

Branch offices: Albany, N. Y., State and James Street; Boston, Mass., 50 Congress Street; Chicago, Ill., 72 West Adams Street.

MISCELLANEOUS SUGGESTIONS.

[Bigelow & Wise, counselors at law. Ernest A. Bigelow, Henry A. Wise.]

15 WILLIAM STREET,
New York, November 18, 1913.

Hon. THOMAS W. HARDWICK,
House of Representatives, Washington, D. C.

MY DEAR MR. HARDWICK: I note by the papers that the Congress of the United States is now interested in various proposed amendments to the Sherman antitrust law and that various Members of the Senate and House are drafting sundry proposed amendments.

I have had occasion during the past six months to handle two important litigations involving what, in my opinion, constituted violations of the Sherman antitrust law, but there is some doubt as to whether or not the law applies. Neither of these cases has as yet been decided. The facts in both cases indicate a plain violation of the spirit of the law, but on technical interpretations of the law it may be held that neither of them come within its language.

I am not seeking congressional aid in particular litigation, but do feel that such combinations as those involved in the two cases which have come under my particular observation should be reached by national legislation. These two combinations are the grand opera and vaudeville trusts. They are undoubtedly trusts. In fact, there is no more vicious trust in this country than that of the vaudeville combine. Vaudeville actors to-day are slaves and must, if they would make a living, wear the collar of the vaudeville trust.

For your information I am sending herewith a copy of an answer filed by me in a suit brought by the Metropolitan Opera Co. and a complaint filed by me against the vaudeville trust. These two pleadings will give you a very clear idea of the way these two concerns operate. I will be obliged if you will put them into the hands of some Member of the House or Senate who is particularly interested in the matter of amending the antitrust law.

I trust that you are well.

With best wishes, sincerely, yours,

HENRY A. WISE.

[In the District Court of the United States for the Southern District of New York. H. B. Marinelli (Ltd.) plaintiff, against United Booking Offices of America, Central Vaudeville Promotion Co., Benjamin F. Keith, A. Paul Keith, Frederick F. Proctor, Edward F. Albee, John J. Murdock, Morris Meyerfeld, jr., and Martin Beck, defendants. Complaint. Bigelow & Wise, attorneys for plaintiff, Borough of Manhattan, New York City.]

H. B. Marinelli (Ltd.), the plaintiff above named, complaining of the defendants above named, by Bigelow & Wise, its attorneys, respectfully shows as follows:

I. That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, with an office and place of business in the city, State, and southern district of New York.

II. That the defendant, United Booking Offices of America, is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with an office and place of business in the city, State, and southern district of New York; and at all times herein mentioned, has been now engaged in business, and now may be found within the southern district of New York; it is organized as a business corporation; has an authorized capital stock issued and outstanding; the purposes for which it is organized, according to its certificate of incorporation, are to contract with and engage acts, attractions, specialties, amusements, actors, musicians, singers, entertainers, and performers for theaters, vaudeville entertainments, and the like; to contract with theaters, vaudeville entertainments, and the proprietors thereof, for the appearance of acts, attractions, specialties, amusements, and for the services of actors, musicians, singers, entertainers, and performers; at and for stated periods or otherwise; to act as the agent of theaters, theatrical and vaudeville proprietors, and amusement enterprises; to do a "booking" business as said term "booking" is understood by theaters, theatrical and vaudeville proprietors, and amusement enterprises; to manufacture theatrical scenery and properties; to lease, build, operate, manage, control, buy, sell, own, deal in theaters and other places of amusement and entertainment; to make any contracts necessary or convenient for the purposes of said business; to buy, own, hold, lease, sell, and deal in any real estate and such personal property as is necessary or incidental to the purpose set out; and to do any and all things necessary or incidental in connection with said business to enhance the value of the company's property or rights; it has an executive management, consisting of a president, secretary, treasurer, and other lesser officers, who reside in the city of New York and are employed by it, and, among other places, exercise their respective functions at said city of New York.

III. That the defendant Central Vaudeville Promotion Co. is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with in office and place of business in the city, State, and southern district of New York; and at all times herein mentioned, has been and now is engaged in business, and now may be found within the southern district of New York; it is organized as a business corporation, has an authorized capital stock issued and outstanding; the purposes for which it is organized, according to its certificate of incorporation, are to purchase, lease, own, or otherwise acquire and to manage theaters, music halls, opera houses, and places of amusement and entertainment; to sell, mortgage, let, or otherwise dispose of such theaters and other places of amusement; to provide for the production, representation, and performance of operas, stage plays, dramas, comedies, burlesque performances, vaudeville performances, ballets, pantomimes, moving pictures, and other musical and dramatic performances and entertainments, and to carry on a general theatrical business; to act as agent for theaters and other places of amusement and entertainment and the owners and persons conducting the same, and to act as agent for actors, singers, musicians, performers, and entertainers of every kind; to do a booking business as the term "booking" is understood by the proprietors of theaters and the theatrical profession generally; and to maintain and conduct a theatrical employment agency; to purchase and otherwise acquire and to sell or otherwise dispose of and deal in plays, sketches, copyrights, dramatic, and musical productions, and rights of every kind therein, and licenses and privileges of every sort for the purposes of said business; to purchase, manufacture, or otherwise dispose of and deal in theatrical properties and scenery, and to maintain and operate theatrical information, press, and art bureaus, and to conduct a photograph business; to apply for, register, obtain, purchase, lease, or otherwise acquire and hold, own, use, and operate or introduce and sell, assign, or otherwise dispose of or grant license in respect of or otherwise turn to account any and all trade-marks, trade names, patents, inventions, improvements, and processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise; and with a view to working and development of the same, to carry on any business, whether manufacturing or otherwise, which this corporation may deem calculated, directly or indirectly, to effectuate these objects; to acquire by purchase or otherwise, and to own, hold, sell, lease, mortgage, or otherwise dispose of all such

property as the purposes of this corporation shall require, or which may be necessary and proper to be used in connection with the business of the corporation, and to do and perform any and all acts and things not herein specifically enumerated, which may be necessary to be done or performed in order to properly carry on or conduct the business of the corporation, and to advance the interests thereof; the corporation shall have power to acquire by purchase or otherwise the whole or any part of the business, good will, property, assets, and contracts of any person, firm, or corporation engaged in a business of the same general character as that for which this corporation is organized, if the same are, in the judgment of the board of directors, useful to the business of the corporation, and may pay therefor in stocks, bonds, notes, debentures, or other obligations of the corporation; the corporation may purchase, acquire, hold, sell, assign, transfer, pledge, or otherwise dispose of the shares of the capital stock, bonds, or other evidences of indebtedness of any corporation of the State of New York or of any other State or elsewhere, and in so purchasing, holding, or otherwise acquiring such stock, bonds, or other evidences of indebtedness to issue in exchange, its stock, bonds, debentures, or other obligations; and the corporation may guarantee the bonds of any domestic corporation engaged in the same general line of business.

IV. On information and belief that the defendants, Benjamin F. Keith, A. Paul Keith, John J. Murdock, Frederick F. Proctor, and Edward F. Albee, are directors of the defendant United Booking Offices of America, and said Benjamin F. Keith is its president, said A. Paul Keith is its secretary, said Frederick F. Proctor is its vice president, said John J. Murdock is its executive manager, and said Edward F. Albee is its general manager; and said Edward F. Albee is the person duly designated by said company upon whom process may be served within the State of York, and that said Edward F. Albee has an office and place of business in the borough of Manhattan, city and State of New York, which is the place where said corporation has its principal place of business within this State.

V. On information and belief that said Benjamin F. Keith, A. Paul Keith, Edward F. Albee, Frederick F. Proctor, and John J. Murdock are citizens and residents of the southern district of New York, and each and all of them may now be found in said district.

VI. That the defendants, Morris Meyerfeld, jr., and Martin Beck, are engaged in business, have an office and place of business, and may now be found in the city, State, and southern district of New York.

VII. On information and belief that the defendants, Morris Meyerfeld, jr., and Martin Beck, are stockholders of the defendant Central Vaudeville Promotion Co. and control its affairs, and said Morris Meyerfeld, jr., is its president and said Martin Beck is its general manager, and as such general manager has an office and place of business in the city and southern district of New York, which is the place where said Central Vaudeville Promotion Co. has its principal place of business.

VIII. On information and belief that the defendant, Benjamin F. Keith owns or controls and operates, and at all times herein mentioned has owned or controlled and operated, theaters in numerous cities throughout the United States, and among such theaters are the following: B. F. Keith's Theater, in the city of Boston, in the State of Massachusetts; the Colonial, Alhambra, Bronx, and Union Square theaters, in the borough of Manhattan, city and State of New York; the Orpheum, Bushwick, and Greenpoint theaters, in the borough of Brooklyn, city and State of New York; B. F. Keith's New Theater, in the city of Philadelphia, in the State of Pennsylvania; the Hippodrome Theater, in the city of Cleveland, in the State of Ohio; B. F. Keith's Theater, in the city of Columbus, in the State of Ohio; B. F. Keith's Theater, in the city of Toledo, in the State of Ohio; the Columbia Theater, in the city of Cincinnati, in the State of Ohio; B. F. Keith's Theater, in the city of Louisville, in the State of Kentucky; the Grand Opera House, in the city of Indianapolis, in the State of Indiana; the Bijou Theater, in the city of Boston, in the State of Massachusetts; the New Theater, in the city of Portland, in the State of Maine; Chase's Theater, in the city of Washington, in the District of Columbia; the Grand Theater, in the city of Syracuse, in the State of New York; and at all such times he was and now is engaged in the business, trade, and commerce, as hereinafter more particularly described, of producing and presenting what is known as vaudeville theatrical performances at said theaters.

IX. On information and belief that the defendant Frederick F. Proctor owns or controls and operates, and at all times herein mentioned has owned or controlled and operated theaters in numerous cities throughout the United States, and among such theaters are the following: Proctor's Theater, in the city of Newark, in the State of New Jersey; the Fifth Avenue Theater, in the Borough of Manhattan, city and State of New York; and at all such times he was and now is engaged in the business, trade, and commerce, as hereinafter more particularly described, of producing and presenting what is known as vaudeville theatrical performances at such theaters.

X. On information and belief that the defendant Edward F. Albee owns or controls and operates, and at all times herein mentioned has owned or controlled and operated theaters in numerous cities throughout the United States, and among such theaters are the following: B. F. Keith's Theater, in the city of Lowell, in the State of Massachusetts; B. F. Keith's Theater, in the city of Providence, in the State of Rhode Island; and at all such times he was and now is engaged in the business, trade, and commerce, as hereinafter more particularly described, of producing and presenting what is known as vaudeville theatrical performances at such theaters.

XI. On information and belief, the defendants Morris Meyerfeld, jr., and Martin Beck own or control and operate, and at all times herein mentioned have owned or controlled and operated theaters in numerous cities of the United States, and among such theaters are the following: The Orpheum Theater, in the city of San Francisco, in the State of California; the Orpheum Theater, in the city of Los Angeles, in the State of California; the Orpheum Theater, in the city of Oakland, in the State of California; the Orpheum Theater, in the city of New Orleans, in the State of Louisiana; the Orpheum Theater, in the city of Kansas City, in the State of Missouri; the Orpheum Theater, in the city of Omaha, in the State of Nebraska; the Orpheum Theater, in the city of Denver, in the State of Colorado; the Orpheum Theater, in the city of St. Paul, in the State of Minnesota; the Orpheum Theater, in the city of Minneapolis, in the State of Minnesota; the Orpheum Theater, in the city of Salt Lake City, in the State of Utah; the Orpheum Theater, in the city of Memphis, in the State of Tennessee; the Orpheum Theater, in the city of Sioux City, in the State of Iowa; and now are, and at all times herein mentioned, have been engaged in the business, trade, and commerce as hereinafter more particularly described, of producing and presenting what is known as vaudeville theatrical performances at such theaters.

XII. That the aforesaid theaters enumerated in Paragraphs VIII, IX, and X hereof, together with certain other theaters enumerated in Paragraph XIII hereof, constitute a group, or circuit, of theaters, which are, and at all times herein mentioned were, known in the theatrical and vaudeville business and to the theatrical and vaudeville trade, and to those engaged therein, as the Keith Circuit of vaudeville theaters, and will hereinafter be referred to as the Keith Circuit.

XIII. That in addition to the theaters enumerated in Paragraphs VIII, IX, and X the following theaters are included in the Keith circuit, to wit: Hammerstein's Victoria Theater and Hammerstein's Paradise Roof Garden, in the Borough of Manhattan, city and State of New York; Harry Davis's Grand Opera House, in the city of Pittsburgh, in the State of Pennsylvania; Kernan's Maryland Theater, in the city of Baltimore, in the State of Maryland; Shay's Theaters, respectively in the cities of Buffalo, in the State of New York, and Toronto, in the Dominion of Canada; the Temple Theaters, respectively in the cities of Detroit, in the State of Michigan, and Rochester, in the State of New York; S. Z. Poli's Theaters, respectively in the cities of Worcester and Springfield, in the State of Massachusetts, Hartford, New Haven, Bridgeport, and Waterbury, in the State of Connecticut, and Wilkes-Barre and Scranton, in the State of Pennsylvania; the Temple Theater, in the city of Hamilton, in the Dominion of Canada; the Orpheum Theater, in the city of Montreal, in the Dominion of Canada; the Dominion Theater, in the city of Ottawa, in the Dominion of Canada; the Auditorium Theater, in the city of Quebec, in the Dominion of Canada; Henderson's Music Hall, at Coney Island, in the State of New York; Brighton Beach Music Hall and New Brighton Theater, at Brighton Beach, in the city and State of New York; Morris's Music Hall, in the city of Rockaway, in the State of New York; the Lynn Theater, at the city of Lynn, in the State of Massachusetts; the Colonial Theater, in the city of Dayton, in the State of Ohio; the Shubert Theater, in the city of Utica, in the State of New York; and the Orpheum Theaters, in the cities of Reading, Allentown, Harrisburg, and Altoona, in the State of Pennsylvania; the Colonia and Lyric Theaters, in the city of Richmond, in the State of Virginia; the Colonial Theater, in the city of Norfolk, in the State of Virginia; Docksteader's Garrick Theater, in the city of Wilmington, in the State of Delaware; the Hudson Theater, in the city of Union Hill, in the State of New Jersey; the Forsythe Theater, in the city of Atlanta, in the State of Georgia; the Colonial Theater, in the city of Erie, in the State of Pennsylvania; and the Savoy Theater, in the city of Atlantic City, in the State of New Jersey.

XIV. That the aforesaid theaters enumerated in Paragraph XI hereof, together with certain other theaters enumerated in Paragraph XV hereof, constitute a group or circuit of theaters which are, and at all times herein mentioned were, known in the theatrical and vaudeville business and to the theatrical and vaudeville trade and to those engaged therein as the Orpheum circuit of theaters, and will be hereinafter referred to as the Orpheum circuit.

XV. That in addition to the theaters enumerated in Paragraph XI of this complaint, the following theaters are included in the Orpheum circuit, to wit: The Majestic Theater, the Chicago Grand Opera House, the Olympic Theater, and the Haymarket Theater, in the city of Chicago, in the State of Illinois; the Columbia Theater, in the city of St. Louis, in the State of Missouri; the Majestic Theater, in the city of Des Moines, in the State of Iowa; the Majestic Theater, in the city of Milwaukee, in the State of Wisconsin; the Orpheum Theater, in the city of Evansville, in the State of Indiana; the Orpheum Theater, in the city of Duluth, in the State of Minnesota; the Orpheum Theater, in the city of Winnepeg, in the Dominion of Canada; the Orpheum Theater, in the city of Ogden, in the State of Utah; the Orpheum Theater, in the city of Lincoln, in the State of Nebraska; the Orpheum Theater, in the city of Butte, in the State of Montana; the Orpheum Theaters in the cities of Spokane and Seattle, in the State of Washington; the Orpheum Theater, in the city of Port and, in the State of Oregon; the Ingersoll Park Theater, in the city of Des Moines, in the State of Iowa; the Forest Park Theater, in the city of St. Louis, in the State of Missouri; the Fontaine Ferry Park Theater, in the city of Louisville, in the State of Kentucky; East End Park Theater, in the city of Memphis, in the State of Tennessee; the West End Park Theater, in the city of New Orleans, in the State of Louisiana; and the Ramona Park Theater, in the city of Grand Rapids, in the State of Michigan.

XVI. Vaudeville, as the term is used and understood throughout the United States and in the Dominion of Canada, consists of an entertainment, for hire, extending over a period of time of from two to three hours during the day or night upon the stage of a regularly licensed theater or playhouse, where, in return for one admission fee, the spectators are afforded the opportunity of witnessing a number of disassociated, short performances by actors, acrobats, musicians, singers, dancers, exhibitors, conjurers, athletes, and other entertainers.

XVII. The business, trade, and commerce of producing vaudeville, as hereinbefore defined, is conducted by three classes of persons, to wit—performers, managers, and proprietors; the class of performers embraces actors, acrobats, athletes, musicians, singers, jugglers, conjurers, and a great number of other entertainers; the class of managers embraces those who are regularly engaged as the personal representatives and business managers of those embraced in the first class; and the class of proprietors embraces the owners, lessees, and proprietors of theaters and playhouses who are engaged in producing and presenting, for hire, vaudeville entertainments; the latter class employs those embraced in the first class. A great number of people in the United States and in the Dominion of Canada are engaged in said business, trade, and commerce, and in the course of every year, tremendous sums of money are expended therein; men and women devote years of their lives to acquiring especial talent as actors or acrobats or musicians or singers or in developing some talent, the public presentation of which is attractive to the theater-going public, and by public exhibitions of such talents are enabled to and do earn, and are dependent thereon to earn a livelihood; those of them most skilled in their respective occupations command high salaries and are in popular demand with the theater-going public; in order to display their talents they must and do seek employment by the proprietors owning and operating high-grade, first-class theaters and playhouses at which high-grade vaudeville is produced. For many years it has been the custom for such performers to employ persons to act for them as their personal representatives and business managers such managers have represented, and do represent such performers, and acting for them have solicited and do solicit proprietors for contracts of employment for their principals, negotiate the terms and conditions of such contracts, arrange for a regular itinerary for their principals, attend to preparing and getting out the usual and necessary advertising for their principals, attend to the transportation and to numerous details incident to and a part of the business of such principals. The proprietors own, lease, or control theaters and playhouses, at which and in connection with which they employ numerous persons, such as stage hands, property men, carpenters, electricians, ushers, ticket sellers, stage managers, conductors, and musicians; they purchase and cause to be manufactured and shipped to them at such theaters and playhouses large quantities of valuable scenery, furniture, fixtures, and costumes, some of which is purchased in a State other than that in which such theaters or playhouse is located, and shipped from such State to the State where such theater or playhouse is located; these proprietors also purchase and cause to be manufactured for and shipped to them great quantities of advertising matter, such as bill posters and handbills, much of which they cause and procure to be transported in interstate and foreign commerce; they also cause and procure to be printed and thereafter offer the same for sale, and do sell, tickets of admission to the entertainments which they are engaged in producing, and for which tickets they receive large sums of money; and as a further part of their aforesaid business, trade, and commerce said proprietors enter into contracts

with performers wherein and whereby said performers are obligated to appear at said proprietors' theatres and perform for them, and wherein and whereby said proprietors are obligated to pay such performers for such services; and in many instances such contracts are made by said proprietors with such performers in a State other than and remote from the State in which the proprietors' said theater is located, and in such instances, by said contract, said performers are obligated to travel from one State to another, and thereafter, and because of such contract, he or she, as the case may be, does travel from one State to another as a direct result of the procurement of said proprietor as aforesaid. Nearly all proprietors of first-class theaters or show houses in the United States and Canada, at which first-class, high grade vaudeville is produced, maintain, and for many years have maintained, agents and representatives in the city of New York, who are and have been engaged in conducting negotiations looking to the employment of persons to perform in vaudeville for said proprietors at their theaters and playhouses. The city of New York is the market for such talent; performers seeking remunerative employment in vaudeville must arrange their itinerary before starting in a season; generally a vaudeville performer can not appear for more than one week consecutively in any one city; they must travel from city to city and State to State, and in order to have any success they must arrange beforehand for a series of employments in many cities; consequently, New York City has grown to be the mart, and all proprietors of high-class theaters go there to hire performers, and all high-class performers go there to obtain employment. Out of these conditions has grown the necessity for the performers to employ managers, or personal representatives. The business, trade, and commerce is one of bargain and sale. Generally the performers are men and women of talent, but lacking in business ability; they are obliged to employ men skilled in barter and sale to represent them and negotiate for them; consequently certain persons have been and are engaged in the business of acting as managers for performers; these persons have established a regular business of representing performers, negotiating their contracts of employment, stipulating as to the terms thereof, and obtaining employment for such performers on the most advantageous terms. Through these means the vaudeville business has grown to be a business of vast proportions; large numbers of theaters have been built throughout the United States and great numbers of people have engaged in the business; everyone engaged therein is constantly engaged either in moving from State to State or from a foreign country to the United States, or vice versa, or in causing and procuring some other person or persons to so move; there is no other business, trade, and commerce in which there is so much of intercourse among the several States of the United States or in which there is so much of intercourse with foreign nations.

XVIII. That the aforesaid theaters in the aforesaid Keith circuit and Orpheum circuit constitute and are practically all of the theaters in the United States and the Dominion of Canada at which first class vaudeville entertainments are produced.

XIX. That all persons who perform in vaudeville in the United States and Canada aspire to obtain employment by the owners and operators of said theaters in said Keith circuit and Orpheum circuit, and no first class performer who is debarred therefrom can obtain sufficient employment in vaudeville at any other theaters in the United States and the Dominion of Canada at which first class vaudeville entertainments are produced from which he or she can earn a living.

XX. Plaintiff now is and for many years has been engaged in the business, trade, and commerce of acting as manager for and personal representative of numerous persons who are and have been engaged in the business, trade, and commerce of performing in vaudeville. Plaintiff maintains four offices and places of business, respectively, in the cities of London, in the Kingdom of Great Britain; Paris, in the Republic of France; Berlin, in the Empire of Germany; and New York, in the State of New York. At each of these offices it maintains a corps of employees, of whom some are engaged in office work and others as theatrical critics and reporters; through this latter class, all of whom are trained observers of theatrical performances, plaintiff maintains a systematic surveillance over the principal theaters and show houses throughout the world at which theatrical and vaudeville performances are produced, and keeps in touch with all novel, interesting and attractive vaudeville performances and performers, and keeps itself informed of the character of exhibitions and performances which will appeal to the theater-going public in the different communities throughout the world in which vaudeville is produced; plaintiff has laid out and expended large sums of money in building up its organization and now has large sums of money invested in its aforesaid business, trade, and commerce; by the expenditure of large sums of money and through the medium of extensive advertising throughout the world plaintiff's business has become widely known throughout North and South America, Europe, Africa, Asia, and Australia. Being fully advised, by the means aforesaid, of the conditions prevailing in the various communities in which vaudeville is pro-

duced, plaintiff is enabled to and does keep the owners and proprietors of theaters and play houses advised of the latest attractions and successes in vaudeville, and also to keep the performers advised of the most desirable places at which they may present their performances; through this comprehensive acquaintance with the vaudeville situation plaintiff has been enabled to and does conduct a large business as manager and personal representative of vaudeville performers; for many years it has been employed by many of the most successful and best known vaudeville performers to act as their manager and personal representative; many such performers have, from time to time, employed plaintiff and paid it large sums of money for acting as their manager and personal representative. Plaintiff's business as such manager and personal representative, among other things, has consisted, and does consist, in contracting with such performers to negotiate for them with the proprietors of theaters and play houses for the employment of such performers by said proprietors, to arrange a series of employments in various countries and cities, to arrange an itinerary of performances for such performers so as to keep them continuously employed and to reduce the amount and expense of their traveling to a minimum; to furnish such performers with information as to the most available and satisfactory routes of travel, the most satisfactory hotels at which to stop, the customs and manners of the various countries which they are to visit, and where they are to travel from one country to another to arrange for such performers the necessary papers to be used in their dealings with the customs immigration, and other Government officials. Many of the performers who have employed plaintiff's services are actors, performers, jugglers, conjurers, acrobats, and various other kinds of entertainers, who as a part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, fixtures, and apparatus, animals, birds, and reptiles, which belong to them and which they carry with them from place to place; in such cases, where plaintiff has been employed as manager or personal representative, it in many instances, as a part of its employment, has attended to the transportation and shipment of such scenery, costumes, fixtures, apparatus, animals, birds, and reptiles, and in many cases this is and has been a very large part of plaintiff's business, trade, and commerce aforesaid. Plaintiff, by means of correspondence and cable, and through its agent and representative in the United States, negotiates and has negotiated, and effects and has effected contracts with proprietors of theaters in the United States, wherein and whereby vaudeville performers obligate and have obligated themselves to come to the United States and perform in vaudeville at theaters and play houses owned or controlled by such proprietors, and thereafter, and as a result of such contracts, said performers have and do come to the United States from Europe, Asia, Africa, Australia, and South America, and have and do perform in vaudeville entertainments produced by such proprietors; and in such cases plaintiff, as a part of its duties as manager and personal representative for such performers, has attended and does attend to the consulation and shipment of the paraphernalia of such performers and, upon the arrival of the same in the United States, has attended and does attend to the entry, bonding, and other necessary details relating to and attending on the entry of foreign merchandise at the United States customhouses; and upon the arrival of such performers in the United States plaintiff has caused and does cause them to be met by one or more of its representatives, who have assisted and do assist said performers in such matters as they may have desired or may desire assistance. Most, if not, all of the performers engaged in vaudeville have advertising matter consisting of billposters and photographs, which are distributed, posted, and circulated in the cities where such performers are to appear, and as a part of plaintiff's business as manager and personal representative for such performers it has attended and does attend to the procuring of such advertising matter and to the preparation of the same, and to its shipment from one country to another and from one State to another State in the United States, and to its publication and distribution in advance of the appearance of such performers. And for the aforesaid services plaintiff has been and is paid by such performers. By reason of the excellence of the service which plaintiff has rendered and does render to its aforesaid patrons, and by reason of its world-wide acquaintance and familiarity with the conditions of the vaudeville business, trade, and commerce, and by reason of its courteous and efficient treatment of its patrons and the success attained by such patrons through plaintiff's services as aforesaid, plaintiff has built up and attained a remunerative business and a good will of great value and has earned, and until the wrongful misconduct of these defendants, as hereinafter more particularly described, was earning large sums of money from its aforesaid business, trade, and commerce.

XXI. That for many years plaintiff, as manager and personal representative of many of the leading vaudeville performers, negotiated for them contracts of employment to perform at all or nearly all of the aforesaid theaters in the aforesaid Keith and Orpheum circuits, and for such services has received large sums of money from

such performers; and at all times since the incorporation of defendant United Booking Offices of America until the 1st day of August, 1913, plaintiff, as manager and personal representative of many of the most prominent vaudeville performers, negotiated for them contracts of employment to perform in vaudeville at all or nearly all of the aforesaid theaters in the aforesaid Keith circuit, and such contracts of employment were so negotiated through said defendant United Booking Offices of America.

XXII. That at all times since the incorporation of defendant Central Vaudeville Promotion Co. until the 1st day of August, 1913, plaintiff, as manager and personal representative of many of the most prominent vaudeville performers, negotiated for them contracts of employment to perform in vaudeville at all or nearly all of the aforesaid theaters in the aforesaid Orpheum circuit, and such contracts of employment were so negotiated through said defendant Central Vaudeville Promotion Co.

XXIII. That through plaintiff's organization and because of its efficient services as aforesaid, it has until the 1st day of August, 1913, succeeded in bringing and causing and procuring to come to the United States of America, and in obtaining employment for them to perform in vaudeville at the aforesaid theaters in the aforesaid Keith circuit and Orpheum circuits a greater number of first-class and recognized vaudeville stars than all the other persons in the United States engaged in the business, trade, and commerce of acting as managers and personal representatives of vaudeville performers.

XXIV. The defendant Benjamin F. Keith, as hereinbefore stated, owns or controls and operates a large number of theaters throughout the United States; at all of these theaters he is, and at all times herein mentioned has been, engaged in the business, trade, and commerce of producing vaudeville entertainments for hire; and in connection with and as a part of such business, trade and commerce, he is, and at all times herein mentioned has been, engaged in employing a large number of persons, to wit: Stage managers, laborers, carpenters, electricians, conductors, musicians, ushers, doorkeepers, and ticket sellers; such persons render services in connection with the performances of vaudeville at such theaters and are paid by said defendant for such services; said defendant also, in connection with and as a part of his said business, trade, and commerce, employs agents, who are located in the city of New York, who act for him in employing persons to perform in vaudeville for him in his aforesaid theaters, and through such agents said defendant from time to time enters into contracts with performers such as actors, acrobats, athletes, conjurors, jugglers, singers, musicians, and various other entertainers, wherein and whereby said performers agree to travel from one city in one State to another city in another State of the United States and to perform in vaudeville for said defendant at his theater in the latter place, and as a result of such contracts, performers do travel and have traveled from one State to another State of the United States and have performed and do perform in vaudeville for said defendant at his aforesaid theaters, and such performers have been and are paid for such services by said defendant; and as a part of his aforesaid business said defendant has entered into and does enter into contracts with performers wherein and whereby such performers have agreed and do agree to come to the United States from a foreign country, and upon arriving in the United States, to perform in vaudeville for said defendant at his aforesaid theaters, and wherein and whereby said defendant has agreed and does agree to pay said performers for such services, and as a result of such contracts said performers have and do come to the United States from foreign countries, to wit: Europe, Asia, and other countries, and have performed and do perform in vaudeville for said defendant at his aforesaid theaters, and have been and are paid therefor by said defendant. And, in many instances, said performers have brought, and do bring with them, from such foreign countries to the United States, large quantities of paraphernalia such as scenery, costumes, and fixtures, animals, birds, and reptiles, which they have transported and caused to be transported to the United States, and from one city in one State to another city in another State of the United States, in connection with and as a part of their work in performing for said defendant in vaudeville at his aforesaid theaters as aforesaid; and so said defendant has been and is engaged in trade and commerce among the several States of the United States and with foreign nations within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

XXV. On information and belief, that in the case of many of the theaters hereinbefore stated to be owned or controlled and operated by the defendant Benjamin F. Keith, he does not actually own the theater building, but the same is owned or leased by a corporation which has been organized by said defendant, and said corporation owns or leases, and at all times herein mentioned has owned or leased, the theater building; but in all such cases said defendant owns, and at all times herein mentioned has owned, a large majority, if not all, of the capital stock of such corporation,

and at all times herein mentioned he has absolutely dominated said corporation and managed and controlled its theater building to all intents and purposes as if the same were actually owned by him; and in all such cases said defendant has regulated and controlled every detail of the business of producing vaudeville at such theaters, and has caused and procured the employment and discharge of all persons connected therewith, and dictated and controlled the character of performances produced at such theaters and caused and procured the employment of performers to perform in vaudeville at such theaters; many such theaters, so dominated, controlled, and managed by him are located in States other than the State of New York; and in connection with and as a part of his aforesaid domination, management, and control of said theaters he has caused and procured, at all times herein mentioned, his agents, servants, and employees in the city and State of New York to enter into and conduct negotiations with performers looking to the employment of such performers to appear and perform for him in vaudeville at such theaters; and as a result of such negotiations, said agents, servants, and employees have caused and procured, and do cause and procure such performers to travel from said city of New York to said theaters in States other than the State of New York, and to perform in vaudeville for said defendant and his aforesaid corporations, and said defendant has caused and procured, and does cause and procure, said performers to be paid therefor; and so said defendant has been and is engaged in business, trade, and commerce, among the several States of the United States, within the meaning of the aforesaid act of Congress.

XXVI. On information and belief that the defendant Benjamin F. Keith, in connection with and as a part of the business, trade, and commerce of producing vaudeville at the theaters dominated, managed, and controlled by him, as stated in the last preceding paragraph, has, at all times herein mentioned, caused and procured his agents, servants, and employees located in the city and southern district of New York, to enter into and conduct negotiations with vaudeville performers located in Europe, looking to and resulting in said vaudeville performers coming to the United States of America to perform for hire, in vaudeville performances, at said theaters; and in such instances, and there have been many such, that being a regular part of said defendant's business, trade, and commerce, said performers have so come to the United States as a result and because of written agreements between them and said defendant's agents, servants, and employees aforesaid; and in many such cases said performers, in compliance with and as a part of their aforesaid agreements have brought with them, and caused and procured to be transported from Europe to the United States, large quantities of scenery, fixtures, costumes, animals, birds, and reptiles, and other paraphernalia; and for their coming to the United States, and bringing and causing to be brought such paraphernalia as aforesaid, and for performing in vaudeville at such theaters, said defendant has, at all times herein mentioned, caused and procured said vaudeville performers to be paid; and so said defendant is, and at all times herein mentioned has been, engaged in business, trade, and commerce with foreign nations within the meaning of the aforesaid act of Congress.

XXVII. The defendant Frederick F. Proctor, as hereinbefore stated, owns or controls and operates a large number of theaters throughout the United States; at all of these theaters he is, and at all times herein mentioned has been, engaged in the business, trade, and commerce of producing vaudeville entertainments for hire; and in connection with and as a part of such business, trade, and commerce, he is, and at all times herein mentioned has been, engaged in doing substantially all of the things alleged in Paragraphs XXIV, XXV, XXVI hereof, to have been and to be done by the defendant Benjamin F. Keith, and to which reference is hereby made as if the same was here repeated as to the defendant Proctor.

XXVIII. The defendant Edward F. Albee, as hereinbefore stated, owns or controls and operates a large number of theaters throughout the United States; at all of these theaters he is, and at all times herein mentioned has been, engaged in the business, trade, and commerce of producing vaudeville entertainments for hire; and in connection with and as a part of such a business, trade, and commerce, he is, and at all times herein mentioned has been, engaged in doing substantially all of the things alleged in Paragraphs XXIV, XXV, and XXVI hereof, to have been and to be done by the defendant Benjamin F. Keith, and to which reference is hereby made as if the same was here repeated as to the defendant Albee.

XXIX. The defendants Morris Meyerfeld, jr., and Martin Beck, as hereinbefore stated, own or control and operate a large number of theaters throughout the United States; at all of these theaters they are, and at all times herein mentioned have been, engaged in the business, trade, and commerce of producing vaudeville entertainments for hire; and in connection with and as a part of such business, trade, and commerce, they are, and at all times herein mentioned have been, engaged in doing substantially all of the things alleged in Paragraphs XXIV, XXV, and XXVI hereof, to have been

and to be done by the defendant Benjamin F. Keith, and to which reference is hereby made as if the same was here repeated as to the defendants Meyerfeld and Beck.

XXX. On information and belief that the entire capital stock of the defendant United Booking Offices of America is, and at all times herein mentioned has been, owned by the defendants Benjamin F. Keith, Frederick F. Proctor, and Edward F. Albee; that said defendants caused and procured said company to be incorporated, and at all times since its incorporation have dominated and controlled and now dominate and control its entire business, trade, and commerce.

XXXI. On information and belief that the entire capital stock of the defendant Central Vaudeville Promotion Co. is, and at all times herein mentioned has been, owned by the defendants Morris Meyerfeld, jr., and Martin Beck; that said defendants caused and procured said company to be incorporated, and at all times since its incorporation have dominated and controlled and now dominate and control its entire business, trade, and commerce.

XXXII. That the business, trade, and commerce in which the defendant United Booking Offices of America is, and at all times since its incorporation has been, engaged consists in employing vaudeville performers to perform in vaudeville for the defendants Benjamin F. Keith, Frederick F. Proctor, and Edward F. Albee, at the theaters owned or controlled and operated by them, respectively, as hereinbefore stated; it is the agent for said defendants in the city and southern district of New York, and at all times herein mentioned, as such agent, it has been engaged in entering into and conducting negotiations with vaudeville performers, looking to and resulting in the employment of such performers to perform in vaudeville for said defendants at their respective theaters aforesaid; and as such agent for said defendants, from time to time, and as a regular part of its business, trade, and commerce, it has entered into and conducted negotiations with various and sundry persons who have been and are acting as managers and personal representatives of vaudeville performers; and among such managers and personal representatives of such vaudeville performers with whom said defendant has heretofore entered into and conducted such negotiations has been this plaintiff; that as a regular part of its business, trade, and commerce, until about the 1st of August, 1913, said defendant dealt with this plaintiff and through this plaintiff arranged for and procured contracts for the employment of various and sundry vaudeville performers for whom plaintiff was acting in the capacity of manager and personal representative as aforesaid, and in and by such contracts so procured said defendant as agent, as aforesaid, employed and agreed to employ said vaudeville performers to perform in vaudeville for said defendants Keith, Proctor, and Albee, respectively, at their aforesaid theaters throughout the United States. And in conducting the aforesaid negotiations looking to and resulting in the employment of said performers as aforesaid, and as a part of its business, trade, and commerce, said defendant has caused and procured said performers to agree to travel from one State to another State in the United States and to perform in vaudeville in such latter State; and as a result of such agreements said performers have traveled and do travel from one State to another State in the United States; and in such negotiations, and as a part of its said business, trade, and commerce, said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements, said performers have traveled from foreign countries, to wit, Germany, France, England, Australia, and other countries to the United States and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, trade, and commerce, said defendant has caused and procured performers to agree to travel from the United States to and to perform in the vaudeville in the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States to and after such travel have performed in vaudeville in the Dominion of Canada; and so said defendant has been and is engaged in trade and commerce among the several States of the United States and with foreign nations, within the meaning of the aforesaid act of Congress; and a further part of the business, trade, and commerce in which said defendant is, and, at all times herein mentioned, has been engaged consists in employing vaudeville performers to perform in vaudeville for the owners of the theaters hereinbefore enumerated as being in the Keith Circuit other than those owned or controlled and operated by the defendants Benjamin F. Keith, Frederick F. Proctor, and Edward F. Albee; it is the agent of the owners and proprietors of such theaters and has done for them, and is doing for them, services in all respects similar to what it is doing and has done for said defendants Keith, Proctor, and Albee as hereinbefore described in paragraphs XXIV, XXV, and XXVI hereof.

XXXIII. That the business, trade, and commerce in which the defendant, Central Vaudeville Promotion Co., is, and at all times since its incorporation has been, engaged

consists in employing vaudeville performers to perform in vaudeville for the defendants, Morris Meyerfeld, jr., and Martin Beck, at the theaters owned or controlled and operated by them respectively, as hereinbefore stated; it is the agent for said defendants in the city and southern district of New York, and at all times herein mentioned as such agent it has been engaged in entering into and conducting negotiations with vaudeville performers, looking to and resulting in the employment of such performers to perform in vaudeville for said defendants at their respective theaters aforesaid; and as such agent for said defendants from time to time and as a regular part of its business, trade, and commerce it has entered into and conducted negotiations with various and sundry persons who have been and are acting as managers and personal representatives of vaudeville performers; and among such managers and personal representatives of such vaudeville performers with whom said defendant has heretofore entered into and conducted such negotiations has been this plaintiff; that as a regular part of its business, trade, and commerce until about the 1st of August, 1913, said defendant dealt with this plaintiff and through this plaintiff arranged for and procured contracts for the employment of various and sundry vaudeville performers for whom plaintiff was acting in the capacity of manager and personal representative as aforesaid, and in and by such contracts so procured said defendant, as agent as aforesaid, employed and agreed to employ said vaudeville performers to perform in vaudeville for said defendants, Morris Meyerfeld, jr., and Martin Beck, respectively, at their aforesaid theaters throughout the United States. And in conducting the aforesaid negotiations looking to and resulting in the employment of said performers, as aforesaid, and as a part of its business, trade, and commerce, said defendant has caused and procured said performers to agree to travel from one State to another State in the United States and to perform in vaudeville in such latter State; and as a result of such agreements said performers have traveled and do travel from one State to another State in the United States; and in such negotiations and as a part of its said business, trade, and commerce said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit: Germany, France, England, Australia, and other countries to the United States, and have, after such travel, performed in vaudeville in the United States; and in such negotiations and as a part of its said business, trade, and commerce said defendant has caused and procured performers to agree to travel from the United States to and to perform in vaudeville in the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States to, and after such travel have performed in vaudeville in the Dominion of Canada; and so said defendant has been and is engaged in trade and commerce among the several States of the United States and with foreign nations within the meaning of the aforesaid act of Congress; and a further part of the business, trade, and commerce in which said defendant is and at all times herein mentioned has been engaged consists in employing vaudeville performers to perform in vaudeville for the owners of the theaters hereinbefore enumerated as being in the Orpheum Circuit other than those owned or controlled and operated by the defendants, Morris Meyerfeld, jr., and Martin Beck; it is the agent of the owners and proprietors of such theaters and has done for them and is doing for them services in all respects similar to what it is doing and has done for said defendants, Myerfeld, jr., and Beck, as hereinbefore described in Paragraph XXIX hereof.

XXXIV. That on or about the 1st day of August, 1913, at the city, county, State, and southern district of New York, the defendants United Booking Offices of America, Central Vaudeville Promotion Co., Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, Morris Meyerfeld, jr., and Martin Beck, hereinafter called "defendants," entered into an unlawful combination and conspiracy to wrongfully and unduly restrain the aforesaid interstate and foreign business, trade, and commerce, so then and since then carried on and conducted by said defendants United Booking Offices of America, Central Vaudeville Promotion Co., Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, Morris Meyerfeld, jr., and Martin Beck, at their aforesaid theaters in the Keith Circuit and the Orpheum Circuit as aforesaid, and also to wrongfully and unduly restrain the aforesaid interstate and foreign business, trade, and commerce, so then and since then carried on and conducted by the aforesaid owners and proprietors of the aforesaid theaters in said Keith Circuit and Orpheum Circuit other than those owned, managed, and controlled as aforesaid by said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, Morris Meyerfeld, jr., and Martin Beck; and from said 1st day of August, 1913, and continuously, and at all times from said date until and on the day of the filing of this complaint, all of said defendants were and now are knowingly and willfully engaged in said unlawful combination and conspiracy and in the furtherance of its unlawful object and purpose aforesaid, and so, at all such times were con-

tinuously and now are engaged in an unlawful and corrupt combination and conspiracy in restraint of said business, trade, and commerce, to the great and irreparable injury and detriment of this plaintiff, and said unlawful combination and conspiracy was to be and is being accomplished by said defendants in the manner and by the means following, to wit:

(A) By said defendants Benjamin F. Keith, Frederick F. Proctor, and Edward F. Albee agreeing together not to employ any person to perform for them in vaudeville at their respective theaters, owned, controlled, and operated by them as aforesaid, except through the agency of the defendant United Booking Offices of America; and in and by said defendants adhering to and carrying out such agreement.

(B) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should not act as agent for the owner, or proprietor of any of the aforesaid theaters in the aforesaid Keith Circuit where such owner or proprietor employed any person to perform in vaudeville at such theater through any agency other than the defendant United Booking Offices of America; and in and by said defendants adhering to and carrying out such agreement.

(C) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together to cause, procure, and compel all owners and proprietors of all the aforesaid theaters in the Keith circuit aforesaid to promise and agree with said defendants not to employ any person to perform in vaudeville at their respective theaters aforesaid, except through the agency of the defendant United Booking Offices of America; and in and by said defendants adhering to and carrying out such agreement.

(D) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should not employ any person to perform in vaudeville at any of the aforesaid theaters in the Keith circuit aforesaid if such person shall have performed in vaudeville in any theater in the United States or the Dominion of Canada other than the aforesaid theaters in the Keith circuit and the Orpheum circuit; and in and by said defendants adhering to and carrying out such agreement.

(E) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should blacklist any person who should perform in vaudeville at any theater in the United States or the Dominion of Canada other than the aforesaid theaters in the Keith circuit and Orpheum circuit; and that such person having been so blacklisted should be debarred from thereafter performing at any of the aforesaid theaters in said Keith circuit and Orpheum circuit, and that the owners and proprietors of all theaters in said circuits should be notified of such blacklisting and forbidden to thereafter employ such performers under pain of being themselves blacklisted; and in and by said defendants adhering to and carrying out such agreement.

(F) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should not act as agent for the owner or proprietor of any theater in the aforesaid Keith circuit who should employ any person to perform in vaudeville for him or them after such person should have been blacklisted as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(G) By said defendants Benjamin F. Keith, Frederick F. Proctor, and Edward F. Albee agreeing together not to employ any person to perform for them in vaudeville at any of their respective theaters aforesaid when such person should be represented by or have in his or her employ as manager or personal representative any person who shall have obtained employment for any person to perform in vaudeville in any theater in the United States or in the Dominion of Canada other than the aforesaid theaters in the Keith circuit and Orpheum circuit aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(H) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should not act as agent for the owner or proprietor of any of the aforesaid theaters in the Keith circuit aforesaid, where such owner or proprietor should have employed any person to perform in vaudeville at his or their theater when such person so employed was represented by or had in his or her employ as manager or personal representative any person who should have obtained employment in vaudeville for any performer at any theater in the United States or the Dominion of Canada other than the aforesaid theaters in the Keith circuit

and the Orpheum circuit aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(I) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should blacklist any person acting as manager or personal representative of vaudeville performers where such person should, as such manager or personal representative, obtain employment for any person to perform in vaudeville in any theater other than the aforesaid theaters in the Keith circuit and Orpheum circuit aforesaid, and that such person, having been so black listed, should be debarred from thereafter negotiating with said United Booking Offices of America for the employment of any person to perform in vaudeville at the aforesaid theaters in said Keith circuit, and that the owners and proprietors of all theaters in said circuits should be notified of such black listing and forbidden thereafter to employ any performer who employed or was represented by any such manager or personal representative so black listed, under pain of being themselves black listed; and in and by said defendants adhering to and carrying out said agreement.

(J) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should not act as agent for the owner or proprietor of any theater in the aforesaid Keith circuit who should employ any person to perform for him or them in vaudeville, when such person so employed was, at the time of such employment, represented by any manager or personal representative who should have been black listed as aforesaid; and in and by said defendants agreeing together to blacklist any performer who should employ any person as manager or personal representative who should have been black listed as aforesaid; and in and by adhering to and carrying out such agreements.

(K) By said defendants Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America agreeing together that said United Booking Offices of America should notify all owners and proprietors of the aforesaid theaters in the Keith circuit aforesaid of all performers black listed as aforesaid, and that any owner or proprietor employing such black listed performer to perform for him or them in his or their theater would not thereafter be able to employ any performers through the agency of said United Booking Offices of America, and by said defendants agreeing that said United Booking Offices of America should blacklist any owner or proprietor of any theater who should employ any performer black listed as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(L) By said defendants, Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America, agreeing together that the defendant United Booking Offices of America should notify the defendant Central Vaudeville Promotion Co. of any and all performers, managers, personal representatives, owners, and proprietors who should be blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(M) By said defendants, Morris Meyerfeld, jr., and Martin Beck, agreeing together not to employ any person to perform for them in vaudeville at their respective theaters owned, controlled, and operated by them as aforesaid, except through the agency of the defendant Central Vaudeville Promotion Co.; and in and by said defendants adhering to and carrying out such agreement.

(N) By said defendants, Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should not act as agent for the owner or proprietor of any of the aforesaid theaters in the aforesaid Orpheum Circuit, where such owner, or proprietor employed any person to perform in vaudeville at such theater through any agency other than the defendant, Central Vaudeville Promotion Co.; and in and by said defendants adhering to and carrying out such agreement.

(O) By said defendants Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together to cause, procure, and compel the owners and proprietors of all the aforesaid theaters in the Orpheum Circuit aforesaid to promise and agree with said defendants not to employ any person to perform in vaudeville at their respective theaters aforesaid except through the agency of the defendant Central Vaudeville Promotion Co.; and in and by said defendants adhering to and carrying out such agreement.

(P) By said defendants, Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should not employ any person to perform in vaudeville at any of the aforesaid theaters in the Orpheum Circuit aforesaid, if such person should have performed in vaudeville in any

theater in the United States or the Dominion of Canada, other than the aforesaid theaters in the Keith Circuit and Orpheum Circuit aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(Q) By said defendants, Morris Meyerfeld, Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should blacklist any person who should perform in vaudeville at any theater in the United States or the Dominion of Canada other than the aforesaid theaters in the Keith Circuit and Orpheum Circuit, and that such person, having been so blacklisted, should be debarred from thereafter performing at any of the aforesaid theaters in said Keith Circuit and Orpheum Circuit, and that the owners and proprietors of all of the theaters in said circuits should be notified of such blacklisting and forbidden to thereafter employ such performers under pain of being themselves blacklisted; and in and by said defendants adhering to and carrying out such agreement.

(R) By said defendants Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should not act as agent for the owner or proprietor of any theater in the Orpheum Circuit who should employ any person to perform in vaudeville for him or them after such performer should have been blacklisted as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(S) By said defendants Morris Meyerfeld, jr., and Martin Beck agreeing together not to employ any person to perform for them in vaudeville at any of their respective theaters aforesaid when such person should be represented by or have in his or her employ as manager or personal representative any person who should have obtained employment for any person to perform in vaudeville in any theater in the United States or in the Dominion of Canada, other than the aforesaid theaters in the Keith Circuit and Orpheum Circuit aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(T) By said defendants Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should not act as agent for the owner or proprietor of any of the aforesaid theaters in the Orpheum Circuit aforesaid, where such owner or proprietor should have employed any person to perform in vaudeville at his or their theater, when such person so employed was represented by or had in his or her employ as manager or personal representative any person who should have obtained employment in vaudeville for any performer at any theater in the United States or the Dominion of Canada other than the aforesaid theaters in the Keith Circuit and the Orpheum Circuit aforesaid, and in and by said defendants adhering to and carrying out said agreement.

(U) By said defendants Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should blacklist any person acting as manager or personal representative of vaudeville performers where such persons should, as such manager or personal representative obtain employment for any person to perform in vaudeville in any theater other than the aforesaid theaters in the Orpheum Circuit and Keith Circuit aforesaid; and that such person, having been so blacklisted, should be debarred from thereafter negotiating with said Central Vaudeville Promotion Co. for the employment of any person to perform in vaudeville at the aforesaid theaters in said Orpheum Circuit, and that the owners and proprietors of all theaters in said circuits should be notified of such blacklisting and forbidden thereafter to employ any performer who employed or was represented by any such manager or personal representative so blacklisted, under pain of being themselves blacklisted and in and by said defendants adhering to and carrying out said agreement.

(V) By said defendants Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that said Central Vaudeville Promotion Co. should not act as agent for the owner or proprietor of any theater in the aforesaid Orpheum Circuit who should employ any person to perform for him or them in vaudeville, when such person so employed was at the time of such employment represented by any manager or personal representative who should have been blacklisted as aforesaid; and in and by said defendants agreeing together to blacklist any performer who should employ any person as manager or personal representative who should have been blacklisted as aforesaid; and in and by adhering to and carrying out such agreement.

(W) By said defendants, Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that the defendant, Central Vaudeville Promotion Co. should notify all owners and proprietors of the aforesaid theaters in the Orpheum Circuit aforesaid of all such performers blacklisted as aforesaid, and that any owner or proprietor employing such blacklisted performer to perform for him or them in his or their theater would not thereafter be able to employ any performers through the agency of said Central Vaudeville Promotion Co., and by said defendants agreeing that said

Central Vaudeville Promotion Co. should blacklist any owner or proprietor of any theater who should employ any performer blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(X) By said defendants, Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that the defendants, Central Vaudeville Promotion Co., should notify the defendant, United Booking Offices of America, of any and all performers, managers, personal representatives, owners, or proprietors, who should be blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(Y) By the defendants, Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, John J. Murdock, and United Booking Offices of America, Morris Meyerfeld, jr., Martin Beck, and Central Vaudeville Promotion Co., agreeing together that the Central Vaudeville Promotion Co., as agent for the aforesaid theaters in the Orpheum Circuit aforesaid should not employ any person to perform in vaudeville in any of the theaters in said circuit when such person should be blacklisted by the defendant, United Booking Offices of America, as aforesaid, and that the defendant, United Booking Offices of America, as agent for the aforesaid theaters in the Keith Circuit as aforesaid, should not employ any person to perform in vaudeville in any of the theaters in said circuit when such person should be blacklisted by the defendant Central Vaudeville Promotion Co., as aforesaid.

XXXV. That on or about the 1st day of August, 1913, the defendants, Benjamin F. Keith, Frederick F. Proctor, Edward F. Albee, A. Paul Keith, and John J. Murdock, unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce aforesaid, and unlawfully, designing, and wickedly contriving to destroy said plaintiff's business, trade, and commerce, and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured the defendant, United Booking Offices of America, to blacklist plaintiff and to announce to all the aforesaid theaters in the Keith Circuit and Orpheum Circuit aforesaid, that thereafter said United Booking Offices of America would not act as agent for any performer and would not obtain employment for any such performer to perform in vaudeville in any of the aforesaid theaters in the Keith Circuit who should thereafter employ this plaintiff as their manager or personal representative.

XXXVI. That on or about the 1st day of August, 1913, the defendants Morris Meyerfeld, jr., and Martin Beck, unlawfully designing and wickedly contriving to injure plaintiff in his business, trade, and commerce aforesaid, and unlawfully designing and wickedly contriving to destroy said plaintiff's business, trade and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured the defendant Central Vaudeville Promotion Co. to blacklist plaintiff and to announce to all the aforesaid theaters in the Orpheum circuit and Keith circuit aforesaid that thereafter said Central Vaudeville Promotion Co. would not act as agent for any performer and would not obtain employment to perform in vaudeville in any of the aforesaid theaters in the Orpheum circuit for any such performer who should thereafter employ this plaintiff as his manager or personal representative.

XXXVII. That on the 2d day of August, 1913, the defendants, unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in Das Organ Der Varietewelt, a newspaper printed and published in the city of Berlin, in the Empire of Germany, and largely read by persons engaged in performing in vaudeville, an advertisement in words and figures following, to wit:

"W. L. Passpart, booking for the Orpheum circuit and affiliated theaters, U. S. A., Randvoll House, 39 Charing Cross Road, London W. C. Telegrams, Beccario, London; home address, Roonstr. 12, Berlin, NW.; telegrams, Classy, Berlin; telefon., Amt Moabit 4311.

"Zur gefl. Kentnisnahme, dass von jetzt ab United Booking Office (Messrs. Keith, Albee, etc.) and Orpheum Circuit Co. (Mr. Martin Beck, etc.) durch die Agentur Marinelli keine Engagements mehr abschliesst."

Which said advertisement, when translated into English, reads as follows:

"W. L. Passpart, booking for the Orpheum circuit and affiliated theaters, U. S. A., Randvoll House, 39 Charing Cross Road, London W. C. Telegrams, Beccario, London; home address, Roonstr. 12, Berlin NW; telegrams, Classy, Berlin; telephone, Amt Moabit 4311.

"Please take notice that from now on the United Booking Office (Messrs. Keith, Albee, etc.) and the Orpheum Circuit Co. (Mr. Martin Beck, etc.) will make no more engagements through the agency of Marinelli."

XXXVIII. That on or about the second day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce, and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in Das Programm, a newspaper printed and published in the city of Berlin, in the Empire of Germany, and largely read by persons engaged in performing in vaudeville, an advertisement in words and figures following, to wit:

"W. L. Passpart booking for the Orpheum Circuit and affiliated theatres U. S. A. Randvoll House 39, Charing Cross Road, London, W. C. Telegrams Beccario—London. Home-Address: Roonstrasse 12, Berlin N. W. Telegrams: Classy-Berlin: Telephon: Amt. Moabit 4311.

"Zur gefälligen Kentnisnahme, dass von jetzt ab United Booking Office (Messrs. Keith, Albee, etc.) and Orpheum Circuit Co. (Mr. Martin Beck, etc.), durch die Agentur Marinelli keine Engagements mehr abschliesst."

Which advertisement when translated into English reads as follows:

"W. L. Passpart booking for the Orpheum Circuit and affiliated theatres U. S. A. Randvoll House 39, Charing Cross Road London, W. C. Telegrams Beccario—London. Home-Address: Roonstrasse 12, Berlin N. W. Telegrams: Classy-Berlin: Telephone: Amt. Moabit 4311.

"Please take notice that from now on the United Booking Office (Messrs. Keith, Albee, etc.) and the Orpheum Circuit Co. (Mr. Martin Beck, etc.) will make no more engagements through the agency of Marinelli."

XXXIX. That on the second day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce and to drive plaintiff out of business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in the New York Star, a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"UNITED BOOKING OFFICES OF AMERICA.
E. F. Albee,
General Manager.

ORPHEUM CIRCUIT OF AMERICA.
Martin Beck,
Managing Director.

"The High Class Vaudeville Theaters Booked and Managed by the Above Concerns Hereafter Will Not Engage Artists Through the Agencies of H. B. Marinelli.

E. F. ALBEE and MARTIN BECK."

XL. That on the 16th day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce, and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in the "New York Star," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"UNITED BOOKING OFFICES OF AMERICA,
E. F. Albee,
General manager.

ORPHEUM CIRCUIT OF AMERICA,
Martin Beck,
Managing director.

"The high-class vaudeville theaters booked and managed by the above concerns hereafter will not engage artists through the agencies of H. B. Marinelli.

E. F. ALBEE AND MARTIN BECK."

XLI. That on the 17th day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and

unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce, and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in "The Morning Telegraph," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"UNITED BOOKING OFFICES OF AMERICA, E. F. Albee, General manager.

ORPHEUM CIRCUIT OF AMERICA, Martin Beck, Managing director.

"The high-class vaudeville theaters booked and managed by the above concerns hereafter will not engage artists through the agencies of H. B. Marinelli.

E. F. ALBEE AND MARTIN BECK."

XLII. That on the 23d day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in "The Billboard," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words and figures following, to wit:

"United Booking Offices of America (agency). Booking for every first-class vaudeville theater North, South, East and West, east of Cincinnati. B. F. Keith, president, F. F. Proctor, vice president; E. F. Albee, general manager; A. Paul Keith, business manager; J. J. Murdock, executive manager. Offices, Putnam Building, 1493 Broadway, New York City."

XLIII. That on the 23d day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in "The Billboard," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"UNITED BOOKING OFFICES OF AMERICA E. F. Albee, General Manager.

ORPHEUM CIRCUIT OF AMERICA Martin Beck, Managing Director.

"The high-class vaudeville theaters booked and managed by the above concerns hereafter will not engage artists through the agencies of H. B. Marinelli.

E. F. ALBEE and MARTIN BECK."

XLIV. That on the 24th day of August, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in "The Morning Telegraph," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"UNITED BOOKING OFFICES OF AMERICA E. F. Albee, General Manager.

ORPHEUM CIRCUIT OF AMERICA Martin Beck, Managing Director.

"The high-class vaudeville theaters booked and managed by the above concerns hereafter will not engage artists through the agencies of H. B. Marinelli.

E. F. ALBEE and MARTIN BECK."

XLV. That on the 7th day of September, 1913, the defendants unlawfully designing and wickedly contriving to injure plaintiff in its business, trade, and commerce, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, trade, and commerce and to drive plaintiff out of said business, trade, and commerce, and in furtherance of and pursuant to the aforesaid unlawful combination and conspiracy, caused and procured to be printed, published, and circulated in "The Morning Telegraph," a newspaper printed and published in the city of New York, in the State of New York, and largely read by persons engaged in performing in vaudeville, an advertisement in words to the effect following, to wit:

"B. F. KEITH CIRCUIT.
E. F. Albee,
General Manager.

ORPHEUM CIRCUIT.
Martin Beck,
Managing Director.

AND AFFILIATED HIGH-CLASS VAUDEVILLE THEATRES

EAST and WEST

Continually searching the World's Artistic Markets For the Best and Newest They Have to Offer.

Always striving to be Distinctive, Original, and Deserving of the Patronage of the Most Discerning.

It should be understood that acts booked to play the high-class theatres in the above circuit lose their commercial value by appearing in other theatres—where the above circuits are represented."

XLVI. That as a result of the aforesaid unlawful combination and conspiracy and the unlawful acts of the defendants in furtherance thereof as aforesaid, plaintiff's business, trade, and commerce aforesaid in the United States and the Dominion of Canada has been and is entirely destroyed and plaintiff is no longer able to represent any performer engaged in performing in first-class vaudeville in the United States and the Dominion of Canada, or to obtain employment for anyone in any of the theaters aforesaid in the Keith Circuit and Orpheum Circuit aforesaid, and by reason thereof plaintiff's good will in its business, trade, and commerce aforesaid throughout the world has been and is greatly damaged; that the damages sustained by plaintiff by reason thereof are one million dollars ($1,000,000);

Wherefore, plaintiff demands judgment against the defendants and each of them in the sum of three million dollars ($3,000,000), together with the costs and disbursements of this action, and an allowance as and for counsel fee as to this honorable court shall seem reasonable.

BIGELOW & WISE,
Attorneys for Plaintiff,
15 William Street, City of New York.

Supreme Court of the State of New York, County of New York.

Metropolitan Opera Company, plaintiff,
against
Oscar Hammerstein and Arthur Hammerstein, defendants.

Amended answer of defendant Oscar Hammerstein:

The defendant, Oscar Hammerstein, answering the complaint herein, by Bigelow & Wise, his attorneys, respectfully shows to the court:

I. He admits paragraph I thereof.

II. Answering paragraph II thereof, this defendant denies any knowledge or information sufficient to form a belief as to whether the plaintiff contemplates continuing during the coming and succeeding seasons, the productions in said paragraph II of the complaint mentioned and referred to; and on information and belief this defendant denies that such productions in which the plaintiff has been engaged are of the highest artistic character and standard.

III. He denies any knowledge or information sufficient to form a belief as to each and every allegation stated and contained in paragraph marked III, except that he admits that the production of grand opera of the highest character and standard is attended with financial risk.

IV. He admits paragraph IV of the complaint.

V. Answering paragraph V of the complaint, he admits that the defendant Arthur Hammerstein is his son and that this defendant and said Arthur Hammerstein had, prior to April 26, 1910, acquired certain skill, experience, and knowledge in and about the production of grand opera; and on information and belief, this defendant denies each and every other allegation stated and contained in paragraph V, except that he admits that from 1906 to 1910 said Arthur Hammerstein was in the employ of this defendant at a fixed salary.

VI. Answering paragraph VI thereof, this defendant denies each and every allegation thereof, except that he admits that by the spring of 1910 this defendant and his production of grand opera and kindred entertainments had become widely known throughout the United States, and that in connection with this defendant's business of presenting said productions, this defendant had acquired and controlled the Philadelphia and Manhattan Opera Houses, with their fixtures and furnishings, and also a large amount of scenery, costumes, and music scores, certain contracts with opera singers, the rights to produce certain operas in the United States, and valuable good will in parts of the United States, particularly in New York, Philadelphia, and Boston.

VII. Answering paragraph VII thereof, this defendant admits that the opera-going public in any community is but a small part of the theater-going public; and a much smaller part of the general public, and that the concurrent production of grand opera by plaintiff and this defendant in the same localities resulted in dividing the attendance of this limited class of the public. He denies any knowledge or information sufficient to form a belief as to any of the other allegations stated and contained in said paragraph VII, except that he admits that during the season of 1909–10, because of such conditions and numerous other conditions, the conduct and production of grand opera by this defendant was unprofitable and resulted in a loss.

VIII. On information and belief this defendant denies each and every allegation stated and contained in paragraph VIII of the complaint.

IX. This defendant denies each and every allegation stated and contained in paragraph IX of the complaint, and alleges that in the spring of 1910, this defendant ceased the production of grand opera in the city of Philadelphia for a period of one week, and that such cessation was the result of a strike by the employees of the street car lines in Philadelphia, which made it impracticable and impossible for the opera-going public at large to reach the opera house of this defendant; and there being no prospect of any termination of such strike, this defendant determined to terminate his opera season at said Philadelphia Opera House, which had about five weeks more to run; and further alleges that thereafter and at the solicitation of Edward T. Stotesbury, of Philadelphia, who represented to this defendant that he was largely interested in said street railways, and also greatly interested in the further production of grand opera in said city, and who agreed with this defendant to defray any loss that might be sustained by this defendant as the result of producing said opera for said remaining five weeks, this defendant continued to produce grand opera at the Philadelphia Opera House for said five weeks.

X. This defendant denies each and every allegation stated and contained in Paragraph X of the complaint.

XI. This defendant denies each and every allegation stated and contained in Paragraph XI of said complaint, except that he admits that on or about April 26, 1910, a contract, of which Exhibit A annexed to the complaint purports to be a copy, and for more particularity as to which reference is made to the original thereof, was entered into by this defendant, through his son, Arthur Hammerstein, acting as his attorney in fact, and by said Arthur Hammerstein; and that said contract related, among other things, to the opera house of this defendant in the city of Philadelphia, and the land upon which it stood, together with all fixtures and furnishings, the rights of this defendant under contracts with certain artists, the rights of this defendant to produce certain operas, and rights or options to produce new operas, all the scenery, costumes, and music scores owned by this defendant in connection with his operatic business in this country, and the good will of this defendant, together with certain covenants contained in said contract.

XII. He denies any knowledge or information sufficient to form a belief as to each and every allegation stated and contained in Paragraph XII, except that he admits that he knew that said Edward T. Stotesbury, in making said agreement of April 26, 1910, was acting on behalf of the plaintiff and certain other persons.

XIII. Answering Paragraph XIII, he admits that by paragraph second of said contract of April 26, 1910, he made certain covenants, for more particularity as to which reference is hereby made thereto; and as to each and every other allegation stated and contained in Paragraph XIII he denies the same.

XIV. He denies any knowledge or information sufficient to form a belief as to each and every allegation stated and contained in Paragraph XIV.

XV. Answering Paragraph XV, he admits that by the terms of said contract of April 26, 1910, said Stotesbury agreed to pay and advance the sum of one million two hundred thousand dollars ($1,200,000), and for more particularity as to the terms of said contract reference is hereby made thereto. He denies that said sum of one million two hundred thousand dollars ($1,200,000) was ever paid to the defendants in this action, and alleges that the same and the whole thereof was paid to this defendant and that the defendant, Arthur Hammerstein, has never been paid or received any part thereof; he admits that Stotesbury performed the other conditions as provided in the said contract; and denies each and every other allegation stated and contained in said paragraph not hereinbefore in this paragraph specifically admitted or denied.

XVI. Answering paragraph XVI, he admits that by the terms of said contract of April 26, 1910, it was provided that this defendant should execute certain assignments, bills of sale and deeds, transferring the property by said contract agreed to be sold, accompanied by covenants assuring the good will to the purchaser, and that some time about the month of June, 1910, certain assignments, deeds and agreements were executed accordingly to the originals of which for more particularity reference is hereby made; and he denies any knowledge or information sufficient to form a belief as to each and every other allegation stated and contained in said paragraph.

XVII. He denies any knowledge or information sufficient to form a belief as to each and every allegation stated and contained in paragraph XVII.

XVIII. He admits that the allegations contained in paragraph XVIII of the complaint are substantially in accordance with the contracts therein referred to, and for more particularity as to said contracts this defendant prays that references be had to the originals thereof.

XIX. He admits paragraph XIX.

XX. He admits that on or about June 21, 1910, this defendant executed a certain bill of sale to the Chicago Grand Opera Co., and that at the same time the defendants entered into a written agreement with said Chicago Grand Opera Co. This defendant has not the original nor a copy of either thereof, and refers to the original for more particularity there f.

XXI. He denies the allegations stated and contained in paragraph XXI, except that this defendant admits and alleges that prior to the execution of the aforesaid contract of April 26, 1910, to wit, in or about the month of March, 1910, the opera season at the opera houses of said Oscar Hammerstein in New York and Philadelphia had terminated, and he admits that since that date neither this defendant nor the said Arthur Hammerstein has produced grand opera in the United States.

XXII. He admits paragraph XXII.

XXIII. He admits the allegations stated and contained in paragraph XIII

XXIV. He denies each and every allegation stated and contained in paragraph XXIV, except that he admits that he returned to the city of New York in the year 1912, and that in or about the month of November, 1912, he had certain conversations with one Paul D. Cravath, whom he believed to be of counsel for the plaintiff, which said conversations dealt with the interpretation and construction of the aforesaid contract of April 26, 1910, and that in such conversations defendant informed said Cravath that he owned certain scenery and properties pertaining to grand opera, some of which had been brought to the United States, and that he intended using the same in producing grand opera in this country, and that he contemplated the erection of an opera house in New York City.

XXV. Answering Paragraph XXV, he admits that in or about the month of November, 1912, he stated to said Cravath that, according to the terms of the aforesaid contract of April 26, 1910, defendant was debarred from producing grand opera in the City of New York for a period of 10 years from the date of said contract; and admits that on several occasions defendant has expressed his sense of obligation to plaintiff; and admits that on the 20th day of November, 1912, defendant sent a letter to the board of directors of the plaintiff, of which a copy is annexed to the complaint herein and marked Exhibit D; and denies each and every other allegation stated and contained in said paragraph not hereinbefore in this paragraph specifically admitted. Further answering said paragraph, he alleges on information and belief, that the letter of November 20, 1912, Exhibit D aforesaid, was written at the request of and its contents were substantially suggested by the aforesaid Paul D. Cravath, and that said Paul D. Cravath then stated to defendant that if that letter was written in accordance with such suggestion and request, the consent asked for in said letter would undoubtedly be accorded to defendant.

XXVI. He admits paragraph marked XXVI.

XXVII. Answering Paragraph XXVII he admits that he has frequently expressed the hope that plaintiff would consent to an amendment of the terms of the aforesaid contract, and admits that after December, 1912, he made certain public statements

which were circulated in various newspapers of the city of New York, to the effect that he intended to produce grand opera in English in the city of New York, with a maximum charge of $3 a seat, and for more particularity reference is made to such statements. He denies that in making any such statements he indulged in any subterfuge or was guilty of bad faith. He admits that in the month of March, 1913, public announcement was made that the City Club, acting in cooperation with plaintiff, intended to give grand opera in English and other languages in New York during the coming season; and denies any knowledge or information sufficient to form a belief that such plan of said City Club was formulated long before this defendant had expressed his intention of again giving grand opera in the city of New York, or that such plan had no connection or relation whatsoever with the announcement by this defendant of this defendant's said plan in that respect, and alleges on information and belief that the announcement so made by said City Club was part and parcel of an unlawful plan and purpose of this plaintiff and divers other persons to monopolize the business of giving and producing grand opera in the United States, and part and parcel of an unlawful conspiracy between the plaintiff, said City Club, and divers other persons to restrain and prevent this defendant and the defendant Arthur Hammerstein from giving and producing grand opera in any part of the United States, which unlawful plan and scheme to monopolize and restrain said business, trade, and commerce will be more particularly set forth hereinafter. He admits that about the 30th day of April, 1913, this defendant publicly announced that if the City Club gave opera in English in the city of New York in the following season, as it was reported that it intended to do, this defendant would give grand opera in said city in Italian, French, and German languages. He admits that the defendant, Arthur Hammerstein, stated that he would test the validity of said agreement of April 26, 1910, and admits that said Arthur Hammerstein has not instituted any action for that purpose, and alleges on information and belief that said Arthur Hammerstein intends to test the validity of said agreement in this action. He denies any knowledge or information sufficient to form a belief as to each and every other allegation stated and contained in said Paragraph XXVII not hereinbefore in this paragraph specifically admitted or denied.

XXVIII. He admits Paragraphs XXVIII, XXIX, XXX, XXXI, and XXXII.

XXIX. Answering Paragraph XXXIII, he admits each and every allegation stated and contained therein, except that he denies any knowledge or information sufficient to form a belief as to whether or not the letter therein referred to was ever received by this plaintiff, and alleges on information and belief that the said letter was not only written by defendant, but was placed in a securely sealed and post-paid envelope, and deposited in the mail, addressed to Mr. R. L. Cottenet, secretary of the Metropolitan Opera Co., at the Metropolitan Opera House, in the city of New York.

XXX. Answering Paragraph XXXIV, he admits that at the time of the verification of the complaint herein said Arthur Hammerstein was in Europe, and was engaged in making contracts in the name and for this defendant with various singers, binding said singers to sing in grand opera under the management of this defendant in the United States and Canada during the coming season, and that at said time said Arthur Hammerstein was also so engaged in making contracts with grand opera conductors, and also in securing the right to the production of certain grand operas and other operas in the United States and Canada; and he denies each and every other allegation stated and contained in said paragraph not hereinbefore in this paragraph specifically admitted or denied.

XXXI. Answering Paragraph XXXV, he admits that the defendant Arthur Hammerstein is employed by him and is rendering certain services to him in connection with his contemplated and proposed production of grand opera in the United States and Canada, and as such employee has been and now is acting in conjunction with this defendant in all such matters, and he denies each and every other allegation stated and contained in said paragraph not hereinbefore in this paragraph specifically admitted or denied.

XXXII. Answering Paragraph XXXVI, he admits that he is proceeding in the construction of an opera house in the city of New York for the production of grand opera, concerts, and other musical and theatrical entertainments in said city, and that he is proceeding to engage artists, singers, and various employees for such productions, and that he is proceeding to secure production rights for various grand operas, operas comique, concerts, and theatrical performances, to be presented there and elsewhere in the United States and Canada, and that he is proceeding to make various other contracts, and to take steps in various directions for the purposes of such productions, and that he is proceeding to carry into effect his threat to give grand opera in the immediate future in the city of New York, and alleges that any alleged agreement or obligation of which said conduct may be in violation is illegal, null, void, and of no effect, and he denies each and every other allegation stated and contained in said paragraph not herein specifically admitted or denied.

XXXIII. Answering paragraph XXXVII, he denies any knowledge or information sufficient to form a belief as to each and every allegation stated and contained therein, and he denies that the production of grand opera by him in the city of New York at the same time as the productions by the plaintiff will make the giving of grand opera of the very best order impossible or that it will result in any damage to the public, and alleges that any opera that will be given by this defendant will be superior in character and quality to that given in the city of New York since the 26th day of April, 1910, and that the public will be thereby greatly benefited.

XXXIV. Defendant denies any knowledge or information sufficient to form a belief as to the allegation stated and contained in paragraph marked XXXVIII.

For a separate and affirmative defense defendant alleges as follows:

XXXV. On information and belief that the plaintiff is a business corporation duly organized and existing under and by virtue of the laws of the State of New York, having an office and its principal place of business in the city, county, and State of New York; it is organized as a business corporation; has an authorized capital stock of the par value of $150,000, divided into 1,500 shares, each of the par value of $100; among the purposes for which it is organized are to sustain, encourage, and cultivate a taste for music, literature, and the arts and to erect, maintain, purchase, rent, or occupy one or more buildings or other premises for these purposes; to give or cause to be given in the city of New York and in other cities and towns in the United States and elsewhere operatic and dramatic performances, representations, concerts, and other entertainments; to own, acquire, occupy, equip, and maintain, by purchase, lease, or otherwise, one or more theaters, opera houses, or other buildings; to acquire all necessary costumes, scenery, properties, musical instruments, libraries, and other material and accessories for use in connection with the giving of operatic or dramatic performances, representations, or entertainments; to purchase, acquire, hold, and dispose of stock, bonds, and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds, or other obligations; to sell, lease, or otherwise dispose of any building or buildings acquired as above provided; and generally to do any and all other acts incidental to or connected with the business of giving operatic or dramatic representations, concerts, performances, or other entertainments.

XXXVI. On information and belief plaintiff's executive management consists of a president, secretary, treasurer, and other lesser officers who reside in the city of New York and are employed by it, and among other places exercise their respective functions at said city of New York; in addition to said executive officers plaintiff employs theatrical, operatic, and stage managers, musical directors, and other employees who are and for many years have been engaged, among other things, in the making of contracts with opera singers, the purchase and manufacture of scenery, costumes, fixtures, and theatrical properties, the making of contracts with musicians and musical directors, the making of contracts in various cities throughout the United States with the owners of various opera houses for the giving of operatic and other performances by the plaintiff in said opera houses in said cities.

XXXVII. On information and belief that for upward of 10 years last past, the plaintiff has owned or controlled an opera house of great value, located on Broadway, in the city of New York, at which it has been engaged in producing grand opera, opera comique, concerts, and other forms of entertainment; it has at all such times owned a large quantity of scenery, costumes, fixtures, musical instruments, music scores, libretti, and a musical library, all of great value, the exact amount being to this defendant unknown.

XXXVIII. On information and belief the business conducted by plaintiff for the 10 years last past has consisted, among other things, in the ownership of the opera house, scenery, costumes, fixtures, and other property aforesaid; in the sending of agents to Europe and other parts of the world for the purpose of soliciting and inducing opera singers, theatrical performers, musical conductors and directors, and divers other persons to enter into contracts with plaintiff wherein and whereby such persons agree to and do come to the United States for the purpose of singing and performing for the plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses and theaters in sundry cities and towns in the several States of the United States; and incidental to and as a part of its obligations under its said contracts with said singers, players, conductors, and directors, the plaintiff defrays the traveling expenses of such persons from their various places of abode in Europe and other foreign countries to the United States, and also from one city to another and from one State to another State in the United States, and in every such instance said singer, player, director, or conductor makes and has made such journeys under the direction of plaintiff and pursuant to the terms and conditions of his or her contract with the plaintiff; many of the aforesaid contracts between the plaintiff and

the aforesaid singers, performers, directors, conductors, and other persons have been and are actually entered into by the plaintiff and said persons in foreign countries, and in many instances as a part of and pursuant to the terms of such contracts the plaintiff has and does advance to and pay large sums of money to such persons in said foreign countries. As a further part of the business of plaintiff it now is, and for many years has been, engaged in entering into contracts with dressmakers, modistes, milliners, costumers, tailors, and hatters, located in Europe and other foreign countries, whereby such persons agree to and do manufacture, make, and produce dresses, gowns, hats, costumes, and draperies for use by plaintiff in its theatrical and operatic productions in the United States, and which said dresses, hats, costumes, gowns, and draperies are shipped, by the makers thereof, from the various places in Europe, where the same are so made, to the plaintiff in the United States, and the same are imported into the United States by the plaintiff, and the makers and shippers thereof are paid therefor by the plaintiff; plaintiff is also engaged, and for many years has been so engaged, in making contracts with manufacturers and painters in Europe and other foreign countries whereby such manufacturers and painters obligate themselves to manufacture and produce for plaintiff furniture, scenery, and fixtures for use by it in its theatrical and operatic ventures aforesaid, and as a result of such contracts said manufacturers and painters for many years have and now do manufacture and produce scenery, furniture, and fixtures at various places in Europe and other foreign countries, and have been and are paid therefor by plaintiff, and have and do consign and ship the same from said foreign countries to this plaintiff in the United States, and this plaintiff at all such times has imported and entered such furniture, fixtures, and scenery into the United States and paid the cost of transportation and the customs duties and other charges thereon.

And as a further part of plaintiff's business it now is and for many years has been engaged in purchasing in foreign countries and importing into the United States various and sundry operatic and musical scores and librettos; and as a further part of its business plaintiff is and for many years has been engaged in making contacts in Europe with divers owners of certain operas wherein and whereby plaintiff has become and is entitled to the exclusive use and production of such operas in the United States, and for such exclusive use plaintiff has and does pay to such persons in Europe regular and fixed sums of money; and as a further part of its business plaintiff is and for many years has been engaged in contracting with various manufacturers, dealers in antiques and curios, painters, costumers, tailors, modistes, milliners, dressmakers, and hatters, in the United States and in divers States of the United States, for the manufacture and production of furniture, fixtures, scenery, dresses, hats, and costumes for use by plaintiff in the production of its aforesaid theatrical and operatic productions; and said persons now are and for many years have been engaged in manufacturing and producing such articles for and shipping and delivering the same to the plaintiff, and in many instances such articles have been and are manufactured and produced by such persons in one State of the United States and shipped and delivered to the plaintiff at a point or place in another State of the United States, and for all such articles plaintiff has and now does pay the said manufacturers and producers thereof, and when the same are and have been shipped and transported from one State to another as aforesaid, the plaintiff has and does pay and defray the costs and charges of and for such transportation; and as a further part of its business plaintiff is and for many years has been engaged in hiring theatrical and operatic singers and players in the United States, and in entering into contracts with such singers and players wherein and whereby they are obligated to sing and play for the plaintiff at any and all places in the United States and the several States thereof that may be designated by plaintiff, and to travel to and from said places and in and among the several States of the United States and to Canada, as and when directed so to do by plaintiff, for which plaintiff has and does obligate itself to remunerate and pay such singers and players; and as a further part of its business plaintiff is and for many years has been engaged in employing numerous mechanics, electricians, carpenters, property men, and musicians who have been and are engaged in working, in their respective callings, for the plaintiff at its aforesaid opera house in the city of New York, and for many years have been traveling for plaintiff and in connection with plaintiff's theatrical and operatic productions from one city to another and from one State to another in the United States, and to, in, from, through, and among the several States of the United States at and under the command and direction of the plaintiff, and for such services such persons have been paid and remunerated by plaintiff, and when traveling as aforesaid the cost of their transportation and their actual expenses have been paid for and defrayed by plaintiff.

And, as a further part of its business, plaintiff is, and for many years has been, engaged in making contracts with the owners of opera houses in the city of Boston,

in the State of Massachusetts; in the cities of Philadelphia and Pittsburgh, in the State of Pennsylvania; in the city of Baltimore, in the State of Maryland; in the city of Washington, in the District of Columbia; in the cities of Cleveland and Cincinnati, in the State of Ohio; in the cities of St. Louis and Kansas City, in the State of Missouri; in the city of Atlanta, in the State of Georgia; in the cities of St. Paul and Minneapolis, in the State of Minnesota; in the city of Chicago, in the State of Illinois; and in divers other cities and towns in the several States of the United States and in the cities of Montreal and Toronto, in the Dominion of Canada, wherein and whereby it has had and does have the privilege of presenting its operatic and theatrical productions; and, as a further part of its said business, plaintiff is, and for many years has been, engaged in the production of grand opera, opera comique, and theatrical performances at its aforesaid opera house in the city of New York and at the aforesaid opera houses in the cities of Boston, Philadelphia, Pittsburgh, Baltimore, Washington, Cincinnati, Cleveland, St. Louis, Kansas City, Atlanta, St. Paul, Minneapolis, Chicago, Toronto, Montreal, and other cities and towns, and in giving such performances it has been and is engaged in causing and procuring the aforesaid opera singers, theatrical performers, musical directors, players, mechanics, electricians, property men, and divers others—such as costumers, chorus singers, valets, and maids—to travel from one place in one State to another place in another State of the United States and from one place in a State of the United States to another place in a Province of the Dominion of Canada, and for such travel and for their respective performances and services all said persons have been paid and remunerated by the plaintiff, and all of their traveling and transportation expenses have been borne and defrayed by plaintiff, and in giving such productions in the aforesaid cities and towns plaintiff is, and for many years has been, engaged in transporting and causing to be transported from one place in one State to another place in another State of the United States and from one place in the United States to another place in the Dominion of Canada its aforesaid musical scores, librettos, furniture, fixtures, scenery, and costumes, and at all such times it has paid the transportation expenses and charges thereon; and, as a further part of its business, plaintiff is, and for many years has been, engaged in paying rent to the owners of the aforesaid opera houses in the aforesaid cities at all times when it uses or has used the same for the production of its operas and performances as aforesaid; and, as a further part of its business, the plaintiff is, and for many years has been, engaged in selling to the public tickets of admission to the aforesaid opera houses for its aforesaid productions, the cost of such tickets varying according to the character of accommodation afforded to the purchasers of such tickets, and in the sale and distribution of such tickets and as a part of its business the plaintiff is, and for many years has been, engaged in advertising its aforesaid productions by means of newspaper notices, handbills, bill posters, and other methods of advertisement, which said newspaper notices are displayed in sundry papers throughout the several States of the United States and paid for by the plaintiff.

And in anticipation of and preliminary to the production of one of its operas or theatrical performances in a certain city in a certain State, plaintiff has been and now is engaged in having bill posters and advertisements of the contemplated production of such opera or performance, printed in one State of the United States and shipped and transported therefrom to another State of the United States, or to the Dominion of Canada, and posted and displayed upon billboards in such latter place, and for such printing, transportation, and posting, plaintiff pays and defrays the expenses; and as a further part of its business and in connection with its production of its operas and performances in all of the aforesaid cities and towns as aforesaid, it causes the aforesaid tickets of admission to be printed and pays therefor, and after the same have been so printed and paid for, it ships by mail and by express certain quantities of such tickets from the place and State where the same are printed to other places in other States of the United States, where they are placed in the hands of agents or ticket sellers who are and for many years have been engaged in selling the same to the opera and theater-going public; and as a further part of its business, plaintiff, when giving its performances in the various cities as aforesaid, from time to time, and in many instances, has and now does receive telegraphic and mail orders from divers and sundry persons, residing in States other than the State of New York, and other than the State in which such performances are being or have been given, for tickets of admission to such performances, and in response to such orders and in consideration of its advertised and published prices for such tickets paid by such person or persons, so ordering and paying for such tickets, plaintiff has and does ship and cause said tickets to be transported by mail or otherwise from one place in one State to another place in another State of the United States; and so the plaintiff is and for many years has been engaged in business, trade, and commerce among the several States of the United States and with foreign nations.

XXXIX. In the year 1906, and for some time prior thereto, the plaintiff had a substantial monopoly of the business of producing grand opera in the city of New York and in the cities of Boston, Philadelphia, Pittsburgh, Baltimore, Washington, Atlanta, Cleveland, Cincinnati, St. Louis, Kansas City, St. Paul, Minneapolis, Chicago, and all other cities and towns in the United States east of the Mississippi River; there was no other organized company regularly engaged in producing grand opera in said cities, and the plaintiff was engaged in its business, trade, and commerce in said cities and among the States of the United States, as hereinbefore described, free from any competition therein; it produced grand opera in regular seasons at its aforesaid opera house in New York City and, to a very limited extent, in the aforesaid cities of Philadelphia, Boston, and Chicago, and only occasionally in the other cities aforesaid.

XL. By virtue of its monopoly, as aforesaid, and because of the fact that it had no competition in the business, trade, and commerce aforesaid, it was enabled to and did produce an inferior quality of opera; and in the year 1906, and for some time prior thereto, it employed only such opera singers, conductors, and players as were absolutely necessary and essential to the production of the limited number of operas which it was at that time producing; it was engaged principally in the production of certain German and Italian operas and had made, and was making, no effort to stage and produce a large number of modern operas and operas comique of great artistic merit which were of world-wide popularity; its scenery and costumes were of inferior quality, its repertoire extremely limited, and the musical rendition of those operas which it was producing was inferior, to say the least; as aforesaid, it had its regular seasons of opera in the city of New York and, to a limited extent, in the cities of Boston, Philadelphia, and Chicago; its season in New York City extended over a period of five months each year, during which it produced five performances each week; in the cities of Boston and Philadelphia its season extended over a period of five months each year, during which period it produced in each of said cities about 10 performances; and in the other cities hereinbefore enumerated it presented only two or three performances each year.

XLI. On information and belief, the cost of the production of such operas as plaintiff was producing in the year 1906, as described in the last preceding paragraph, was far less than the revenue derived by it from such performances, and in the year 1906, and for some time prior thereto, plaintiff was conducting its business at a large financial profit and paying substantial dividends to the holders of its stock, while at the same time its patrons were being furnished with the most inferior quality of grand opera performances, for which plaintiff was exacting from the opera-going public prices far in excess of the value of any such performances.

XLII. Because of the condition of grand opera in the city of New York and the other cities aforesaid, as described in the last preceding two paragraphs, there was in said cities, and generally throughout the United States, in the year 1906 and years subsequent thereto, a general and popular demand for a greater variety and a higher quality of grand opera than that which was being produced by the plaintiff.

XLIII. For the production of high class grand opera and opera comique it is essential that the producer thereof obtain right of production of operas of recognized merit and popularity; in many if not most cases such operas are protected by copyright and the owners thereof exact and require the payments of substantial sums of money for such rights of production; after obtaining such rights the producer must purchase numerous musical scores for each such opera; separate scores being necessary for each singer and musician; those scores are, in most cases, copyrighted and to obtain the same necessitates the outlay of large sums of money; for the production of each opera there must be obtained large quantities of costumes, fixtures, and scenery, all of which are of great expense, and for the care and storage of which the producer must provide a regular warehouse or place of safe-keeping; in addition to the foregoing the producer must, by contract, secure the services of singers, so-called "stars" of the very highest order of ability; these singers command extremely high salaries for each performance at which they sing, and require guaranty of a certain number of performances; for a full and successful season of grand opera and opera comique the producer must assume contractual obligations to such artists amounting in the aggregate to upward of $500,000; in addition to such "stars" the producer must also contract with singers and performers of lesser renown and obligate himself to them for the payments of money aggregating many thousands of dollars; he must also hire stage directors, musical directors, musical conductors, and musicians, all of high repute and ability, with whom he must contract and to whom he must obligate himself in large amounts of money; he must also hire carpenters, electricians, mechanics, costumers, property men, and numerous other employees, all of whom are on salaries, and their aggregate pay amounts to many thousands of dollars; with such an ensemble and only with

such, can a producer of grand opera and opera comique present opera which will meet with the approval and receive the support of the opera-going public.

XLIV. In no city in the United States, outside of the city of New York, will the opera-going public attend the productions of high-class grand opera in sufficient numbers and for a sufficient number of performances to produce a revenue in any wise adequate to defray the absolutely necessary outlay to produce such high-class opera, nor will the opera-going public in any number of such cities do so. With a proper and necessary equipment, as hereinbefore enumerated, for the production of grand opera and opera comique, the producer can not possibly obtain sufficient engagements for enough performances in the aggregate in all of the cities of the United States other than New York City, Philadelphia, Boston, and Chicago, from which he will derive revenue adequate to maintain his ensemble and defray the expense of transportation thereof from place to place, to say nothing of producing no income upon his investment and allowing nothing for depreciation in his properties. The business of producing high-class grand opera and opera comique in the United States differs from that of most other businesses in that the market therefor is extremely limited; the demand for grand opera and opera comique in the cities of the United States outside of the cities of New York, Philadelphia, Boston, and Chicago is so limited, and the opera-going public in such cities so small in number that the revenues from producing such opera in said cities would be, under the most advantageous circumstances, entirely inadequate to defray the expenses of producing such opera therein. For the financially successful production of high-class grand opera and opera comique in the United States, it is absolutely essential and necessary that the producer thereof have the use of an opera house in the city of New York; no other city in the United States can or will support a regular season of high-class grand opera and opera comique; the city of New York is essential and necessary as a base at which the producer of grand opera must maintain his ensemble of singers, performers, musicians and artists, scenery, fixtures, and costumes, and at which he must be able to carry on a regular series of performances; if he has such base and conducts such regular series of performances thereat, then and then only can he successfully produce first-class grand opera and opera comique in the lesser cities of the United States; in other words, the city of New York is the market for high-class grand opera and opera comique in the United States, and one debarred therefrom is in fact debarred from conducting and producing high-class grand opera and opera comique in the United States.

XLV. For 40 years this defendant has been a resident of the city of New York and for 27 years last past has been connected with the theatrical and musical business in said city, and during said 27 years has erected 11 playhouses and 1 grand opera house in said city.

XLVI. For many years prior to the year 1906 the Metropolitan Opera House, which is now owned by this plaintiff, had been the only edifice in the city of New York devoted to the presentation of grand opera and was the only place where grand opera was produced in said city of New York. In the year 1906, because of the condition of grand opera as it was then being produced by this plaintiff, as hereinbefore stated, and because of the popular demand for a better quality of opera and a greater variety thereof, this defendant decided to enter the grand opera field. Thereupon, at an expenditure of a large sum of money, to wit, approximately $1,000,000, defendant acquired the title to certain real estate located on West Thirty-fourth Street, in the city of New York, upon which he erected an opera house which was first class in every respect, which said opera house is, and at all times since its erection has been, known as the Manhattan Opera House.

XLVII. Having erected said opera house, defendant, at great expense to himself, went to Europe, where he succeeded in securing contracts with world-famous singers, among them: Sopranos and altos—Mary Garden, Tetrazzini, Zapelli, Cisneros, Gerville-Reache, Carmen Mellis, Duchene, Maretzka-Aldrich, Sylva, Severina; tenors—Zanattello, Dalmores, Bassi, Bonci, McCormack, Daddi, Fossetta, Zerola, Venturini; baritones and bassos—Renaud, Dufrenne, Nicolay, Sammarco, Polese, Arimondi, Beck, Scott, Galletti-Ganoli, Crablé, Fossetta, Huberdiau, Didur, Reshiglian, and many others, many of whom had never theretofore performed in the United States. Through defendant's efforts these eminent singers, all residing in Europe, and all having world-wide reputations, were induced to come to the United States for the purpose of singing for defendant in grand opera and opera comique at his aforesaid opera house in Thirty-fourth Street. By the terms of the contracts made by defendant with said singers it was expressly provided that they and each of them should sing for defendant in a specified number of performances, and that while under contract with defendant they should not sing for any other person in the United States, and that he should have the exclusive benefit of their services while in the United States.

Having obtained the services of such eminent artists, defendant also traveled throughout Europe seeking for and obtaining the services of musical directors and conductors of world-wide reputation. Thereupon defendant induced and persuaded such persons to come to the United States for the purpose of conducting the opera performances to be produced by defendant at his opera house aforesaid.

Thereupon defendant by contract obtained the right to produce in the United States certain grand operas and operas comique of great artistic merit which had never theretofore been produced in grand opera in the United States, such as Electra, Herodiade, Thais, Sapho, Jongleur de Notre Dame, Tales of Hoffman, Crispine e la Comare, Elisir d'Amour, Griselidis, Louise, Pelleas and Melisande, Princess d'Auberge, Navarraise, Damnation de Faust.

The defendant also purchased and procured to be made in Europe a large quantity of scenery, furniture, fixtures, and costumes, for use in connection with his production of grand opera, which said scenery, furniture, fixtures, and costumes he caused and procured to be shipped from Europe and imported into the United States. Defendant also caused and procured to be manufactured and made in the United States a large amount of scenery, furniture, fixtures, and costumes, for use in connection with his production of grand opera, and entered into contracts in the United States with divers and sundry persons, such as stage directors and managers, electricians, carpenters, mechanics, musical directors, and chorus singers, whereby said persons obligated themselves, respectively, to work for defendant in connection with his production of grand opera, and whereby he obligated himself to pay them for their respective services. Defendant also purchased quantities of musical scores, librettos, musical instruments, and various other accessories to the production of grand opera, some of which said articles were purchased by said defendant in Europe and some of which were purchased in the United States, and all of which defendant caused to be transported to his aforesaid opera house in the city of New York.

XLVIII. On the 10th day of November, 1906, defendant gave his first performance of grand opera in the city of New York. For a period of five months thereafter defendant regularly produced six performances each week, and during said five months presented to the opera-going public in the city of New York an extensive repertoire of grand opera embracing a number not produced in the United States for many years prior thereto. During the following years of 1907, 1908, 1909, and 1910, defendant regularly produced grand opera and opera comique at his aforesaid opera house during seasons lasting five months each year, and during each of said seasons defendant produced a greater variety of high-class grand opera than had ever theretofore been produced in the city of New York, including many of the aforementioned, and the same was presented and sung by a greater variety of singers of greater note and ability than had ever theretofore appeared in grand opera in the city of New York.

XLIX. In the year 1908, defendant having met with great financial and artistic success in the production of grand opera at his aforesaid opera house in the city of New York, and having educated the opera-going public to an appreciation of high-class grand opera and opera comique superior to that ever theretofore produced in the United States, and there being a popular demand therefor, defendant determined to build an opera house in the city of Philadelphia, in the State of Pennsylvania, and to there regularly produce first-class grand opera and opera comique. Thereupon defendant purchased a valuable tract of real estate located at the intersection of Broad Street near Girard Avenue in the city of Philadelphia, upon which he erected a first-class opera house at an actual cost and expense of $1,250,000. Prior to the erection of defendant's said opera house in the city of Philadelphia the only production of grand opera by said city had been given by plaintiff, and as hereinbefore stated, the plaintiff had only given about six such productions in each year. During the years 1908-9 and 1909-10 defendant conducted a regular season of opera in said city of Philadelphia extending over a period of five months in each of said years and covering six performances each week during said seasons. In the season of 1908-9 at said opera house in Philadelphia defendant met with great financial and artistic success.

L. Having erected his aforesaid opera house in the city of Philadelphia as aforesaid, and having his opera house in the city of New York as aforesaid, defendant was enabled to augment his ensemble and did from time to time contract with and secure the services of numerous singers, musical directors and conductors of great ability and world wide reputation, to perform for him at his aforesaid opera houses. Defendant also from time to time entered into contracts with the owners of opera houses in the cities of Montreal and Toronto in Canada, Buffalo, Rochester, and Syracuse in the State of New York, for the use of their respective opera houses, and during the years 1906, 1907, 1908, 1909, and 1910 defendant from time to time caused and procured the aforesaid singers, musicians, conductors, directors, mechanics, carpenters, elec-

tricians, and divers other persons in his employ to travel to and from said cities of Montreal, Toronto, Buffalo, Rochester, and Syracuse, and there, and at each of said places, to produce high class opera comique, and in connection with the production of such opera comique defendant caused and procured to be transported from the city of New York and the city of Philadelphia to said cities of Montreal, Toronto, Buffalo, Rochester, and Syracuse large quantities of scenery, furniture, fixtures, costumes, and musical instruments, and for the transportation of all of said persons and said properties defendant paid the expenses and charges thereof; and during said years defendant contracted with divers owners of opera houses located in the city of Baltimore in the State of Maryland, in the city of Pittsburgh in the State of Pennsylvania, in the city of Cincinnati in the State of Ohio, in the city of Washington in the District of Columbia, and in the city of Boston in the State of Massachusetts for the rental of their respective opera houses, and thereafter and from time to time defendant caused and procured the aforesaid singers and all of said other persons and said scenery, costumes, and other properties to be transported to and from said cities of Baltimore, Pittsburgh, Cincinnati, Washington, and Boston, and caused and procured said singers and players to sing and perform at said opera houses and to produce various and sundry operas thereat, and for such transportation defendant paid the expenses and charges thereof.

And in connection with the production of opera comique and grand opera as aforesaid at said cities of Montreal, Toronto, Buffalo, Rochester, Syracuse, Baltimore, Pittsburgh, Cincinnati, Washington, and Boston by defendant as aforesaid, defendant sold and offered for sale tickets of admission and received in payment therefor sums of money.

LI. During the years 1907, 1908, and 1909 defendant met with great financial and artistic success in the production of grand opera and opera comique as aforesaid, the operas produced by him were received with public approval, the opera-going public was increased in number, and defendant's productions were generally popular and largely in demand. Defendant had introduced to the public during this period the aforesaid French operas of the modern repertoire never before brought to the attention of the musical public in the United States, and continued through his efforts and recognized ability as a grand-opera director, to bring before the New York and American public at large, artists of great renown never theretofore presented to any audience in the United States, and numerous other singers discovered by him in his search throughout the world, who rapidly rose to positions of professional greatness.

LII. This defendant is not and never has been a man of great wealth; but in the years 1906, 1907, 1908, and 1909, though his untiring efforts and search throughout Europe, America, and other parts of the world, he succeeded in securing the producing rights of many operas of great and recognized merit, among such operas being those hereinbefore mentioned; and also succeeded in securing contracts with a large number of distinguished opera singers of great and recognized ability (such as those hereinbefore mentioned), and also succeeded in securing contracts with opera directors and conductors, ballet masters, and other persons of great repute and ability, wherein and whereby such persons obligated themselves to come to the United States and sing and perform for this defendant exclusively in grand opera and opera comique to be produced by him in his aforesaid opera houses in the cities of New York and Philadelphia and in divers other opera houses in sundry cities and States of the United States, and as a result of such efforts and such contracts this defendant succeeded in bringing said operas and in causing and procuring said singers, directors, and other persons to come to the United States; and through defendant's artistic production of said operas and divers and sundry other popular and well-known operas and operas comique and through the extraordinarily efficient rendition of such operas and operas comique by the musicians, conductors, directors, and singers under defendant's control and in his employ, and by reason of the recognized excellence of the singing and acting of the great ensemble of singers and actors so gathered together, this defendant was enabled to and did produce in said cities and present to the opera-going public therein in the years 1907, 1908, 1909, and 1910 the most extensive and comprehensive repertoire of grand opera and opera comique ever produced in the United States; and year by year as this defendant proceeded and progressed with such productions his reputation as an opera director increased and his productions of grand opera and opera comique increased in popularity with the opera-going public, and the attendance of the opera-going public at his aforesaid opera houses increased and his revenues from the said business, trade, and commerce increased so that in the years 1908 and 1909, notwithstanding the wicked and unlawful conduct of this plaintiff as hereinafter more particularly described, defendant was not only conducting the production of grand opera and opera comique to the satisfaction and gratification of the opera-going public in the United States, but was also conducting same at a substantial financial remuneration

and profit to himself; though defendant's efforts as aforesaid, grand opera and opera comique, both of which had, prior to defendant's efforts therein, been at a low ebb in the United States, were popularized and the number of opera goers in the United States was greatly increased and the demand for high-class grand opera and opera comique was likewise increased, and defendant, but for the wrongful and illegal conduct of plaintiff, as hereinafter more particularly described, had every reason to hope, believe, and expect that he would be able to continue in said business, trade, and commerce to the satisfaction and gratification of the continually increasing opera-going public, and to the enhancement of defendant's reputation and financial profit.

LIII. In the year 1906 this defendant caused and procured one Allesandre Bonci, one of the greatest living lyric tenors who had been discovered by defendant in Italy, and who had never been heard of or seen in this country before, to come to the United States from Italy for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera house in the city of New York, and in divers other opera houses in sundry cities and States of the United States; prior to his coming to the United States for such purposes said Bonci had entered into a written contract with this defendant wherein and whereby he had agreed with defendant to sing for defendant exclusively for a period of five years, beginning with the opera season of 1906-7, for which services defendant was to pay said Bonci a large salary amounting to many thousand dollars each year.

Said Bonci fulfilled his aforesaid contract for the season of 1906-7 and was paid in full by defendant for such services in accordance with and in due compliance with the terms and conditions of said contract.

The services of said Bonci during said season of 1906-7 were eminently satisfactory to this defendant and to the opera-going public, said Bonci attained great fame by his singing at the performances at which he appeared at defendant's said opera house during said season, and by reason of his wonderful voice he became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant, and added greatly to defendant's reputation, popularity, and prestige as a director of opera; accordingly this defendant, relying upon said Bonci's services for the coming seasons of 1907-8 prepared and made plans to present said Bonci in numerous operas for which he was peculiarly adapted.

In the year 1907, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Bonci, plaintiff, well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and induce said Bonci to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure said Bonci to enter into a contract with plaintiff wherein and whereby said Bonci agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses in the State of New York and in other States of the United States; and as a result of said contract said Bonci did, during the years 1907-8 and years subsequent thereto, sing for plaintiff in violation of his aforesaid contract obligations to this defendant: and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Bonci for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to sing for this defendant, and which said sums were far in excess of the real value of any services rendered by said Bonci to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Bonci to violate his aforesaid contract with this defendant, as aforesaid, plaintiff deprived defendant of the services of said Bonci, which said services defendant relied and was relying upon for the proper production of certain operas which he had advertised would be given by him and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced, at the time of producing said operas, to substitute another singer inferior to said Bonci in ability and reputation, to sing the parts which said Bonci was to have sung, and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LIV. In the year 1907 this defendant caused and procured one Albani, one of the greatest living lyric tenors who had been discovered by defendant in Italy, and

who had never been heard of or seen in this country before, to come to the United States from Italy for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera house in the city of New York, and in divers other opera houses in sundry cities and States of the United States; prior to his coming to the United States for such purposes said Albani had entered into a written contract with this defendant wherein and whereby he had agreed with defendant to sing for defendant exclusively for a period of five years, beginning with the opera season of 1906–7, for which services defendant was to pay said Albani a large salary, amounting to many thousand dollars each year.

Said Albani fulfilled his aforesaid contract for the season of 1906–7 and was paid in full by defendant for such services in accordance with and in due compliance with the terms and conditions of said contract.

The services of said Albani during said season of 1906–7 were eminently satisfactory to this defendant and to the opera-going public, said Albani attaining great fame by his singing at the performances at which he appeared at defendant's said opera house during said season, and by reason of his wonderful voice he became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant, and added greatly to defendant's reputation, popularity, and prestige as a director of opera; accordingly this defendant, relying upon said Albani's services for the coming season of 1907–8, prepared and made plans to present said Albani in numerous operas for which he was peculiarly adapted.

In the year 1907, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Albani, plaintiff, well knowing of said contract and of its terms and conditions, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and induce said Albani to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure said Albani to enter into a contract wherein and whereby said Albani agreed with plaintiff to sing for plaintiff in opera performances to be produced by plaintiff in the city of Boston at the Boston Opera House, and as a result of said contract, said Albani did, in the year 1907, sing for plaintiff in said performances at said Boston Opera House in violation of his aforesaid contract obligations to this defendant, and did refuse to sing for this defendant at his aforesaid opera house in the city of New York, and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Albani for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to sing for this defendant, and which said sums were far in excess of the real value of any services rendered by said Albani to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Albani to violate his aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of the services of said Albani, which said services defendant relied and was relying upon for the proper production of certain operas which he had advertised would be given by him and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced, at the time of producing said operas, to substitute another singer inferior to said Albani in ability and reputation to sing the parts which Albani was to have sung and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LV. In the year 1908 this defendant caused and procured one Valles, a tenor of prominence and marked ability, to come to the United States from Europe for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera house in the city of New York and in divers other opera houses in sundry cities and States of the United States; prior to his coming to the United States for such purposes said Valles had entered into a written contract with this defendant wherein and whereby he had agreed with defendant to sing for defendant exclusively for a period of five years, beginning with the opera season of 1908–9, for which services defendant was to pay said Valles a large salary amounting to many thousand dollars each year.

Said Valles fulfilled his aforesaid contract for the season of 1908–9 and was paid in full by defendant for such services in accordance with and in due compliance with the terms and conditions of said contract.

The services of said Valles during said season of 1908-9 were eminently satisfactory to this defendant and to the opera-going public, said Valles attained great fame by his singing at the performances at which he appeared at defendant's said opera house during said season, and by reason of his wonderful voice he became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant, and added greatly to defendant's reputation, popularity, and prestige as a director of opera; accordingly this defendant, relying upon said Valles' services for the coming season of 1909-10 and 1910-11, prepared and made plans to present said Valles in numerous operas for which he was peculiarly adapted.

In the year 1908, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Valles, plaintiff well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and induce said Valles to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure said Valles to enter into a contract with plaintiff wherein and whereby said Valles agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York, and at divers other opera houses in the State of New York and in other States of the United States; and as a result of said contract said Valles did, during the season 1909-10, refuse to sing for defendant in violation of his aforesaid contract obligations to this defendant; and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Valles for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to sing for this defendant, and which said sums were far in excess of the real value of any services rendered by said Valles to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Valles to violate his aforesaid contract with this defendant, as aforesaid, plaintiff deprived defendant of the services of said Valles, which said services defendant relied and was relying upon for the proper production of certain operas which he had advertised would be given by him and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced, at the time of producing said operas, to substitute another singer inferior to said Valles in ability and reputation, to sing the parts which said Valles was to have sung, and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LVI. In the year 1908 defendant caused and procured one Florentino Constantino, a tenor of world-wide renown and among musical experts considered as the equal of the great tenor Caruso, to come to the United States from Europe for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia, and in divers other opera houses in sundry cities and States of the United States; prior to his coming to the United States for such purpose said Constantino had entered into a written contract with this defendant wherein and whereby he had agreed with defendant to sing for defendant exclusively for a season of five months during each of the opera seasons in the years 1908-9, 1909-10, 1910-11, for which services defendant was to pay said Constantino a salary of $500 for each performance in which he appeared in the season of 1908-9, $600 for each performance in the season of 1909-10, and $700 for each performance in the season of 1910-11.

Said Constantino fulfilled his aforesaid contract for the season of 1908-9 and was paid in full by defendant for such services, in accordance and in due compliance with the terms and conditions of said contract.

The services of said Constantino during said season of 1908-9 were eminently satisfactory to this defendant and to the opera-going public; by reason of his wonderful voice of unusual and rare beauty and by virtue of his impressive dramatic ability and of his singularly attractive personality said Constantino became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant and added greatly to defendant's reputation, popularity, and prestige as a director of opera; accordingly this defendant, relying upon said Constantino's services for the coming seasons of 1909-10 and 1910-11, prepared and made plans to present said Constantino in numerous operas for which he was peculiarly adapted.

In the year 1909, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Constantino, plaintiff well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and induce said Constantino to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure said Constantino to enter into a contract with plaintiff wherein and whereby said Constantino agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York, and at divers other opera houses in the State of New York and in other States of the United States; and as a result of said contract said Constantino did during the years 1909-10, and years subsequent thereto, sing for plaintiff in violation of his aforesaid contract obligations to this defendant; and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Constantino for his said services to this plaintiff the sum of $1,200 for each performance in which said Constantino appeared for plaintiff, which said sum was far in excess of the amount for which said Constantino had contracted to sing for this defendant and far in excess of the real value of any services rendered by said Constantino to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Constantino to violate his aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of the services of said Constantino, which said services defendant relied and was relying upon for the proper production of certain operas which he had advertised would be given by him and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced, at the time of producing said operas, to substitute another singer inferior to said Constantino in ability and reputation to sing the parts which said Constantino was to have sung and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendants' professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LVII. In the year 1908 defendant caused and procured one Charles Gillibert, one of the greatest actor-baritones of the world, to come to the United States from Europe for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia, and for the purpose of singing in sundry other opera houses in divers cities of the United States; prior to his coming to the United States for such performances said Charles Gillibert had entered into a written contract with this defendant wherein and whereby he had agreed with defendant to sing for defendant exclusively for a term of five years, beginning with the opera season of 1908-9, and for his services in so singing defendant had agreed to pay said singer a large salary, amounting to many thousand dollars.

Said Charles Gillibert having come to the United States at the instance of this defendant did, during the season of 1908-9 enter upon the fulfillment of his aforesaid contract with this defendant, and for some time appeared in grand operas produced by this defendant and sung the parts therein assigned thereunder to him by this defendant. In all such performances in which he so appeared, his services were eminently satisfactory to this defendant and to the opera-going public, and by reason of his wonderful voice and dramatic ability said Charles Gillibert became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant and added greatly to defendant's reputation, popularity, and prestige as a director of opera, and accordingly this defendant relying upon said Charles Gillibert's services during the opera season of the years 1909-10 and succeeding seasons, prepared and made plans to present said Charles Gillibert in numerous operas for which he was peculiarly adapted.

In the year 1908, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Charles Gillibert, plaintiff well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle and induce said Charles Gillibert to violate and breach his aforesaid contract with this defendant, and then and there did invite and solicit the said Charles Gillibert to

enter into a contract with plaintiff wherein and whereby he should agree with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses in the State of New York, and in other States of the United States, and as a result of said invitation and solicitation said Charles Gillibert did, thereupon, refuse to fulfill his obligations under the aforesaid contract with this defendant, and all of this was accomplished by this plaintiff in and by knowingly, wilfully, and wickedly offering to give to said Charles Gillibert for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to sing for this defendant, and other inducements, and which said sums and inducements were far in excess of the real value of any services to be rendered by said Charles Gillibert to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Charles Gillibert to violate his aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of a portion of the services of said Charles Gillibert, which said services defendant relied and was relying upon for the production of certain operas which he had advertised would be given by him, and which said operas he contemplated and intended producing at his aforesaid opera houses; and, as a result, defendant was forced at the time of producing said operas to substitute another singer, inferior to said Charles Gillibert in ability and reputation, to sing the parts which said Charles Gillibert was to have sung and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation and in great harm to defendant's good will in the business trade and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LVIII. In the year 1909 defendant caused and procured one Marguerite Sylva, a mezzo-soprano of world-wide renown and of recognized ability, to come to the United States from Europe for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia, and for the purpose of singing in sundry other opera houses in divers cities of the United States; prior to her coming to the United States for such performances said Marguerite Sylva had entered into a written contract with this defendant wherein and whereby she had agreed with defendant to sing for defendant exclusively for a term of five years, beginning November 15, 1909, and for her services in so singing defendant had agreed to pay said singer a large salary, amounting to many thousands of dollars.

Said Marguerite Sylva having come to the United States at the instance of this defendant did, in the year 1909, enter upon the fulfillment of her aforesaid contract with this defendant, and for some time appeared in grand operas produced by this defendant and sung the parts therein assigned to her by him. In all such performances in which she so appeared her services were eminently satisfactory to this defendant and to the opera-going public, and by reason of her wonderful voice and dramatic ability said Marguerite Sylva became and was extremely popular with the opera-going public, and her services became and were of great financial value to this defendant and added greatly to defendant's reputation, popularity and prestige as a director of opera, and accordingly this defendant, relying upon said Marguerite Sylva's services during the opera season of the years 1909–10 and succeeding seasons, prepared and made plans to present said Marguerite Sylva in numerous operas for which she was peculiarly adapted.

In the year 1909, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Marguerite Sylva, plaintiff well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same did unlawfully and wickedly solicit, inveigle, and induce said Marguerite Sylva to violate and breach her aforesaid contract with this defendant, and then and there did cause and procure the said Marguerite Sylva to enter into a contract with plaintiff wherein and whereby she agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses in the State of New York, and in other States of the United States, and as a result of said contract said Marguerite Sylva did, during the years 1909–10 and years subsequent thereto sing for plaintiff in violation of her aforesaid obligations to this defendant, and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Marguerite Sylva for her said services to this plaintiff sums of money far in excess of the amount for which she had contracted to sing for this defendant, and which said sums were far

in excess of the real value of any services rendered by said Marguerite Sylva to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Marguerite Sylva to violate her aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of the services of said Marguerite Sylva, which said services defendant relied and was relying upon for the production of certain operas which he had advertised would be given by him, and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced at the time of producing said operas to substitute another singer inferior to said Marguerite Sylva in ability and reputation to sing the parts which said Marguerite Sylva was to have sung and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LIX. In the year 1909 defendant caused and procured one Vilmos Beck, a baritone of recognized and world-wide renown and fame, to come to the United States from Europe for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia, and in divers other opera houses in sundry cities and States of the United States; prior to his coming to the United States for such performances said Vilmos Beck had entered into a written contract with this defendant wherein and whereby he had agreed with the defendant to sing for defendant exclusively for a term of five years, and for his services in so singing, defendant had agreed to and was obliged to pay said Beck a large salary, amounting to many thousand dollars.

Said Vilmos Beck having come to the United States at the instance of this defendant did, in the year 1909, enter upon the fulfillment of his aforesaid contract with this defendant, and for some time appeared in grand operas produced by this defendant and sung the parts therein assigned thereunder to him by this defendant. In all such performances in which he so appeared, his services were eminently satisfactory to this defendant and to the opera-going public, and by reason of his wonderful voice and dramatic ability said Vilmos Beck became and was extremely popular with the opera going public, and his services became and were of great financial value to this defendant and added greatly to defendant's reputation, popularity, and prestige as a director of opera, and accordingly this defendant, relying upon said Vilmos Beck's services during the opera season of the years 1909-10 and succeeding seasons, prepared and made plans to present said Vilmos Beck in numerous operas for which he was peculiarly adapted.

In the year 1909, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Vilmos Beck, plaintiff well knowing of said contract and of its terms and conditions, and then and there being informed thereof by this defendant, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and induce said Vilmos Beck to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure the said Vilmos Beck to enter into a contract with plaintiff wherein and whereby he agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses in the State of New York, and in other States of the United States, and as a result of said contract said Vilmos Beck did, during the years 1909-10 and years subsequent thereto, sing for plaintiff in violation of his aforesaid obligations to this defendant, and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give and giving to said Vilmos Beck for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to sing for this defendant, and which said sums were far in excess of the real value of any services rendered by said Vilmos Beck to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring said Vilmos Beck to violate his aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of the services of said Vilmos Beck, which said services defendant relied and was relying upon for the production of certain operas which he had advertised would be given by him, and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced at the time of producing said operas to substitute another singer inferior to said Vilmos Beck in ability and reputation to sing the parts which said Vilmos Beck was to have sung and would have

sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LX. In the year 1906 defendant caused and procured one Charles Dalmores, then known and recognized throughout Europe as the greatest French dramatic tenor in the world, to come to the United States from Europe for the purpose of singing in grand-opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia, and in divers other opera houses in sundry cities and States of the United States; and prior to his coming to the United States for such performances, said Charles Dalmores had entered into a written contract with this defendant wherein and whereby he agreed to sing for this defendant exclusively during the opera seasons in the years 1906-7, 1907-8, 1908-9, and 1909-10, and for which services defendant had agreed and was obligated to pay to said Dalmores large sums of money amounting to many thousand dollars.

During the opera seasons in the years 1906-7, 1907-8, 1908-9 said Dalmores fulfilled his aforesaid contract with defendant and sung for defendant in various operas produced by defendant and was paid in full by defendant for such services in accordance and in due compliance with the terms and conditions of said contract. The services of said Dalmores during said seasons of 1906-7, 1907-8, were eminently satisfactory to this defendant and to the opera-going public. By reason of his wonderful voice and dramatic ability said Dalmores became and was extremely popular with the opera-going public, and his services became and were of great financial value to this defendant, and added greatly to defendant's reputation, popularity, and prestige as a director of opera. Accordingly this defendant, relying upon said Dalmores' services for the coming seasons of 1908-9 and 1909-10, and subsequent seasons, prepared and made plans to present said Dalmores in numerous operas for which he was peculiarly adapted.

In the year 1908, without the knowledge or consent of this defendant, and in violation of his rights under his aforesaid contract with said Dalmores, plaintiff and its agents, well knowing of said contract and of its terms and conditions, unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as an attempt so to do, did unlawfully solicit, inveigle, and induce the said Dalmores to violate and breach his aforesaid contract with this defendant, and then and there did cause and procure the said Dalmores to enter into a contract with plaintiff wherein and whereby said Dalmores agreed with plaintiff to sing for plaintiff at its aforesaid opera house in the city of New York, and at divers other opera houses in the State of New York and other States of the United States, and all of this was accomplished by plaintiff and its agents in and by knowingly and wickedly and falsely representing and pretending to said Dalmores that this defendant was hopelessly insolvent and in financial difficulties and would be unable to pay said Dalmores for singing for him under his aforesaid contract with defendant, and in and by knowingly, willfully, and wickedly offering and contracting to give to said Dalmores for his proposed services to this plaintiff sums of money far in excess of the amount for which said Dalmores had contracted to sing for this defendant, and other inducements all far in excess of the real value of any services to be rendered by said Dalmores to plaintiff, as plaintiff then and there well knew.

In and by seducing, inveigling, and procuring the said Dalmores to violate his aforesaid contract with this defendant as aforesaid, plaintiff deprived defendant of a portion of the services of the said Dalmores, which said services defendant relied and was relying upon for the proper production of certain operas which he had advertised would be given by him, and which said operas he contemplated and intended producing at his aforesaid opera houses, and as a result defendant was forced at the time of producing said operas to substitute another singer inferior to said Dalmores in ability and reputation, to sing the parts which the said Dalmores was to have sung and would have sung but for the wrongful acts of plaintiff as aforesaid, all of which resulted in great financial loss to defendant and in irreparable damage to defendant's professional reputation, and in great harm to defendant's good will in the business, trade, and commerce aforesaid, and in great mental anguish, suffering, and distress to this defendant.

LXI. In the years 1907, 1908, and 1909, this defendant caused and procured numerous other opera singers, male and female, of recognized ability and world-wide renown, to come to the United States from Europe and from other parts of the world for the purpose of singing in grand opera performances to be produced by defendant in his aforesaid opera houses in the cities of New York and Philadelphia and in divers

other opera houses in sundry cities and States of the United States, and prior to their coming to the United States for such performances such singers had entered into written contracts with this defendant wherein and whereby they and each of them had agreed with defendant to sing for defendant exclusively for a season or seasons during the ensuing years, and for which services defendant had agreed with them and each of them to pay them large sums of money, amounting in the aggregate to many thousand dollars, and many of said singers did during the opera seasons in the years 1906–7, 1907–8, 1908–9, 1909–10, sing for defendant in operas produced by him in his said opera houses and in divers other opera houses in sundry cities and States of the United States, and were paid therefor by defendant in accordance and in due compliance with the terms and conditions of their respective contracts with defendant.

In the years 1909 and 1910, without the knowledge or consent of this defendant, and in violation of his rights, under his aforesaid contracts with said singers and others of defendant's operatic forces, plaintiff and its agents, well knowing of said contracts, and in violation of defendant's rights thereunder, unlawfully designing and wickedly contriving to injure this defendant and his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, did unlawfully and wickedly solicit and attempt to induce said singers and others aforesaid to violate and breach their respective contracts aforesaid with this defendant, and then and there did seek to cause and procure said singers and others aforesaid to enter into contracts with the plaintiff to sing for or otherwise serve plaintiff at its aforesaid opera house in the city of New York, and at divers other opera houses in the State of New York and in other States of the United States, and as inducements to said singers and others aforesaid to break their aforesaid contracts with this defendant and to make contracts with this plaintiff, plaintiff and its said agents did falsely and fraudulently represent and pretend to said singers and others aforesaid and each of them that this defendant was hopelessy bankrupt and in financial distress and was unable and would be unable to carry out his contracts with them, and would be unable to afford them the opportunity to sing in grand opera for or otherwise serve him, and would be unable to pay them for their services to him, and further did offer and promise and agree to pay to them sums of money far in excess of the sums which defendant had agreed to and was obligated to pay to them for their services to him, which said sums of money so offered and promised by plaintiff to said singers and others of defendant's operatic forces were far in excess of the value of any services which they might thereafter render to this plaintiff, as plaintiff and its said agents then and there well knew.

LXII. And as a result of such unlawful practices by the plaintiff and its said agents, the well-known opera singers, to wit, Zenatello, Carmen Melis, Galletti-Ganoli, and Duffault, all of whom were under contract with defendant to sing for him in performances of grand opera to be produced by him during the season of 1910, and to sing for him exclusively, and for which defendant was obligated to pay them specific and certain sums of money for so singing, threatened defendant that they would break their said contracts and leave him and go to plaintiff and sing for the plaintiff unless the defendant altered their respective contracts and agreed to pay them sums of money far in excess of the amounts provided to be paid to them in their respective contracts with defendant, and because of said threats and because of the misconduct of this plaintiff and its agents as aforesaid, and in order to save himself from utter ruin, and to prevent said singers from leaving him and going to said plaintiff, this defendant was compelled to and did pay to said Zenatello, Carmen Melis, Galletti-Ganoli, and Duffault sums of money far in excess of the amounts which said persons had agreed to sing for as and for their compensation for singing for him, all to the great damage of this defendant.

LXIII. In the year 1906 defendant had caused and procured one Campanini, a musical director of great ability and world-wide renown, to come to the United States from Europe, and had introduced said Campanini to the public as his director of his grand opera performances at his aforesaid opera house in the city of New York, and prior to his coming to the United States for such performances said Campanini had entered into a written contract with this defendant wherein and whereby he had agreed to conduct defendant's grand opera and opera comique performances at his aforesaid opera house in the city of New York during the opera seasons of 1906–7, 1907–8, 1908–9, for which services defendant had agreed to pay said Campanini. After said Campanini had rendered his services for this defendant during the opera season of 1906–7, for which he had been paid in full, and said services so rendered by said Campanini had been eminently satisfactory to this defendant and to the opera-

going public, and by reason of his great ability as a musical director said Campanini was extremely popular with the opera-going public, and his services had become and were of great financial value to this defendant and added greatly to defendant's reputation, popularity, and prestige as a director of opera, defendant relied upon the said Campanini's services for the coming season of 1907-8 and subsequent seasons, and prepared and made plans for said Campanini to conduct the musical direction of defendant's grand opera productions during the coming season of 1907-8 and subsequent seasons.

In the year 1907, without the knowledge or consent of this defendant, plaintiff, knowing of defendant's arrangements with said Campanini and knowing of defendant's dependence upon said Campanini, and then and there unlawfully designing and wickedly contriving to injure this defendant in his aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States and as an attempt so to monopolize the same, did unlawfully and wickedly solicit, inveigle, and attempt to induce said Campanini to desert defendant and enter into a contract with plaintiff and then and there did attempt to cause and procure said Campanini to enter into a contract with plaintiff whereby said Campanini was to act as musical director for plaintiff at its aforesaid opera house in the city of New York and at divers other opera houses in the State of New York and in other States of the United States, and as a result of said solicitation, tempting, and inveigling said Campanini threatened defendant to leave his employ and to go into the employ of plaintiff as musical director for plaintiff unless defendant should agree to pay said Campanini a salary far in excess of that theretofore paid to him by this defendant, and in order to prevent said Campanini from carrying out said threats and in order to retain his services which were necessary to defendant, defendant was compelled to and did accede to such demands and thereafter was compelled to and did pay said Campanini a salary far in excess of the real value of his services, and all of this was accomplished by this plaintiff in and by knowingly, willfully, and wickedly offering to give to said Campanini for his said services to this plaintiff sums of money far in excess of the amount for which he had contracted to act as musical director for this defendant and which said sums were far in excess of the real value of any services which could or would have been rendered by said Campanini to plaintiff, as plaintiff then and there well knew.

LXIV. Prior to the erection of defendant's aforesaid opera house in the city of New York plaintiff's season of grand opera in New York City had extended over a period of five months in each year, during which plaintiff had given five performances each week. In the years 1907, 1908, 1909, and 1910, unlawfully designing and wickedly contriving to injure and destroy defendant's aforesaid business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, the plaintiff, notwithstanding a constantly diminishing attendance of the opera-going public at the performances of grand opera and opera comique produced by it at its aforesaid opera house in the city of New York, increased the number of such performances from five to seven in each week of its said seasons, and advertised and presented at various of such performances the aforesaid Allesandro Bonci, whom plaintiff had induced and persuaded to break his contract with this defendant as aforesaid.

LXV. In the year 1908 plaintiff and its directors and officers, unlawfully designing and wickedly contriving to injure and destroy this defendant's business, trade, and commerce aforesaid, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, notwithstanding the fact that the opera-going public in New York City was hardly sufficient in number to support the production of the grand opera and opera comique performances then and there being given by plaintiff and this defendant, purchased and caused and procured to be purchased a tract of land at Central Park West, between Sixty-second and Sixty-third Streets, in said city of New York, upon which they erected and caused and procured to be erected an opera house known as the "New Theater," and thereafter in the years 1909 and 1910 plaintiff and its said officers and directors unlawfully designing and wickedly contriving to injure and destroy defendant's business, trade, and commerce, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, caused and procured to be produced at said opera house, at great financial loss to plaintiff, four performances of grand opera and opera comique each week during a season of five months in each year, so that in the opera season of the years 1909-10 the num-

ber of performances of grand opera and opera comique in said season in said city of New York was 16 as against 5 but four years prior thereto; and as an outlet for the use of the aforesaid opera singers whom plaintiff had induced, inveigled, and seduced, to break their contracts with this defendant as aforesaid, and as a further effort to injure and destroy this defendant's business, trade, and commerce aforesaid, and as attempts to unlawfully and wickedly monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, plaintiff and its officers and directors in said years of 1909 and 1910 caused and procured such singers, so inveigled and seduced to sing for plaintiff in and at the aforesaid performances of grand opera produced at said "New Theater" as aforesaid.

LXVI. Prior to the erection of defendant's aforesaid opera house in the city of Philadelphia plaintiff in each year rented the privilege of presenting grand opera in an opera house on Broad Street in said city and at which in every season each year it had produced not exceeding five or six performances of grand opera.

After the erection of defendant's said opera house in said city of Philadelphia and in the years 1908-9, 1909-10, plaintiff, its officers and directors, unlawfully designing and wickedly contriving to injure and destroy this defendant's business, trade, and commerce aforesaid, and unlawfully designing and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as unlawful attempts so to monopolize the same, notwithstanding the fact that plaintiff's business of producing grand opera and opera comique was then being conducted at a loss, made arrangements with the owners of the Academy of Music, an opera house in the city of Philadelphia, as a result of which plaintiff produced two performances of grand opera and opera comique each week for five months in each of the years 1908-9, 1909-10, at said Academy of Music in said city of Philadelphia.

LXVII. But for plaintiff's unlawful and wicked conduct in causing and procuring the opera singers and musical directors aforesaid to violate their contracts with defendant as aforesaid, this plaintiff could not have presented the additional performances of grand opera and opera comique in the cities of New York and Philadelphia as aforesaid.

LXVIII. In and by the unlawful and wicked conduct of this plaintiff as hereinbefore set forth the business, trade, and commerce of producing grand opera and opera comique in the United States was thoroughly disorganized, the opera singers, musical directors, and other performers of such opera were completely demoralized, and men and women engaged in the business of singing in and directing operatic performances were educated to an utter disregard of contract obligations, and defendant's business of producing grand opera and opera comique was by the year 1910 reduced to such a condition of uncertainty that he could not rely or depend upon anyone under contract with him complying with the provisions of such contract, and through plaintiff's aforesaid wrongful and malicious conduct his financial condition was seriously impaired, he was mentally distressed and harassed, and physically unfit to carry on his aforesaid business, trade, and commerce. During the years 1908, 1909, and 1910 defendant, through plaintiff's wrongful and malicious conduct, as hereinbefore set forth, had constantly found himself obliged to rearrange his plans; in many instances after scheduling and advertising the contemplated production of certain operas and advertising that certain of the before-mentioned distinguished singers would appear therein, he would find that all such plans must be abandoned, because such singers had been seduced away from him by the plaintiff and its agents through the unlawful methods hereinbefore set forth.

These constant changes and the corresponding disappointment to the opera-going public, which had theretofore patronized defendant's performances, brought defendant's business into disrepute, defendant's prestige and reputation was damaged, the attendance upon his productions of grand opera and opera comique was diminished and all of this resulted not only in great financial loss to this defendant, but also in mental anguish, worry, and concern, which in the month of March, 1910, resulted in defendant's physical collapse.

In March, 1910, this defendant, as a result of all of the foregoing, was in such a condition, physical and mental, that he was unfit to attend to any business of any nature whatsoever, and was so thoroughly disgusted and disappointed at the manner in which he had been treated by a competitor, this plaintiff, which had demonstrated that it had financial support and backing sufficient to enable it to conduct the business of producing grand opera at a loss so long as defendant continued in such business, decided to give up the fight and was ordered so to do by his medical advisers, who informed and advised him that in order to save his life he must quit all business and leave the United States and seek a rest and recuperation for his shattered nerves and constitution.

LXIX. In the month of March, 1910, defendant owned the following enumerated property, which he was using in the production of grand opera and opera comique as hereinbefore stated, to wit: An opera house in the city of New York, which had been erected and equipped to the actual cost and expense of approximately $1,000,000; an opera house in the city of Philadelphia, which had been erected and equipped at an actual cost and expense of approximately $1,250,000; scenery, costumes, fixtures, and other theatrical properties of the value of approximately $350,000; an opera library of the value of approximately $50,000; contracts with opera singers and directors of the value of approximately $150,000; the exclusive rights to the production of numerous operas worth approximately $1,000,000; and a good will in his business, trade, and commerce aforesaid.

LXX. In the months of March and April, 1910, and at no time prior thereto, did this defendant, or anyone acting for him or under his directions, ever produce grand opera or opera comique in the city of Chicago in the State of Illinois.

LXXI. In the years 1906, 1907, 1908, 1909, and 1910 defendant produced grand opera and opera comique principally in the cities of New York, Philadelphia, and Boston, and occasionally in the cities of Washington, Baltimore, Pittsburgh, Buffalo, Rochester, Syracuse, Montreal, and Toronto; but defendant's good will in his said business, trade, and commerce extended throughout the United States and into Canada because of the reputed excellence of his operatic productions in said cities of New York, Philadelphia, and Boston.

LXXII. In or about the month of March, 1910, the plaintiff, its officers and directors, then well knowing this defendant's condition, as hereinbefore set forth, and realizing that they, through their aforesaid unlawful and wicked practices, had succeeded in injuring and practically destroying defendant's business, trade, and commerce aforesaid, and realizing his dangerously impaired physical and mental condition as aforesaid, and unlawfully devising and wickedly contriving to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, sent various emissaries and agents to this defendant and through such emissaries and agents made various offers and propositions to this defendant looking to and with the view to plaintiff acquiring from defendant his aforesaid opera houses, scenery, fixtures, costumes, contracts with singers, and producing rights; said emissaries and agents made numerous proposals and offers to defendant, all of which were considered and discussed by defendant notwithstanding the fact that at the time of such proposals and discussions this defendant's physical and mental condition was such that he was not competent to properly transact any business negotiations of such an important character. While in the midst of such negotiations and before defendant had accepted or agreed upon any terms and before defendant had decided to sell out and dispose of his aforesaid properties, contracts, business, trade, and commerce his condition, both physical and mental, became such that he was advised, directed, and commanded by his medical advisers to give up all consideration of business and to leave the United States and seek rest and recuperation, which advice defendant decided to and did accept, and in the month of April, 1910, this defendant left the United States and went to Europe, from whence he did not return except for a short stay until the autumn of 1912.

LXXIII. Prior to defendant's departure from the United States, as last aforesaid, he had discussed with the Edward T. Stotesbury, mentioned in the complaint herein, the proposition of selling to said Stotesbury defendant's aforesaid opera house in the city of Philadelphia; defendant had also discussed with one Otto Kahn, one of plaintiff's directors, the proposition of combining the defendant's and plaintiff's aforesaid business, in which event defendant was to have had an interest in such combination; but in none of the aforesaid discussions between defendant and plaintiff's agents had defendant ever agreed to sell out his entire business, trade, and commerce and to refrain from engaging therein for any period of years. In every discussion had by defendant with any of plaintiff's aforesaid agents, prior to defendant's departure for Europe, as aforesaid, defendant had demanded the payment to him of at least $1,500,000 for his aforesaid opera house in the city of Philadelphia.

LXXIV. Shortly prior to defendant's departure for Europe, as aforesaid, defendant then being mentally worried, harassed, and wholly unfit to attend to any further business, and realizing the utter hopelessness of attempting to compete with plaintiff in the aforesaid business, trade, and commerce, and being persuaded thereto by plaintiff's agents and employees, signed and executed a power of attorney of which a copy is annexed to the complaint herein and marked "Exhibit C," and to which reference is hereby made as if here set forth in full.

LXXV. On the 26th day of April, 1910, this defendant was in the city of London in the Kingdom of Great Britain.

LXXVI. On information and belief the contract, a copy of which is annexed to the complaint herein and marked "Exhibit A," and to the original of which the defendant prays that reference may be had, was written and prepared by plaintiff and its employees and agents.

LXXVII. Said contract was not seen by this defendant prior to April 26, 1910, nor did this defendant know of the terms proposed to be incorporated therein; such terms were arranged, as defendant is informed and believes, by plaintiff's agents and employees and defendant's attorney in fact, and after being so arranged were embodied in said contract of April 26, 1910, which said contract was signed by this defendant's said attorney in fact, Arthur Hammerstein, without the same being submitted to this defendant for his sanction or approval.

LXXVIII. On information and belief that immediately after the signing and delivery of said contract of April 26, 1910, by this defendant's aforesaid attorney in fact, and before this defendant had ever seen the same, the plaintiff paid to defendant's said attorney in fact for this defendant, and said attorney-in fact accepted for this plaintiff, the sum of $100,000 as provided to be paid by the terms and conditions of paragraph marked "Fourth" of said contract of April 26, 1910; and immediately thereafter, and without the knowledge of this defendant, and before this defendant had ever seen said contract of April 26, 1910, defendant's said attorney in fact delivered to plaintiff, its officers and agents, defendant's aforesaid scenery, costumes and fixtures, library, and contracts with singers and opera-producing rights aforesaid.

LXXIX. Thereafter and in or about the month of June, 1910, at the city of London, England, the aforesaid contract of April 26, 1910, and the fact that the same had been executed and delivered, as aforesaid, and that defendant's property, contracts, and rights aforesaid had been turned over to plaintiff and its agents, as aforesaid, was brought to this defendant's attention; at that time this defendant's mental and physical condition was such that he was unable to make any resistance, his natural love and affection for his son restrained him from repudiating his acts as attorney in fact, as aforesaid, and because of these facts and of defendant's mental distress, worry, and harassment, resulting from the wrongful, unlawful, and wicked acts of plaintiff, its officers and agents, as aforesaid, defendant accepted said contract, and thereafter, and in the month of June, 1910, executed certain papers, which, he is informed and believes, are confirmatory of the acts of his attorney in fact, as aforesaid, and to which papers defendant prays that reference may be had as if the same were here set forth in full.

LXXX. On information and belief, that, at the time of the execution of the aforesaid contract of April 26, 1910, plaintiff represented, pretended, and agreed that this defendant should not be debarred from producing grand opera and opera comique in any part of the United States other than the cities of New York, Philadelphia, Chicago, and Boston, and that plaintiff would not do and had not done anything to debar defendant from producing grand opera and opera comique in such other parts of the United States, when as a matter of fact and as plaintiff then and there well knew, it was making and planning to make contracts and agreements for the production of grand opera and opera comique in practically every city of the United States where the opera-going public was sufficient in number to warrant or justify the production of grand opera and opera comique.

LXXXI. That the aforesaid representations and assurances given by plaintiff and its agents to this defendant and his aforesaid attorney in fact, at the time of and prior to defendant's executing the aforesaid confirmatory agreements to the effect that plaintiff was not doing and would not do anything to debar or prevent this defendant from producing grand opera and opera comique throughout the United States, except in said cities of New York, Philadelphia, Boston, and Chicago were the controlling and material considerations to defendant for his execution of said confirmatory agreements, and but for said assurances and promises, which defendant accepted and relied upon, he would not have executed said confirmatory agreements.

LXXXII. On information and belief, that, at the time of and prior to the execution of the aforesaid agreement of April 26, 1910, plaintiff and its officers and agents represented and pretended to and agreed with defendant's aforesaid attorney in fact, that defendant might and could produce grand opera and opera comique throughout the United States except in the cities of New York, Philadelphia, Boston, and Chicago, and that plaintiff was not doing and would not do anything to debar or prevent defendant from so doing, when as a matter of fact, as plaintiff and its said officers and agents then and there well knew, plaintiff was making, and planning to make, contracts and agreements for the production of grand opera and opera comique in practically every city of the United States where the opera-going public was sufficient in number to warrant or justify the production of grand opera and opera comique.

LXXXIII. On information and belief that the aforesaid representations and assurances given by plaintiff and its agents to defendant's said attorney in fact, as stated in the last preceding paragraph, were a controlling and material consideration to said attorney in fact for his execution of said agreement of April 26, 1910, and the agreement of which a copy is annexed to the complaint and marked "Exhibit B," and to the originals of which said agreements defendant prays that reference may be had; and but for said false and fraudulent representations and assurances, which defendant's said attorney in fact accepted, believed, and relied upon, he would not have executed said agreements.

LXXXIV. That by the aforesaid false and fraudulent representations, all of which were made by plaintiff and its agents with the intent to monopolize the business, trade, and commerce of producing grand opera and opera comique in the United States, and as attempts so to monopolize the same, defendant's aforesaid attorney in fact was induced to execute the aforesaid agreements of April 26, 1910, copies of which are attached to the complaint herein as Exhibits A and B.

LXXXV. That notwithstanding said false and fraudulent representations which defendant and his said attorney in fact believed and relied upon, the aforesaid contract of April 26, 1910, of which Exhibit A purports to be a copy, and the agreement confirmatory thereof which was signed by defendant in the month of June, 1910, as aforesaid, both expressly provide that this defendant shall not for a period of 10 years be connected in any business that encroaches upon the field occupied by the plaintiff at the time of executing said contracts, when at that time and ever since plaintiff has occupied and now does occupy the entire field of grand opera and opera comique throughout the United States.

LXXXVI. On information and belief, that immediately after the execution of the aforesaid contract of April 26, 1910, by defendant's attorney in fact, as aforesaid, and before defendant had ever seen said contract, plaintiff made public announcement of the fact that defendant had sold out his business, trade, and commerce aforesaid, which said announcement made it practically impossible for defendant to produce grand opera and opera comique in the succeeding season, even had he repudiated said contract and refused to confirm the same.

LXXXVII. That immediately upon such publication all of defendant's subscribers canceled and abandoned their subscriptions for the next opera season, defendant's singers and directors and other employees sought for and made other engagements, and it would have been impossible for defendant to have reorganized his ensemble and to have been in position to present grand opera in the season of 1910–11 even had he refused to ratify and confirm said contract of April 26, 1910.

LXXXVIII. That for all of the foregoing reasons and because of his mental and physical condition as aforesaid, and without fully appreciating the character of the papers which he was signing or that such contracts purported to or could be claimed to obligate him not to produce grand opera and opera comique in the United States for a period of 10 years from the date thereof, defendant, being then and there mentally irresponsible, signed a number of papers at London, England, in the month of June, 1910, the principal ones of which he believes to have been duplicates of the two agreements of which Exhibits A and B, attached to the complaint herein, purport to be copies.

LXXXIX. In the opera seasons of the years 1906–7, 1907–8, 1908–9, and 1909–10 plaintiff's regular charge for tickets for orchestra seats in its aforesaid opera house in the city of New York, for its performances of grand opera, was $5; and during said years plaintiff, being compelled thereto because of the excellence of defendant's production of grand opera at his aforesaid opera house in said city of New York, produced a varied repertoire of grand opera and presented therein numerous well-known and popular singers and performers.

XC. In the season of 1910–11, and in all seasons subsequent thereto, having, by the unlawful practices hereinbefore set forth, succeeded in driving defendant out of the aforesaid business, trade, and commerce, and having secured to itself a monopoly in the city of New York in said business, trade, and commerce, plaintiff raised its price for tickets for orchestra seats, in its said opera house, from $5 to $6, and at all performances of grand opera at said opera house, at all such times, plaintiff exacted and received from purchasers of each of such tickets the sum of $6; and now, feeling secure in its monopoly of said business, trade, and commerce, plaintiff has publicly announced that after the opera season of 1913–14 its charge for each of such tickets will be $7; and this notwithstanding the fact that since defendant was driven out of and eliminated from the business as aforesaid, plaintiff's production of grand opera and opera comique, at its aforesaid opera house, has been inferior in quality, and its repertoire of operas more limited, and its rendition, staging, and producing thereof has been in every way inferior to what it was when defendant was producing opera in the city of New York as aforesaid.

XCI. That by producing such quality and character of opera in said city of New York since defendant's elimination from such business, and by increasing its charge for tickets of admission to its said performances as hereinbefore stated, plaintiff has been guilty of a fraud upon the public and has exacted, demanded, and received from the public large sums of money far in excess of the worth of any performances of opera which it has produced, and it has been able so to do, and has so done, by virtue of its unlawful monopoly of said business, trade, and commerce, effected through its elimination of defendant from said business, trade, and commerce as hereinbefore stated.

XCII. On information and belief that the aforesaid contracts of April 26, 1910, copies of which are annexed to the complaint herein as Exhibits A and B, are illegal, null, and void in that the same are unlawful contracts in unreasonable restraint of trade and commerce among the States of the United States and with foreign nations, and in that the same were made and executed and procured to be made and executed as a part of an unlawful monopoly of and as unlawful attempts to monopolize the business, trade, and commerce of the United States and among the several States thereof and with foreign nations, and in that the defendant and his aforesaid attorney in fact were fraudulently deceived by plaintiff and its agents into executing and delivering the same, and in that same are in all respects unconscionable and contrary to public policy and good morals.

For a second separate and distinct defense to the complaint herein:

XCIII. That the corporate powers conferred upon the plaintiff by its charter are no other and no more than the following, to wit:

"To sustain, encourage, and cultivate a taste for music, literature and the arts, and to erect, maintain, purchase, rent, or occupy one or more buildings or other premises for these purposes; to give or cause to be given in the city of New York and in other cities and towns in the United States and elsewhere, operatic and dramatic performances, representations, concerts, and other entertainments; to own, acquire, occupy, equip, and maintain, by purchase, lease, or otherwise, one or more theaters, opera houses, or other buildings; to acquire all necessary costumes, scenery, properties, musical instruments, libraries, and other material and accessories for use in connection with the giving of operatic or dramatic performances, representations, or entertainments; to purchase, acquire, hold, and dispose of stocks, bonds, and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds, or other obligations; to sell, lease, or otherwise dispose of any building or buildings acquired as above provided; and generally to do any and all other acts incidental to or connected with the business of giving operatic or dramatic representations, concerts, performances, or other entertainments."

XCIV. That the contract between this defendant and the said Edward T. Stotesbury and the deed poll executed by defendant, as mentioned in the complaint, copies whereof are annexed thereto as exhibits A and B, and to both of which reference is hereby made as if the same were here set forth in full, purport to vest in the plaintiff all the undertaking and good will acquired and owned by this defendant in the business of producing opera in the cities of New York and Boston; that the acquisition of such undertaking and good will was not within the powers conferred upon plaintiff by its aforesaid charter; and was in contravention of the purposes for which the plaintiff corporation was chartered; wherefore said attempted acquisition was unauthorized, illegal, ultra vires, and void; the contract and deed poll purporting to effect the same were void and of no effect, and the plaintiff acquired thereunder no rights which are enforceable in this or any action or proceeding.

XCV. That the said contract and deed poll and the attempted acquisition of rights thereunder, as aforesaid, were and are contrary to public policy and in violation of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," being an act of July 2, 1890 (26 Stat., 209), and as such are illegal.

XCVI. That the value of the real and personal property received from this defendant by the said Edward T. Stotesbury and his nominees and the plaintiff was far in excess of the value received from any and all of said parties by this defendant or any one on his behalf, wherefore this defendant has had and received no thing of value which, ex aequo et bono, he should repay or restore or offer to repay or restore unto the plaintiff or others.

Wherefore defendant prays that the complaint herein may be dismissed and that he may be discharged herein and that he may recover from the plaintiff the costs of this action.

BIGELOW & WISE,
Attorneys for defendant, Oscar Hammerstein.
Office and post-office address, 15 William Street,
Borough of Manhattan, City of New York.

HENRY A. WISE, *Of Counsel.*

STATE OF NEW YORK,
County of New York, ss:

Oscar Hammerstein, being duly sworn, deposes and says that he is one of the defendants in the within entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

OSCAR HAMMERSTEIN.

Sworn to before me this 11th day of September, 1913.
[SEAL.]

BYRD D. WISE,
Notary Public No. 95, New York County.

GOVERNMENT PROCEEDINGS UNDER THE SHERMAN ACT AND PRIVATE DAMAGE SUITS.

CHICAGO, ILL.

A bill now before Congress entitled "A bill to supplement an act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,'" approved July 2, 1890, provides in section 12, in substance, that a decree or judgment rendered in favor of the Government in a proceeding brought by it for violation of the Sherman Act shall be conclusive evidence of the illegality established by the judgment, as between the Government and the defendant, in favor of any other party in any other proceeding brought under or involving the provisions of the act.[1]

The effect of this provision will be to set aside, with reference to one particular class of cases, the old established principle of the common law as well as of equity, which limits the operation of what is known as res judicata to parties and privies. As this is a principle the general justice and expediency of which has never been questioned, very cogent reasons should be made to appear for the proposed change. It has always been the practice and habit of American legislation to respect as far as possible the traditional maxims of remedial justice, even where not protected by constitutional provisions.

The proposed change ought not only to be justified by conditions peculiar to combinations and monopolies which render the existing rule onerous and inequitable, but it should also be clearly free from dangers, hardships, or inconveniences of its own. The possible and unintended consequences of the proposed new rule should be scrutinized with all the more care, as the change is without a precedent in past legislation, and its operation and effect must therefore be more or less a matter of speculation.

1. It is in the first place incumbent upon the advocates of the bill to show that the law as it stands is unduly disadvantageous to private plaintiffs. Such proof requires an analysis of the damage cases that have been brought under antitrust laws in the past. While there are no official statistics of such cases, yet it may be assumed that the reported cases, if not complete, are yet fairly typical, and they certainly represent the most important litigation.

The current digests show 37 damage suits based on trusts or combinations, 25 of them brought under the Federal act and 12 under State laws.

Of these 37 cases 12 were unsuccessful on the pleadings, while in one case the trial failed to develop sufficient evidence of a conspiracy so that a verdict was directed for the defendant. (Virtue v. Creamery Package Co., 179 Fed., 115, 1910.)

Of the cases decided in favor of plaintiff five appear so far to have resulted in verdicts for damages, while the reports of the other cases show as yet merely a disposition

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[1] SEC. 12. That whenever in any suit or proceeding, civil or criminal, brought by or on behalf of the Government under the provisions of this act a final judgment or decree shall have been rendered to the effect that a defendant, in violation of the provisions of this act, has entered into a contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or has monopolized or attempted to monopolize, or combined with any person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, the existence of such illegal contract, combination, or conspiracy to monopolize shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such person, constitute as against such defendant conclusive evidence of the same facts and be conclusive as to the same issues of law in favor of any other party in any other proceeding brought under or involving the provisions of this act. In all cases where any person who shall have been injured in his business or property by any person or corporation by reason of anything forbidden or declared to be unlawful under the provisions of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and who at the time or previous to the institution of such suit by the United States as aforesaid has a cause of action under section seven of said act or section thirteen of this act against any defendant in a suit wherein a decree or judgment has been obtained as aforesaid, the statutes of limitations applicable to such cases shall be suspended during the pendency of such suit and shall not again become operative until after the date of the final decree or judgment in such case.

in favor of the plaintiff on the pleadings, leaving it uncertain whether the cases went to trial, and if so what the result was.

All the cases resulting in verdicts for damages in the States (Jackson v. Stanfield, 137 Ind., 592; Smith v. Morgantown (N. C.), 74 S. E., 961; Cleland v. Anderson, 66 Nebr., 252) have been cases in which combinations formed to maintain prices sought to make it impossible for price-cutting concerns to obtain goods; one of the Federal cases was of the same nature (Montague v. Lowry, 193 U. S., 38, 1904), while the other Federal case is the well-known Danbury Hatters' case, Loewe v. Lawlor, decided by the circuit court of appeals in December, 1913.

The cases successful on the pleadings show that a good cause of action can be framed as well against a monopolistic corporation [1] as against a combination of concerns.[2]

Certainly this analysis of cases does not furnish positive proof that it is impossible to make a case for damages under the law as it stands. While the number of suits brought is small, it does not appear that this was due to difficulties of proof; on the contrary, it is significant that only one case was lost on the ground of insufficiency of evidence. In all the other cases where the plaintiff was unsuccessful he would not have been helped by making the Government suit conclusive.

The case for the proposed change must therefore rest upon facts which are matter of experience rather than of record. It is probably contended (the writer has not seen any extended argument in favor of the proposed change) that to establish by competent evidence the formation of monopolistic combinations is an undertaking beyond the resources of private individuals and that they ought, therefore, to have the benefit of the findings obtained at the expense of the Government.

It would, however, be still incumbent upon the private plaintiff to show the effect of the monopolistic combination upon his own business and to prove that he was legally injured by the practices complained of.

2. Conceding that it is desirable to give the private litigant the benefit of the facts established at the expense of the Government, is it not sufficient to provide that such facts should be admissible in evidence in suits for damages brought by private persons? This, while likewise a departure from recognized principles, would certainly not go as far as the proposed change. It would have the advantage of making the issues in damage suits independent of the issues in Government proceedings and would avoid the injustice of making the Government victory conclusive in cases where the loss to the private concern was not due to coercive practices or unfair competition on the part of the trust, but to its superior organization and efficiency.

3. Merely to make evidence admissible instead of giving a judgment conclusive effect has this additional advantage, that it may make the new rule applicable to pending proceedings provided the cause of action in favor of private parties is not already barred. It is extremely doubtful whether the courts would give the proposed change retroactive effect, and if they should do so the consequence would be to render the provision unconstitutional, certainly with regard to criminal proceedings brought by the Government. It would clearly be ex post facto legislation to attach to a sentence in a prosecution of a trust formed in the past, a conclusive effect with reference to liability to damages, which it did not have when the trust was organized. This consideration is important in view of the fact that the era of the organization of great trusts lies in the past.

4. There is, however, another consideration which weighs strongly against giving private parties all the benefit of a judgment for the Government.

It is well known that the antitrust campaign of the Government has been directed not so much against informal associations of separate and independent concerns as against the great monopolistic corporations. As regards the latter the time between legitimate consolidation and illegal monopoly is not easy to draw, and largely in consequence of this inherent uncertainty the Government has generally failed in its criminal prosecutions and its successes have been achieved in proceedings in equity.[3]

The proceeding in equity is essentially an administrative one; it is in a sense corrective, but not vindictive. The law is being formed and established by decrees

[1] Six Federal cases: Sugar Trust, Penn. S. R. Co. v. Am. S. R. Co., 160 Fed., 144, 1908; Tobacco Trust Monard T. Co. v. Am. Tob. Co., 165 Fed., 775; Peoples Tobac. Co. v. Am. Tob. Co., 170 Fed., 396; Ware Kramer Co. v. Am. Tob. Co., 180 Fed. 160; Shoe Machinery Trust; Strout v. U. M. Co., 195 Fed. 313, 1912; Power Trust; Buckeye Co. v. Du Pont, 196 Fed 514.

[2] Seven Federal cases: Ellis v. Inman, etc., 131 Fed., 182, 1904, lumber dealers; Mines v. Scribner, 147 Fed., 927, 1906, publishers; Thomson v. Union Castle, 166 Fed., 251, 1908, shipping companies; Jayne v. Loder, 149 Fed., 21, 1906, druggists; State v. O'Connor, 181 Fed., 267, 1908, coal dealers; Meeker v. Lehigh 183 Fed., 848, 1910, coal carriers; Chattanooga Foundry v. Atlanta, 203 U. S., 390, 1906, pipe manufacturers. State cases: Erie v. Produce Exch. Co., 82 Minn., 173; Delmes v. Pascagoula (Miss.) 1912, 60 So., 210, Klingel v. Sharp, 104 N. J., 218.

[3] See an article of the present writer on the Enforcement Provisions of the Sherman Act: Journal of Political Economy, vol. 20, p. 462.

more or less tentative in their nature, and the present tendency seems to be to effect reorganizations without judicial intervention, by negotiation and compromise.

Such a course of proceeding is distinctly beneficial, and, in view of provisions so vague and indefinite as those of the Sherman law, perhaps the only one that seems to have promise of enduring success.

How, then, will such proceedings be affected by the proposed change giving private parties a direct interest in Government suits?

Obviously, it will be quite out of the question for the corporation proceeded against to plead guilty or consent to a judgment or decree, since that would expose it at once to heavy damage suits. Apart from that, the Government, as well as the court, might be unconsciously influenced by the fact that the judgment rendered would have results beyond the purview of the pending proceeding, and a just consideration for collateral consequences might bias governmental or judicial action in favor of the corporation. The Government, moreover, might not feel at liberty to settle cases out of court, in view of the prejudicial effect of such action upon private interests. In brief, Government proceedings would be seriously embarrassed by considerations outside of the merits of the Government's own cases.

5. The most effective manner of dealing with the claims of private parties injured by monopolistic combinations would be to separate entirely practices in the nature of a boycott from acts of combination or consolidation in which private injury is merely an incidental result and not directly contemplated.[1] In so far as the former are actionable at common law, they might, if necessary, also be recognized as actionable by Federal legislation—although even apart from an express Federal statute—a boycott is probably not rendered immune from actionability under common law or State statute by the fact that it relates to interstate commerce; a saving clause in a Federal antitrust act would be sufficient to preserve common-law right of action.

Injuries consequential upon the formation of a monopoly, the legal status of which is doubtful until judicially determined should, however, be dealt with by analogy to railroad overcharges or discrimination, there should be in the first place only a direct proceeding to establish the right or wrong of the matter, with power in that same proceeding to award equitable reparation to private parties who for that purpose might either initiate the proceedings or intervene in it. (See interstate commerce act, secs. 15 and 16, as amended by act of 1906.)

For acts subsequently done in violation of a decree and order the corporation should be fully liable in damages to private parties, and for the purpose of such action the decree might be made conclusive as to the illegality of the practice.

6. Moreover, no revision of the clauses regarding civil proceedings under the Sherman Act should be undertaken without eliminating the provision, allowing the recovery of threefold damages. It does not appear how the provision came to be inserted in the act; it certainly received no discussion and probably no consideration. Senator Sherman at one stage of the bill expressed himself against any penal provisions in view of the indefiniteness of the practices, at which the legislation was aimed.[2] In the antitrust laws of the States—otherwise sufficiently drastic—no double or threefold damages occur only in insolated instances. Confounding as they do civil and penal remedies they are contrary to every sound principle of legislation and the practice of allowing them is decreasing in American States; in the legislation of Congress they are unknown outside of this law; and, if anywhere, a vindicative remedy seems out of place in legislation which pursues a purely tentative policy with regard to a difficult economic problem. Is it too much to say that it is mere thoughtlessness that allows or perpetuates provisions which are condemed by the almost universal practice of legislation?

7. Finally as regard the proposed suspension of the statute of limitations. This is a minor matter. However, attention should be called to the fact that only one case appears to have held that a suit for damages should await the bringing of direct proceedings to ascertain the reasonableness of a rate. (Meeker *v.* Lehigh, etc., R. Co., 162 Fed., 354, 1908.) In a later case, however, between the same parties the circuit court of appeals held that where plaintiff did not sue as a shipper, he could proceed

[1] Of the damage suits brought under the Sherman Act only three appear to have been of the latter character: Two suits against the American Tobacco Co. (180 Fed., 100; 175 Fed., 774) and the suit by the City of Atlanta against the Chattanooga Foundry (203 U. S., 390), based on an increase of prices due to a combination; all the others complained of acts directed against the plaintiff specifically (refusal to sell to him, 131 Fed., 102; 147 Fed., 927; 149 Fed., 21; 181 Fed., 267; attempt to drive him out of business, 183 Fed., 548; attempts to coerce him to come into the combination or to acquire control of voting power; cases against Tobacco, Powder, Sugar, and Shoe Machinery Trusts.)

[2] Mar. 21, 1890, 51 Cong., 1st sess., p. 2456.

independently of the administrative proceeding. No private suit brought under the Sherman Act, has, as far as the reports show, been dismissed because owing to another proceeding pending, the statute of limitations had run against the plaintiff. The proposed provision would, of course, be superfluous if private parties were allowed to intervene in Government proceedings for the purpose of obtaining reparation.

ERNST FREUND.

[The Chattanooga Times, daily and Sunday. H. C. Adler, general manager.]

CHATTANOOGA, TENN., *January 10, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: The Associated Press carries to-day an outline of an antitrust bill now being drafted by the committee of the House of which you are chairman. That bill, according to the news, will apply to banks and trust companies as well as to railroads and other industrial corporations.

It has been the writer's observation that one of the worst troubles our merchants and manufacturers and people generally have with local banks is the so-called clearing-house combinations of the banks. This is general and does not apply to Chattanooga only. These clearing houses, you will find upon investigation, have rules and regulations covering many things, and as they all do an interstate business, they must of necessity come under any law the Federal Government passes which relates to interstate commerce. Among the provisions which they incorporate in their rules is one in which they regulate the collection charges for checks deposited with them, all banks having the same charges, and the charge is made as the result of a combination. If the combination did not exist and one or two banks in Chattanooga, for instance, would make no charge for the collection of outside checks, the business of the depositors would naturally gravitate to the noncharge banks, and would result in the breaking down of that rule; but the combination is hard and fast as a general proposition, and therefore all the banks being members of it refuse to make any change in that rule. But a more important regulation by the clearing-house banks in a number of cities is the one in which they will agree, it matters not what a man's credit, collateral, or security may be, as to the rate of discount or interest he is compelled to pay when borrowing money.

In Chattanooga the clearing house bank, which means all the banks of the city, have a regulation in which the minimum rate of interest charged to borrowers is 6½ per cent. If a borrower were to take United States Government bonds as collateral, and their face value were double the amount that he wanted to borrow, he would still be unable to obtain any money at a less rate from any bank than 6½ per cent. The charge is usually more, but under no circumstances could it be less. This regulation of the banks is supported by a rule which imposes a severe fine upon any of the banks transgressing it. No bank is permitted by the rules of the clearing house to offer as an inducement to the customer of another bank a lower rate of interest in order to obtain his account than he is paying at the bank with which he is at present doing business. There are other rules and regulations most of these clearing houses have which makes the banks one big combination, permitting them to hold in the hollow of their hand all the industrial and mercantile enterprises of the towns and cities in which they do business. That is wrong, and because of their power and influence over the merchant and manufacturer they are compelled to be silent and take what they can get. They can not afford to fight the banks because the banks could ruin 90 per cent of them at any time that it would suit their pleasure to do so.

This banking proposition is one which could be very well regulated in the bill your committee is now drafting, and there is no part of the bill which will afford greater relief to all parts of the country than a provision which will absolutely prohibit the financial institutions of entering into agreements covering matters of this kind. The writer hopes that you will make some investigations into the allegations contained in this letter and act accordingly.

With assurances of my highest regard and respect, I remain,

Very truly, yours,

H. C. ADLER.

[George Allen Dewey, attorney and counselor at law.]

1 MADISON AVENUE,
New York, January 10, 1914.

HON. HENRY D. CLAYTON,
Chairman House Judiciary Committee,
Washington, D. C.

DEAR SIR: The writer read with much interest the account in to-day's New York Tribune, in reference to the proposed legislation, in charge of your committee, to effect legislation of trusts and monopolies.

The writer had some correspondence last summer with Chairman Oldfield, of the House Committee on Patents, in reference to the business methods of the Weed Chain Tire Grip Co. This company has been one of the most flagrant violaters of the principle of free and open competition in the automobile business. They have taken the position that by reason of their ownership of a broad patent covering noncreeping tire chains, that they have the right, not only to dictate to the dealer the price at which he shall resell their product, but have claimed and exercised the right to cut accredited dealers off their list, whenever in their judgment their method of doing business does not meet with their approval. To be more specific, this company refuses any longer to sell my client, the Mutual Auto Accessories Co., Weed chains, on the ground that the Mutual Auto Accessories Co. was selling their automobile supplies to a cooperative organization known as The Service Co. Inc,, which latter organization, as an inducement of membership in it, sells the general line of automobile supplies at reduced prices. This Service Co. never sold Weed chains at a price less than the published retail price, nor did the Mutual Co. allow them any commission on their sales of Weed chains, but the Weed Co. cut off the Mutual Co. from the purchase of any Weed chains merely upon the ground, as they claim, that they did not approve of concerns handling their product cutting any prices.

Since the recent very broad decision of the Supreme Court the writer has been under the impression that such practices on the part of the Weed Co. were illegal, and after these decisions the Weed people boasted that they would get around it in some way.

In view of their boast the inclosed form of contract which they are now using wherever Weed chains are sold, is of interest, as it seems to the writer that it is a very patent attempt to get around the plain meaning of the court's decision. In the Sanatogen case, the writer is under the impression that the Supreme Court stated that no subterfuge put out as a license arrangement would be tolerated, and of course from the practical standpoint it is absurd to attempt to sell a pair of chains under a license. This proposed form of contract of the Weed people is a serious matter for my clients, for if they are not allowed to handle Weed chains it seriously affects their standing in the trade as a jobber, for the Weed chain to-day is almost a necessity to an automobile owner.

If you care to give us your views on this matter it will be greatly appreciated, for if in your opinion such a contract is permitted by the present law it may be of value to you in drawing up your proposed legislation, as surely this instance represents one of the most intolerant acts committed under the cloak of our patent law.

In conclusion, may I be allowed to state that you will be accomplishing for the public a tremendous benefit if legislation can be enacted to free us from such despotism as we have suffered for nearly a year, and which has also been the experience of nearly all the other dealers.

Trusting to have the pleasure of hearing from you at your earliest convenience and thanking you in advance for your courtesy, I am,

Yours, very truly,

GEO. ALLEN DEWEY.

[Original.]

WEED CHAIN TIRE GRIP CO. SUBAGENCY CONTRACT.

....., *191..*

THE MOTOR CAR EQUIPMENT CO.,
Metropolitan Distributors, 55 Warren Street, New York, N. Y.:

In consideration of your appointing us your selling agents and supplying us with material at consumers' prices less a commission of .....per cent, we hereby accept such agency and agree to be bound by each and all of the terms and conditions printed upon the reverse side of this contract

Ship us the following:

Pairs.	Weed chains.	Rid-O-Skid.	Size.	Pairs.	Weed chains.	Rid-O-Skid.	Size.
			28 x 3				32 x 4½
			30 x 3				34 x 4½
			32 x 3				35 x 4½
			34 x 3				36 x 4½
							37 x 4½
			30 x 3½				38 x 4½
			31 x 3½				40 x 4½
			32 x 3½				42 x 4½
			33 x 3½				34 x 5
			34 x 3½				35 x 5
							36 x 5
							37 x 5
			31 x 4				38 x 5
			32 x 4				39 x 5
			33 x 4				40 x 5
			34 x 4				36 x 5½
			35 x 4				37 x 5½
			36 x 4				38 x 5½
			37 x 4				38 x 6
			40 x 4				40 x 6

CROSS CHAINS.

Quantity.	Size.		Quantity.	Size.
	2½			4½
	3			5
	3½			5½
	4			6

ADJUSTERS.

Pairs.	Size.		Pairs.	Size.
	28-30			37-38
	32-34			40-42
	36			

Accepted.....

Dated....., *191*..

TERMS AND CONDITIONS OF SUBAGENCY CONTRACT.

1. In consideration of the agency herein granted, the agent agrees not to sell or offer for sale, either directly or indirectly, the products covered by this contract, except at full net list prices as fixed by the distributor, and the agent further agrees not to offer any merchandise or other inducement with the products covered by this contract to induce their sale, and not to directly or indirectly employ any method which shall in any way violate the spirit and intent of this contract.

2. The agent will truthfully and honestly account to the distributor for the proceeds of all of the products sold and distributed by it under this contract, less the commission herein specified to be paid to the agent as compensation for his services.

3. The agent agrees that it shall not be entitled to nor claim any commission upon the sale of the products covered by this contract except as specified by the terms hereof, nor at any time upon products covered by this contract sold at prices less than the full list price.

4. The agent agrees that it will not handle, sell, or offer for sale any other chain grips or any other nonskidding devices than those of the Weed Chain Tire Grip Co., or the parts thereof resembling them in any way, or marked in any way similar to the product covered by this contract; the agent admits and concedes the validity of the patents of the Weed Chain Tire Grip Co. under which the products covered by this contract are

manufactured and sold, and will not at any time or under any circumstances contest the validity of said patent.

5. In case of the violation of this contract by the agent herein, it is understood and agreed that said contract agency and employment immediately terminates and the distributor may retake for the manufacturer from the agent any of the products of the distributor or manufacturer covered by this contract and remaining in the hands of the agent unsold, and the agent by such violation forfeits any right to compensation hereunder and all the benefits hereby conferred.

6. The product covered by this contract and consigned to the agent hereunder is understood to be and remains the property of the manufacturer until finally sold to an ultimate consumer, and the agent has no property right or title therein.

7. The agreement hereunder may be canceled on 60 days' notice by either party to the other, and the employment of the agent hereunder, if not previously terminated, terminates of its own limitation 6 months from the date hereof.

8. The records of the distributor as to the amount of product distributed by the agent shall in all cases be final in fixing the compensation of the agent for his services.

[Haight, Sandford & Smith. Everett P. Wheeler, counsel.]

27 WILLIAM STREET,
New York, January 13, 1914.

SIR: Since a revision of the law in reference to combinations in restraint of trade is to be taken up, permit me to suggest two amendments to the present law, which are the result of considerable experience in the trial of cases under the existing statute.

I have found that under the provisions of section 7 of the Sherman Act, which gives treble damages to an injured party, the plaintiff enters the court amid an unfavorable atmosphere. The first impression is that the claim if trebled will give excessive damages. The consequent disposition is to minimize the recovery. Again, in the case of destructive competition, which to my mind is the greatest evil of attempted monopoly, it is very difficult to admeasure the damage. The decisions in the Federal courts, particularly in reference to recovery of damages from the loss of business, are unsettled. If the offender has succeeded in destroying the plaintiff's business, it is difficult to prove exactly the amount of damage.

Again, the Supreme Court held in American Banana Co. *v.* United Fruit Co. (213 U. S., 347), that the statute as it now stands does not extend to acts committed by citizens of the United States in a foreign country for the purpose of destroying the trade of a competitor from that country to the United States. The effect of this decision is to deprive the statute, so far as it relates to foreign commerce, of more than half its efficacy. That Congress has power to give a remedy to American citizens for acts committed by other American citizens in a foreign country there can be no doubt. So it has power to punish criminal offenses committed by American citizens in foreign countries. On this principle the statutes against the slave trade were based. (Act of May 10, 1800; 2 Stat. L., 70.) In like manner the act of January 30, 1799 (1 Stat. L., 61) provides that every citizen who carries on correspondence with a foreign country "with intent to influence its action in any controversy with the United States, or to defeat the measures of the Government of the United States," shall be punished by fine and imprisonment. In short, to use the language of Hall (International Law, 5 ed., 49): "A State has the right to attach whatever significance it will within its own territory to acts of its subjects wherever those acts may be done."

See Commonwealth *v.* Macloon (101 Mass., 1), where the whole subject of power is considered.

To remedy the two defects just suggested, I have drafted an act which I venture to submit for your consideration and that of your advisers.

I am, with great respect, very truly, yours,

EVERETT P. WHEELER.

AN ACT To amend an act entitled, "An act to protect trade and commerce against unlawful restraints and monopolies."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. Section seven of said act is hereby amended so as to read as follows:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in

which the defendant resides or is found, without respect to the amount in controversy and shall recover the damages by him sustained, and the costs of suit, including a reasonable attorney's fee, and also such reasonable compensation by way of exemplary damages as the jury shall determine.

"In assessing damages in such cases the jury or the court, if the case is tried without a jury, shall estimate as nearly as may be such profits as the plaintiff might in the ordinary course of business have reasonably expected to realize if his business had not been unlawfully interfered with by defendant, and such damages so assessed shall be included in the verdict or decision in addition to any damages proved to have been actually sustained by the plaintiff."

SEC. 2. The said act is also hereby amended by adding at the end thereof the following:

"SEC. 9. This act shall extend to any acts done in a foreign country by citizens or residents of the United States, and to any Acts procured or instigated by citizens or residents of the United States to be done in such country. It shall be no defense in a suit brought to recover damages by reason of any such acts, or of any combination, contract, conspiracy, or monopoly prohibited by this act, that the overt acts or any of them done in pursuance of such combination, contract, conspiracy, or monopoly were actually done or committed by the officers or agents of any foreign power, or were lawful by the laws of the country where they were committed. American citizens procuring or instigating such unlawful acts shall be liable, civilly and criminally, to the same extent that they would have been had they personally done the acts complained of."

PITTSBURGH, PA., *January 22, 1914.*

Hon. H. D. CLAYTON,
Chairman of the Committee of the Judiciary,
Washington, D. C.

SIR: A year or so ago I filed a bill here in the United States district court against a trust. Three of the companies were registered in this State, and another had a registered agent at Philadelphia, Pa., who accepted service. In the district court here this morning the Hon. Judges Orr and Young declared that we had no service in this district.

This is proof of my contentions that a trust can ruin a man in Pittsburgh, yet get outside of harm by going into the other districts of the State. But to go into New York what hope would there be for a man there without money to buck a trust?

My case was No. 765, May term, 1913, Paul *v.* American Chicle Co., New Jersey Co., New York office, registered in Pennsylvania; Sen Sen Chiclet Co., same New York office, registered in Pennsylvania; Autosales Gum & Chocolate Co., New York corporation, registered agent in Philadelphia.

How can a man ruined by a trust get his witnesses into one of the other districts? How can he hope to get the facts with his witnesses in New York? Few would believe that these conditions exist.

Here are the proofs.

Respectfully submitted.

W. J. PAUL,
Post Office Box 787, Pittsburgh, Pa.

RESOLUTION PRESENTED BY THE RESOLUTION COMMITTEE TO THE NEW YORK WHOLESALE GROCERS' ASSOCIATION IN CONVENTION ASSEMBLED AT UTICA, N. Y., JANUARY 22, 1914, AND UNANIMOUSLY APPROVED.

Whereas unrestricted competition in the sale of proprietary products results in such goods being sold at a loss; and

Whereas the losses sustained in the sale of proprietary products must be made good by charging excessive prices on other lines; and

Whereas such practices are in the interest of large aggregations of capital operating through department stores, chain stores, and mail-order houses, who by offering so-called "leaders" in reality mislead the public, and thus tend to eliminate the smaller individuals and independent merchants, although the latter are on the whole just as efficient, if not more efficient, as distributors: Therefore be it

Resolved, That we favor legislation giving the independent manufacturer or proprietor of trade-marked goods the right to make the resale price on his own products,

believing that this right will not restrict real competition, but will in reality help to prevent monopoly; and be it further

Resolved, That the secretary send a copy of these resolutions to the national Senators and Congressmen from New York State and congressional committees in charge of such legislation; to the National Wholesale Grocers' Association of the United States; to the National Association of Retail Grocers of the United States; and to the American Specialty Manufacturers' Association.

NEW YORK, *January 23, 1914.*

Hon. JOSEPHUS DANIELS,
Washington, D. C.

SIR: * * * I feel it my public duty to call your attention to a certain loophole in the proposed trade relations, trade commission, define monopoly, and interlocking directorates bills which would leave the Army and Navy as helpless as now under certain conditions, namely, persons dealing solely with the Government are not necessarily in "commerce among the several States but with the United States," and are immune under the proposed acts which do not reach all persons doing all the things provided against in the proposed acts because persons might not execute a single act between States or among several States. A corporation doing business solely with the Government might not trade among the several States and could do whatever it pleased about "doing Uncle Sam."

My legal opinion is that an independent act is necessary to protect the Government and honest contractors doing business solely with the Government.

Yours, truly.

F. B. WHITNEY.

(Hanson & Orth, 27 Cedar Street, New York.)

NEW YORK, *January 24, 1914.*

Hon. HENRY D. CLAYTON,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: I beg to call your attention to one feature of restraint of trade which does not seem to be contemplated by any of the bills recently introduced, namely: Imported merchandise the market for which in its country of origin or elsewhere out of the United States has been subjected to unlawful restraint and monopoly, say, in some such manner as the Brazilian coffee valorization scheme which was the subject of adverse action by the Attorney General several years ago.

I also desire to call your attention to one phase of restraint and monopoly which apparently has escaped attention, namely, monopoly of buying, the definition of which is the discrimination which large and powerful corporations bring to bear against the individuals, firms, and smaller corporations who must sell to such large corporations.

Monopoly of selling on the part of the large corporations has received a great deal of attention, but monopoly of buying has not.

Possibly it has been considered but classed as unimportant, because none of the large classes of the population is affected; nevertheless the hardship involved is very real and actual to a large number of individuals, firms, and smaller corporations all over the country, whose only claim to classification is that they are the rank and file of merchants and business men.

To avoid the possibility that this letter may be classed as a "crank" communication, I wish to say that Representative Tuttle of New Jersey will vouch for my standing and seriousness.

Yours, very truly,

CHARLES D. ORTH.

JANUARY 28, 1914.

The Dane County order of the Wisconsin State Union of the American Society of Equity holding its quarterly convention at Madison resolves as follows:

Whereas we are fully conscious of the pioneer work our county, State, and national organizations have done in spreading the doctrine of cooperation to the end that all farmers may enjoy a better living because of opportunity for better farming and better business: Therefore be it

Resolved, That we most earnestly request our Congressman, Hon. John M. Nelson, and our Senator, Hon. Robert M. La Follette, to guard most zealously the rights of cooperative activity which we and kindred organizations have obtained at the cost of such great effort and sacrifice; to give the most careful scrutiny to all impending national legislation, particularly what is known as the antitrust bill recently introduced by Mr. Clayton, of Alabama; and to use their utmost influence in expurgating whatever portions of the bill may deprive farmers of the right to cooperatively market and prepare for market the products of their farms.

[Legislative reference library. Wisconsin Free Library Commission.]

MADISON, WIS., *January 22, 1914.*

I have read over the outline of the President's message. Of course, after all it is an outline, and we can not tell exactly what the bills will be like until we see them. Now, I want to warn you about a difficulty which will come up in any bill where the courts decide on what the law says rather than what the commission decides. As I said before in a letter to you, the commission can decide upon economic grounds and this decision will remain unless overturned by the courts. Of course, the burden of proof is upon anybody adverse to the commission, and then when you come to define all kinds of wrongs which can be committed, as the President suggests and which I agree ought to be defined, you may find yourself up against the proposition of trying to find out what a cooperative farmers' organization is and what it does, and, of course, you have always present before you the labor union question. Now, I have been trying to define for our legislators here a cooperative organization so as not to have it come under a trust act, and I find it simply impossible if you consider the cases which came up previously in this country and of which the courts have to take cognizance. That is, no court under the present procedure can define a cooperative organization of farmers, or a labor union, in such a way as to keep it from being subject to prosecution as a price-fixing agreement. Frankly, then, a cooperative organization may be used for public welfare or it may be used against public welfare. That should be decided after an investigation of the whole question and on its public welfare aspects. With that elastic power of the commission which I suggested in former letters, the question of the reasonableness of the acts of a cooperative organization or a labor union could be determined in each particular instance upon economic grounds, but that can not be determined if you come up before the courts, and inevitably, if you come before the courts, these organizations—which are the weaker kinds of organizations—are much more subject to the wrongs of long litigation. Examine this whole question yourself, and you will find that what I say is right. Take up any bill now before Congress, and you will find that there is a danger in every one of them of destroying the cooperative movement in America.

Two or three of us here have been studying the legal side of the cooperative movement pretty thoroughly, and I am sure that any one of us will be glad to give you what information or advice we can upon the subject. Why can't we have the interstate trade commission decide upon the reasonableness of a cooperative organization or a labor union, even if you do not like the decision which I first proposed to you upon the whole question of fair and unfair trade? I want to say right now that any attempt to define a cooperative organization by law will result in tremendous difficulties, and, indeed, may be the means of stopping these organizations in this country. The old Sherman Act was hard on them and any amended Sherman Act will be equally hard if the matter goes before the court instead of going before somebody who will have the decision to make upon the economic welfare grounds.

Yours, very truly,

C. MCCARTHY.

Electrical Merchants & Manufacturers' Association, Chicago, Ill. President, P. C. Burns, Chicago; vice president, Donald L. Morrill, Chicago; secretary, Sydney Stein, Chicago; treasurer, J. M. Lenz, Chicago. Board of directors: P. C. Burns, American Electric Co., Chicago, Ill.; Donald L. Morrill, Swedish-American Telephone Manufacturing Co., Chicago, Ill.; Sydney Stein, Cracraft-Leich Electric Co., Genoa, Ill.; J. M. Lenz, Runzel-Lenz Electric Co., Chicago, Ill.; Joseph C. Belden, Belden Manufacturing Co., Chicago, Ill.; W. H. Trimm, Monarch Telephone Manufacturing Co., Fort Dodge, Iowa; J. S. Cuming, Central Telephone & Electric Co., St. Louis, Mo.; George A. Briggs, Chicago Telephone Supply Co., Elkhart, Ind.; Henry Tiedeman, Menominee Electric Manufacturing Co., Menominee, Mich.; A. V. Overshiner, Inland Electric Co., Chicago, Ill.; Royal Smith, Smith-Perry Electric Co., Dallas, Tex.; Percy Stern, Interstate Electric Co., New Orleans, La.; W. H. McKinlock, Metropolitan Electrical Supply Co., Chicago, Ill.; A. G. Bean, Dean Electric Co., Elyria, Ohio; Frank Pardee, Ericsson Manufacturing Co., Buffalo, N. Y.]

OFFICE OF THE SECRETARY,
Chicago, Ill., January 30, 1914.

Hon. ALFRED G. ALLEN,
House of Representatives, Washington, D. C.

SIR: We wish to respectfully call your attention to a condition in restraint of trade caused by telephone operating companies using their shops, warehouses, exchange managers and other employees for the sale of merchandise throughout the United States in direct competition with merchants and manufacturers not having any special privileges or franchises from Government, thereby destroying legitimate competition.

We respectfully request that you use your best effort to have incorporated in the bills before Congress a provision which will stop this immoral practice. We hope that you can pass a law that will be prohibitive both directly and indirectly.

The American Telephone & Telegraph Co. has workshops and warehouses, known as the Western Electric Co., in all the principal cities of the country, such warehouses and shops, together with the telephone exchange managers and other employees throughout the United States, are engaged in the sale of merchandise. They have free access to the telephone lines—a dangerous situation—the privacy sometimes necessary in the conduct of competitive business may be destroyed.

To illustrate—a like condition would obtain should the post offices be used as department stores, using postmasters, mail carriers, and other facilities to sell goods in unfair competition.

We quote from the Baltimore platform of 1012:

"We favor such legislation as will effectually prohibit the railroads, express, telegraph, and telephone companies from engaging in business which brings them into competition with their shippers or patrons."

We should be glad to have you arrange for hearings and will appreciate your kindly advising us at the earliest moment, believing this matter sufficiently urgent to call for early action.

We are, with great respect, yours, very truly,

ELECTRICAL MERCHANTS & MANUFACTURERS' ASSOCIATION,
P. C. BURNS, *President.*

[General office National Paper & Type Co., 31 Burling Slip. Harrison C. Lewis, treasurer and general manager. Branch houses: Mexico City, Mexico; Monterey, Mexico; Guadalajara, Mexico; Habana, Cuba; Buenos Aires, Argentina; Lima, Peru.]

NEW YORK, *February 6, 1914.*

Hon. H. D. CLAYTON,
Chairman Judiciary Committee, House of Representatives,
Washington, D. C.

DEAR SIR: I should like to present for your consideration the effect upon the business of this company of the proposed antitrust legislation.

This company was organized for the sole purpose of doing an export business. It has established six branches in foreign countries, all carrying substantial stocks of merchandise, and its total sales have been about $20,000,000, in return for which it has brought at least $15,000,000 foreign gold into this country. While the volume of our sales may not compare favorably with those of iron, steel, flour, railroad equipment, etc., our present average of about $2,000,000 a year is of high-class American manufactured goods, the greater cost of which is high-priced labor.

We have created a fairly substantial demand for many machines and articles heretofore entirely unknown in the countries in which we are operating. This has been exceedingly expensive, and the returns to us as yet have been moderate.

In considering the expense and investment required, we have secured a large number of exclusive selling contracts for the goods we handle. These contracts apply only on foreign business and do not affect the domestic market in any way. If forced

to surrender our present exclusive selling contracts, our business might be substantially reduced and our efforts to increase the sale of American products abroad materially lessened. I shall be glad to give all necessary details to support this position, either in writing or by personally appearing before your committee, as you desire. I shall also be glad to have the factories which we represent express their views on the subject, if that is desired. They, I believe, are unanimous in their judgment as to the beneficial results of making an exclusive contract on export business with a large and responsible company, making all proper efforts to develop a foreign demand for American goods.

It is also quite possible that we may be seriously embarrassed by the provisions of the contemplated bill affecting holding companies. Certain foreign countries either have or contemplate passing laws requiring local incorporation. In such an event we should have to incorporate our branch in such a country and should need the right to hold the stock of that branch. It would, in effect, be a part of this company, but for local legal reasons might have to conduct its business as a separate corporation.

There seem to me many reasons why companies doing business abroad should be exempt from certain conditions affecting domestic concerns. We meet in our business the competition and methods of European concerns, and it would be unfortunate if our operations were restricted, as theirs are not. It is quite a general practice for the European manufacturer to give exclusive contracts and to conduct his business generally according to the requirements of the situation, and I believe that it is greatly to the interest of American manufacturers that we should be accorded many of the privileges enjoyed by our European competitors. I shall be glad to see you personally or to appear before your committee, or to advise you in writing of any further information or details which you desire.

We have no desire or intention of evading in any way such laws as may be passed, and we ask only consideration of the situation abroad as we see it and experience it.

Thanking you in advance for your consideration of the matter, I am,

Yours, very truly,

H. C. LEWIS,
General Manager.

THOMAS JEFFERSON DEMOCRATIC CLUB,
OFFICE OF THE SECRETARY,
749 Harrison Street, Gary, Ind.

THE JUDICIARY COMMITTEE,
House of Representatives, Washington, D. C.

GENTLEMEN: I learn from the Congressional Record and the daily press that Mr. Samuel Gompers, of the Federation of Labor, is strenuously laboring to secure an amendment to the Sherman law exempting labor unions from prosecution as a trust.

I beg to say that I have filed an objection to any such exemption before the Department of Justice and the Interstate Commerce Commission, upon whose suggestion I now ask permission to request your committee to consider carefully and to understand that such an amendment would inevitably plunge this Nation into a struggle compared to which the Civil War would be a kindergarten outing. Gentlemen, the merest casual observer is able to see that the Federation of Labor is a trust—a labor trust—and logically comes under the Sherman law's jurisdiction. There is no avoiding it.

Their methods, plan of campaign, their restrictions, their manner of extorting submission to their manifestoes and exactions all come under the ban of the Sherman law. They are graft ridden; they give bribes and take bribes. Moreover, gentlemen, the tendency of their plan of warfare is to abandon action by crafts and to move by masses, which is industrial unionism. Think what this means and involves—e. g., a dispute exists in a brickyard in Podunk, Ind., which the business agent can not have settled to his satisfaction. To force compliance with his demands (whether just or otherwise, he is the sole judge and jury), every industry stands still in the entire State and Nation through orders issued from the federation's president. Are you in favor of such tyranny being delegated to Samuel Gompers and his successors? Notice what has occurred in Calumet, Mich., and is now, to-day, occurring in Chicago. Can you tell anyone what relations the structural ironworkers on the Morrison Hotel, the bricklayers and hod carriers, have to a waitresses' strike on the restaurants in Chicago? Yet they are ordered out on strike. Does this not prove a labor trust? Does your committee approve this?

Besides, gentlemen, you are legislating not for a class or fraction of the people. The federation represents a class, a mere fraction of the citizens of the United States.

They represent not freedom, but despotism; not equal rights to bargain in the labor market, but a monopoly of such bargaining. They deny the rights of any not of their company to follow their occupation except on terms of their dictation. You must conserve the rights of those (the vast majority) who are not in labor unions, and see that they enjoy the unfettered privilege of the exercise of their trades, crafts, and industry.

Right here in this city for two years the labor unions have injured and paralyzed the business of this community. It was only through the courageous stand of enlightened citizens that they were repelled, but they are marshaling for another attack.

An exemption from prosecution under the Sherman law as a trust means to give labor unions license to heckle, badger, and annoy manufacturers, building contractors, and every form of activity, a right to which they are not entitled under the Constitution.

Gentlemen, do not pass the amendment sought. Kill it in committee, or report adversely. If you sow the wind you will reap the whirlwind.

Respectfully, yours,

E. BRADDOCK.

PORTLAND, ME., *February 5, 1914.*

JUDICIARY COMMITTEE OF THE HOUSE AND SENATE,
Washington, D. C.

GENTLEMEN: Some time ago I wrote the President a letter relating to the trust question from the standpoint of the packers of sardines on the coast of Maine, a copy of which is herewith inclosed. I also inclose a letter from the Attorney General suggesting that I write my views to your honorable committee. From the letter I wrote the President, you will readily understand our position. It is hardly necessary to repeat what I have set forth in that communication. While I will not attempt to review the trust questions only so far as it relates to the sardine packers, I will reiterate some of the conditions which are well known to everyone who has any knowledge of the sardine business. It is sometimes a great deal easier to criticize and find fault with existing circumstances than it is to suggest a remedy. Had I the authority, I would amend the present antitrust law in the following way:

All corporations or persons may apply to the trade commission (that is assuming that said commission will be appointed) for a license to do business. Said licenses may be granted under such conditions and restrictions as may seem just to the trade commission; provided, however, that all said corporations or persons may be allowed the right to carry on their business without fear or favor from the Department of Justice, so long as no agreements between said corporations or persons increase the average price of their products to the consumer or create any unusual hardship to any corporation or person.

If your committee could fully understand the situation and know how many families are dependent on the success of the sardine business, there would be no need of any argument on these questions. It has been one of the largest industries of our State and would be now under proper protection and encouragement. This is no theory; the facts are cold and stubborn, and unless we get relief by favorable action of Congress or by mortification of the antitrust law. The said law to my mind has cost the industries of this country more than it has to reconstruct our Navy.

The effects of the fear that exists in the minds of the business men of state has had much to do with demoralizing the business. No one has seemed to understand this piece of legislation and no other country on earth would have stood for it. If we have upon the statutes a law that the court can not explain, why should it be retained? Why not repeal it and write a law that the common people can realize what it means? Certainly the majority of people doing business do not want to be looked upon as criminals because they mutually agree among their associates to protect themselves against what is known as cutting prices to a point below the cost of production. Not that they want exorbitant prices, yet they feel that they have the right to protect themselves to the extent of a reasonable price that will render them a fair profit on the capital invested. I believe in trade commission. If this matter can be put into the hands of intelligent and practical men that have authority to do what is right and just to all parties and interests I think that the matter can be satisfactorily adjusted. But to appoint a committee without mortifying the antitrust law would not accomplish much for the business interests of the country.

Hoping for the best, I remain, yours, very truly,

LUTHER MADDUX

[The Telephone Improvement Co., incorporated in New York State. Frederick C. Stevens, president; Merton E. Lewis, vice president; V. H. Dreyer, secretary and treasurer; Garrison Babcock, general manager; H. O. Webster, chief engineer. Exclusive sales agency of the North Electric Co.]

CHICAGO, *February 5, 1914.*

Hon. HENRY D. CLAYTON,
Chairman House Committee on Judiciary,
House of Representatives, Washington, D. C.

MY DEAR SIR: My attention has been called to the action taken on January 16 in a communication to you by the Electrical Merchants & Manufacturers Association relative to the unfair methods employed by the Bell Trust affecting manufacturers of equipment and supplies in competition with the Western Electric Co., which is owned and controlled by the American Telephone & Telegraph Co. and operated in their benefit. In this connection I wish to present the urgent prayer of those interested in the Telephone Improvement Co., a New York corporation; the Telechronometer Co., a New York corporation; and the North Electric Co., an Ohio corporation, involving a list of stockholders comprising over 300 individuals who have invested money with confidence in the merits of the product of these companies during the past 20 years, but who have been deprived of practically any profits, due largely to the tactics employed by the Bell Telephone Trusts. The particular recent feature of their methods which is objectionable is in the fact that during the past two or three years the Bell operating companies have cooperated with the Western Electric agents in bringing influences to bear upon independent operating companies against their purchase of independent apparatus, holding forth the promise of a merger which would be prejudiced if other than the Western Electric equipment was purchased.

I trust that you will make such use of this communication with those lawmakers who may assume the responsibility for attempting relief measures, and in that event and in the name of fair dealing every one connected with our institution will rejoice.

Yours, respectfully,

GARRISON BABCOCK,
General Manager The Telephone Improvement Co.

[Moffett & Sons, wholesale grocers. Samuel Moffett, Robt. O. Moffett, Sam B. Moffett.]

FLINT, MICH., *February 7, 1914.*

To the CHAIRMAN,
House Commerce Committee on Administration Trust Bills,
Washington, D. C.

DEAR SIR: Kindly permit us to call your attention to the matter of quantity prices that are now in force by many manufacturing concerns. We are doing a legitimate small jobbing business and we are placed at a great disadvantage in handling different kinds of goods for the reason that our big competitors are buying at much lower cost than ourselves, for the reason that they are in shape to buy in much larger quantities.

This quantity price permits our competitors to make a reasonable profit when sold by them at our cost price, which fact you must admit tends to drive the small dealer out of business and thereby establish monopoly and control by "big business."

We have been up against this quantity price curse of the trade for many years and are still fighting for a chance to exist under this great disadvantage. Manufacturers should be compelled to make one price to all who are handling their product in a legitimate manner. Ninety per cent of the wholesale jobbing trade in the grocery line are small buyers, while 10 per cent only are large buyers, who are being favored with the lowest manufacturers' price. Surely you must admit under this condition that the small dealer is not getting a square deal, for is not the business of the 90 per cent of small buyers equally or more valuable to the manufacturers than the 10 per cent of large buyers?

One price in any quantity (with a reasonable minimum quantity limit) from manufacturers to jobber, with privilege of delivering at destination in carload lots, and the allowance of carload rate of freight in less than carload lots should be the limit that any manufacturer be permitted to charge for his product, for unless the manufacturers quantity price is abolished, monopoly has the right of way, and the doom of the small dealers is sealed.

Respectfully,

MOFFETT & SONS.

[Moffett & Sons, wholesale grocers. Samuel Moffett, Rold. O. Moffett, Sam B. Moffett.]

FLINT, MICH., *February 7, 1914.*

To the CHAIRMAN,
House Commerce Committee on Administration Trust Bills,
Washington, D. C.

DEAR SIR: The attached letter tells its own story.

Before the Bug Poison Trust secured control we had a good, fair business in Paris green, but were finally crowded out through the trust's manipulation of quantity prices.

The people at Grand Rapids who wrote this letter were endeavoring to sell us Paris green and after we had written them our experience they mailed us this letter, which was undoubtedly dictated by one who is an expert in his line and whose statements can be relied upon. We believe it will be of interest to your committee.

Very truly,

MOFFETT & SONS.

[Carpenter-Udell Chemical Co., manufacturers of agricultural spraying material. R. E. Carpenter, president; C. S. Udell, secretary-treasurer; E. A. Stowe, vice president.]

GRAND RAPIDS, MICH., *February 6, 1914.*

Messrs. MOFFETT & SONS,
Flint, Mich.

GENTLEMEN: We are in receipt of yours of the 5th, and we are very glad indeed to see such a letter as you write us, because it contains the same sentiment that the writer has had for a number of years.

We will have to and want to write you at some length in regard to this matter, so we will presume upon your good nature to the extent of consuming some little of your time in reading this.

The writer was associated with a manufacturing concern in New York City for a number of years and has had inside knowledge of the Paris green situation for the past 12 years, and is in a position to know just the trouble that the Paris green jobbers have had. We want to say at the outset that the writer never has been, and is not now, in sympathy with the manner in which Paris green has been sold to the jobbing trade.

About seven years ago Paris green was selling around 11 or 12 cents a pound, and there was no schedule for the smaller prices, each manufacturing house having a different price for pounds, and different price for twos, and all of the other packages. About six years ago the manufacturers had a conference, in the wintertime, or rather late in the fall, and decided that they would name no prices whatever, but would wait until early in the spring before naming a price. That year arsenic jumped from about 2½ cents a pound up to 8 or 9 cents a pound under the manipulation of the arsenic producers. Of course, this warranted a higher price in Paris green. Contracts were made with various jobbers throughout the country based on an opening price, and about the middle of April that year the price was made 25 cents a pound based for the larger quantity of goods.

There came an immediate protest from those jobbers who had had an increasing business from year to year on Paris green, and we might illustrate that in this way: Say you had been selling 8 tons one year, the next year 10, the next year 12, and the next year 14 or 15 tons, and you felt reasonably certain that you could dispose of a carload with 18 tons of green. You were called upon by the representative of the manufacturing house and assured that you would be properly cared for, and in order to save freight you gave an order for a car of Paris green, relying on the manufacturer to take care of you. Prices were not named, as we stated above, until about the middle of April, then the price was 25 cents a pound, a jump of over 10 cents a pound of the previous year, and totally unwarranted.

The writer said he was associated with a New York house. He was not associated with them as a partner, but just an employee. When the price of 25 cents a pound was sent broadcast to the jobbers, they made their protest, and there was a meeting called and the following Saturday, the price was advanced a cent a pound. This was done to make the jobbers think they were buying right.

Now, a jobbing house does not care particularly what price they have to pay for goods, as long as the price remains somewhat standard, but in the case of this tremendous jump in price, it curtailed the consumption to a considerable degree, and arsenate of lead, which at that time was just coming into use, was used to a considerable extent in place of Paris green, and you, having placed your order for a carload and having the goods in your warehouse, carried over three or four tons, possibly seven or eight

tons into a market next year of 21 cents a pound. With this drop in price you sustained a heavy loss.

You were assured that year that that would be about the price of Paris green from then on, and you sold out your goods that you carried over from last season, and perhaps bought a few more tons. The next year the price dropped to 15 cents, and you had another loss.

Now a proceedure of this kind is absolutely against all decent business, and is not legitimate at all. The writer, of course, at that time was not in a position to protest, but he did protest to the head of the house with whom he was connected, but of course, without avail, and so it has gone since then down to 13 cents and 12 cents, 11 cents, back to 13 cents, and is now varying between the 13 and 11 cent price, with the result that a great many jobbers in the United States are just in the same frame of mind that you are, and this frame of mind has all been caused by the action of the Paris green manufacturers.

Now, there is no earthly reason why Paris green should be sold on any other basis than any other single item of merchandise that is manufactured in the entire world. The total consumption of Paris green in the United States is about 3,500 tons, so you see that its importance in the mercantile world is mighty small indeed, and to think that it should be an item that is juggled in a manner that it has been, it makes a disgusting and discouraging proposition for anyone. But the manufacturers have brought this condition down on their own heads, and have no one to blame but themselves.

There is no reason whatever, why the Paris green should not be sold at a price year after year of, say, 15 cents a pound base. Some years, of course, blue stone changes in value. It is now about a cent a pound cheaper than it was a year ago. Now this would mean that Paris green could be sold to the jobbing house at about a cent a pound less than last year. Arsenic has not varied a great deal in the last five or six years. A year ago the arsenic producers tried to manipulate the price up to 6 cents a pound again, but the Paris green had all covered at a much lower price, and this year it is down to a normal basis.

So as we say above, a normal price of 14 or 15 cents a pound should be made on Paris green. This would show the manufacturers a fair profit, and the price could be varied from year to year a cent a pound which would not influence, or make much material difference to the jobbing house. But this getting together and making an abnormal price, when there is really no bona fide reason for it, and then put the jobbing houses up against a falling market the following year, and making them sustain a heavy loss is not legitimate, and never could be reasoned out that it should be done. Paris green is a bad thing to manufacture. It wears out a plant very quick on account of the acids used in connection with its production, and it is hard to get men to work in it. It can only be made in cold weather, on account of its causticity, and its action on the men's skin when they perspire.

It is an item that should show a good fair profit to the manufacturer, but not an exorbitant one. When the writer decided to have his own factory and have a spraying plant here in Grand Rapids, which, by the way, was three years ago this summer, the price of green at that time was 13 cents a pound, but just as soon as we got out among the jobbing houses, and we found so many of them willing to change their source of supply owing to such conditions that you mention in your letter, and they placed their contracts with us, the New York houses began to underbid us, and last year, which was our second year in business, they made a special point to go to every one of the customers that we had sold the year previous and made them a cost price on green. But there wasn't a single jobber but who stood by us. They knew and understood that we were pursuing methods which would mean protection to them in the future. They also knew that if they turned us down and we were forced out of the green business it would only be a matter of another season before the prices would be advanced so that they would recuperate their losses that they had sustained while forcing us down. This is the reason why our business has developed the way it has, and to-day we are the largest spray manufacturing concern in the United States.

We have absolutely no affiliation with any of the eastern manufacturers of Paris green. Of course it is impossible for us to go out and sell green for 2 or 3 or 4 cents a pound more than they are selling it for in New York, but we are right here in the middle of a large consuming country, and we give the best of service, and we are entirely in sympathy with the jobbers of the three trades, viz, hardware, drug, and grocery, doing our utmost to bring the Paris green situation down to a stable basis, and we ask the support of the jobbing trade in that effort. We can assure them that we will do everything in our power toward the same end.

Of course you have received our letters wherein we are calling your attention to our new system of packing. This was devised especially for the benefit of the wholesale grocers. Paris green has been packed for years in 100-pound cases, and the

inside cartons are cardboard, and 100 pounds of green is altogether too much to put in a case. It has meant numberless claims to the factories, and also numberless claims to the jobber from the retail dealer. Then again, jobbing houses will repack some Paris green with other merchandise, and in the transportation of same the paper cartons become broken and the Paris green sprinkled all over the contents of the case and, of course, refused by the consignee.

We have eliminated that entirely by our new method of packing and brought things down to where the jobber can have some interest in the Paris green business.

We will ask you to pardon this long letter, but the writer has had every word of this in his system a long time; but every word of it is true, and we know you will agree with us.

Now, we will finish by saying that we want to do some business with you, and we will name you a price on Paris green by which you can make some money, and furnish you a system of packing that you will be more than pleased with and one that will bring you trade.

We await your reply.

Yours, truly,

CARPENTER-UDELL CHEMICAL CO.

THE MAN WHO WINS.

The man who wins is the man who does,
The man who makes things hum and buzz,
The man who works and the man who acts,
Who builds on a basis of solid facts,
Who doesn't sit down to mope and dream,
But humps ahead with the force of steam,
Who hasn't the time to fuss and fret,
But gets there every time—you bet.

The man who loses is he who talks,
Who mumbles and fuzzles and trifles and balks,
Who wouldn't do anything to-day
That he can put off in the same old way;
Who's down on his luck and curses his fate,
And tries to catch fishes without any bait;
Who goes through life with a frown on his face,
Convinced that the world is a mighty poor place.

The man who wins is the man who wears
A smile to cover his burden of cares;
Who knows that the sun will shine again,
That the clouds will pass and we need the rain,
Who buckles down to a pile of work
And never gives up and never will shirk
Till the task is done, and the toil is sweet
While the temples throb with the red blood's heat.

The man who loses is the man who moans
That the way is rough and he dreads the stones:
Who is looking for something soft to do,
Where the pay is big and the hours are few;
Who dreams of this and dreams of that,
But never sails in and throws off his hat,
Who fears the feel of a drop of sweat,
And never gets anywhere—you bet.

The man who wins is the man who climbs
The ladder of life to the cheery chimes
Of the bells of labor and bells of toil,
And isn't afraid that his skin will spoil
If he faces the light of the glaring sun
And works in the light till his task is done—
A human engine with triple beam
And a hundred and fifty pounds of steam.

(Unknown Author.)

(Moffett & Sons, wholesale grocers, Flint, Mich.)

NEAL BROWN,
Wausau, Wis., February 7, 1914.

Hon. HENRY D. CLAYTON, M. C.,
Washington, D. C.

DEAR SIR: Being a stranger, I hope you will pardon this trespass upon your attention by a stranger.

I notice that the three recent antitrust bills have been referred to the Judiciary Committee and I wanted to make some suggestions in regard to these bills.

First, take tentative committee bill (H. R. 2) entitled, "A bill to prohibit certain persons from being or becoming officers or employees of National banks or of certain corporations."

I inclose a substitute amendment to this section which embodies a suggestion I would like to make. I believe this section, as now incorporated in the bill, would work great hardship and inconvenience, and especially in the country territory of the United States, and by this territory I mean that outside of a few large cities.

I have already written to Congressman Konop, of this State, quite fully along this line, and I am inclosing a copy of my letter to him. At the time I wrote it I had not intended to send it to you or might have made it a little more concise.

I would urge that the evils aimed at by this bill exist almost entirely in a few of the larger industrial centers and it seems unjust to interfere with the legitimate business methods of thousands of corporations outside of the larger cities. I have made a rather crude substitute for section 4. Inhibiting common directors in corporations having a capital stock in excess of $10,000,000, or having a production exceeding 10 per cent of the total production of the country for the preceding calendar year. This really adopts an idea of Mr. Bryan's which was introduced into one of our recent national Democratic platforms.

One criticism that might be made upon the inhibition based on production is that there would be no way of finding out what the production was for the preceding calendar year, unless the interstate trade commission could be given authority to ascertain this production and make proper report of the same, and this report could serve as the basis for applying my suggested substitute section. The report of the commission would have the same status as an ordinary census report, although, doubtless, the work of making a report would be done better by a trained body of men like the members of the interstate trade commission than by the ordinary census-taking officials. I thought the limitation of $10,000,000 would not be entirely satisfactory for the reason that in some lines of production the entire corporate capitalization would not be very large, and still the opportunity for illegal combination would exist.

I have been unable to discover that interlocking directors in corporations that I am familiar with are conducive to illegal combination, and I am speaking now more particularly of conditions in the middle west, outside of the larger cities. I do not believe that if two or more corporations wanted to form an illegal combination, the fact of their having one or two common directors would cut any figure. I wouldn't mean by this, however, that if two competitive corporations had the same directors throughout that it would not help some in promoting a combination, but I am speaking about the great body of corporations as I know them where the corporations are entirely distinct and yet may have one or two common directors.

I have in mind the concrete case of the Marathon Paper Mills and the Wausau Sulphate Fibre Co., both located near here and both engaged in making wrapping paper, although the product of the one is quite widely different from that of the other. The Sulphate Fibre Co. makes only what is called Kraft paper, being a very tough wrapping paper and has practically only one kind or grade, while the Marathon Paper Mill is engaged in manufacturing hundreds of specialties in wrapping and design papers. Still I suppose, as to some part of the product of each, they are competitors. I am a director in both companies, being the only common director in the two companies. These companies have been operating about three years. Each company has its own sales agent, and these agents act entirely independent of each other. I have suggested on several occasions that the two companies agree to employ one sales agent to sell the product of both mills, but the managers never would consent to this. I thought this would cut down the expense of selling for each company quite considerably. I think only a small part of the product of these two mills would be competitive, and still I would not say that their entire production was noncompetitive. But I would like you to know that I am not taking this matter up because of my relations to these two companies. It so happens that there is good material for directors in each company outside of the present directors, and I know that my place could be easily filled in either one, but this is not the case with thousands of corporations, many of them of small capitalization engaged in the lumber business.

If this measure as framed in the original bill should be enacted into law and a lot of the directors now in existing corporations were thrown out of office by law, there wouldn't be stock holders enough left in many of these corporations from which to select a board of directors.

Now, in reference to section 2 of this act forbidding interlocking directors in banks: I inclose a suggestive substitute for this. I have shortened the phraseology a little in respect to the recitals of the Federal reserve currency act. The name of it is given as the "Federal reserve act," and the term "Member bank" is also defined, as is the term "Reserve bank."

I think the inhibitions of this section should only apply to the larger cities and not to banks in the country districts, for in country banks there has never been any evil arising out of interlocking directors. It seems to me it would be wise to have this prohibition apply only to banks of these larger cities. I haven't the last census before me, but I assume that there would be about six or eight cities of the country having population in excess of 500,000. This would include Boston, New York, Philadelphia, Chicago, Baltimore, New Orleans, Cincinnati, Cleveland, Buffalo, San Francisco, and St. Louis. By inhibiting interlocking directors in banks in these cities we would accomplish everything that we are striving for and at the same time would not interfere with a great multitude of country banks.

I would like to make a few suggestions in regard to committee bill No. 1. This provides that no person, and this of course means corporations, shall discriminate in prices between different purchasers with the intent to thereby injure or destroy a competitor, etc. I am not very clear as to this. Does it compel a manufacturing plant, for instance, to have the same mill price for all purchasers of its product? To illustrate: The Wausau Sulphate Fiber Co., having a mill at Mosinee, near here, manufactures Kraft paper and pulp. There is practically no other mill making this product west of Chicago. The largest mill that manufactures this product is at Berlin, N. H. This Berlin mill competes very strenuously with the Mosinee mill throughout the country, yet the Mosinee mill has a great advantage over its Berlin competitor in the Chicago territory and the territory west of Chicago. In order to secure customers in this western territory the Berlin mill must cut its price to meet the price of the Mosinee product, so that the customer can get the product from the Berlin mill without transportation added as cheaply as he can get the same product from the Mosinee mill. This means, of course, that the Berlin mill having this product must cut its mill price to the extent of the cost of transportation in excess of the transportation from the Mosinee mill to this customer. Say the transportation from the Mosinee mill to Chicago is 10 cents per hundred and the transportation from the Berlin mill to Chicago is 20 cents a hundred, and the Mosinee mill is selling its product in Chicago at $3.75 per 100 pounds.

Deducting the 10 cents for transportation it would leave the mill price at Mosinee $3.65 per 100 pounds, whereas the Berlin mill, in order to compete in the Chicago market, would have to have a mill price of $3.55 per 100 pounds, and if it had that price for customers in the Chicago market would this law compel it to have the same price for customers in the territory tributary to the Berlin mill? If the Berlin mill does make its mill price $3.55 in order to compete with the Mosinee mill in the Chicago market, is the Berlin mill guilty under this proposed act of discriminating in price with the purpose or intent to injure or destroy a competitor? I take it that this isn't its purpose, although it may injure the Mosinee mill. Its purpose is to get business and to sell its product.

I am a stockholder and director in the Mosinee mill and naturally might be interested in shutting the Berlin mill out of this west territory, but it seems to me that if this proposed law should be given the interpretation suggested it would tend to promote a monopoly for it would give the Mosinee mill a monopoly over the Berlin mill in this western territory. No doubt this case is typical of many others in different lines of production.

But I am not so deeply concerned about this measure as I am over the provisions in the bill prohibiting interlocking directors, for I assume that this bill No. 1 was intended to prevent a repetition of many gross and culpable attempts on the part of competing concerns to crush out business rivals that have occurred in the past, and not to interfere with the ordinary, usual, and reasonable methods of doing business by competitive institutions. I have not examined recently the decisions under the Sherman Act, but I believe the proofs in many of the cases show that some of the great combines have from time to time used their power to utterly destroy and bankrupt rival concerns, and doubtless, if this proposed act becomes a law and comes before the court for construction, they will give it a fair and reasonable interpretation, and that it is very improbable that it would be held that the law prohibited the ordinary and

usual kinds of competition. In other words, that in the case I supposed, the Berlin mill might have a mill price of $3.55 per 100 pounds for shipments into Chicago territory in order to meet the competition of the Mosinee mill, although the Berlin mill might have a greater mill price for customers nearer to Berlin.

I hope you will pardon this long letter. I realize that in "butting in" I may be suggesting things that you and the other members of your committee are entirely familiar with and that you have fully thrashed out. I always feel reluctant to appear before legislative committees, owing to the fact that I am quite likely to be ignorant of the things such committees have been considering and that I will weary them with a thrice-told tale. I would be glad to file a memorial or brief before the committee or appear before it and present these suggestions with such amplification as I am capable of, and as the committee might desire.

Although I have not a large acquaintance with Members of Congress, Congressman Browne, of this district, and Congressman Konop, of this State, and the other Wisconsin Congressmen know me very well. I am also well acquainted with Mr. Davies, of the Corporation Bureau. Any of these gentlemen will assure you that I have some opportunity to acquire information of the matters referred to in this letter.

Yours, truly,

NEAL BROWN.

FEBRUARY 6, 1914.

Hon. THOMAS F. KONOP, M. C.,
Washington, D. C.

MY DEAR CONGRESSMAN: I was very much pleased to receive from you, on request of Charlie McDonald, the three trust measures that I very much desired to examine. Much of the matter contained in these bills I highly approve of, but I am very doubtful about the wisdom and effect of certain provisions.

Section 1 of this bill, which prevents interlocking of directorates in transportation companies engaged in interstate commerce and companies engaged in selling equipment to such transportation companies, is doubtless warranted by conditions as we have known them, except that I am unable to understand why a director in a bank or trust company should be per se taboo as an officer or employee of a transportation company engaged in interstate commerce. But none of the provisions of this first section affect industrial conditions over a large part of our country.

The questions raised by this section may be important in cities like New York and other great commercial and industrial centers.

I happen to have in mind only one director and officer of a large bank in this State who is also a director in a railroad company engaged in interstate commerce. I don't believe the connection has resulted in any harm. I am not conversant enough with the effect of such interlocking directors in the great cities.

I think section 2, which forbids a director of one of the member banks under the new currency system from being a director in another member bank is not justified, and I think it may do a great deal of harm. I presume in the large cities there may be evils of sufficient magnitude arising out of interlocking directorates that would warrant this provision, but I can not conceive how it would do anything but harm over the greater part of the country. It is likely that there are several men of high financial standing in this locality who would be compelled to resign from one or more directorships in order to comply with this provision, to the detriment of the banks they were connected with. I can not see what harm could result from a director of a member bank here being a director of another bank in some other State or locality, or even in this locality. For instance, Walt Alexander is a director in the the National German American Bank and is president, I think, of the Marathon County Bank, of this city. The Marathon County Bank is a State bank, and Mr. Alexander and his partner, Mr. Stewart, before his death, grew up with this bank and made it what it is. Mr. Alexander could not well be dispensed with as an officer in this bank. He is also, as I have stated, director and vice president in the National German-American Bank, and ought to remain a director in that bank. If the Marathon County Bank should be authorized by State law to become a member of the Federal reserve system, he would have to resign one or the other of these directorships, and I am satisfied, rather than have this occur, the Marathon County Bank would remain out of the system. I presume he is also a director in two or three country banks in the Middle West.

It must be remembered that country banks secure for directors men of the highest financial standing and integrity, for the credit of the bank and its ability to weather any storm that comes is dependent upon the standing given the bank by its board of directors. It may be said, with many industrial corporations, and with many large

city banks, that outside of the present directors of such institutions there are other men among the stockholders who would fill the bill just as well, but in small country towns, and by this I mean cities anywhere under 50,000 population, it is impossible to find among the stockholders of most of the banks more than a limited number of men whose financial standing and business ability is such as would qualify them for one of these directorships. I don't know how, for instance, Mr. Alexander's place in any one of these banks here could well be filled. He is also a director in the First National Bank of Milwaukee, but I presume that this Milwaukee bank could easily fill his place from among its stockholders, because of the greater number of qualified men from which to make a choice. But we haven't this liberty of choice in country cities. I presume this city is typical of many others throughout the country.

I believe it would be a great hardship to various small banks throughout the country if this provision became the law. I have wondered if a provision could not be substituted inhibiting interlocking directors in banks in the Federal reserve cities and whether this would not meet the evil aimed at. We feel satisfied there is no evil in interlocking directors anywhere except in larger cities. You must remember that this entire movement against interlocking directorships started with abuse existing in New York, mainly, and as regards transportation companies and industrial companies or construction companies that had dealings with such transportation companies. There never has been a suggestion that these evils existed in any place outside of New York and perhaps a few other of the larger cities. I am illustrating these suggestions by concrete cases I have before me, and assume that Wausau, with about 18,000 population, is typical of many other of the smaller cities. I have wondered if suggestions of this kind have been made to the committee having this bill in charge.

Section 4 of this act, it seems to me, is unnecessary and not warranted by any conditions that I am familiar with. It is certainly unwarranted by any condition that exists in 90 per cent of the territory of our country. This section forbids corporations engaged in interstate or foreign commerce having a common director or directors.

Take the lumber business: There are thousand of mills, great and small, engaged in the manufacture of lumber throughout the country. Probably the greater part of these mills are small mills. I know of some in this part of the country that have not cost over $5,000 to build. Frequently a timber owner who has a tract of land will put in a small mill to cut the timber. He may have another tract in the same State or in other States and is doing the same thing as to such other tracts. Many times there will not be over two or three stockholders in one of these corporations and very often not over half a dozen. This is so of many of the larger mills. It would be impossible, it seems to me, to make any combination in the lumber business in restraint of trade that would be effective, and if such a combination were made it would not be promoted by a policy of interlocking directorates. It must be remembered, too, that almost every sawmill in the country is competitive with every other sawmill in the country. The mills on the western coast ship lumber almost everywhere throughout the country. A good deal of that lumber has been shipped into the lumber districts of northern Wisconsin. Some of our lumber men who are operating here, and are directors in concerns here, are also directors in lumber concerns on the coast. And this is so as regards the South.

Lumber from the South is sold in almost every part of the country. I don't see how some of these corporations engaged in the lumber business that have common directors with other corporations engaged in the lumber business are going to select their directors so as to carry on their business properly. I could give you hundreds of concrete instances that would show you the difficulties surrounding this subject and I suppose that what you and other members who will have to vote on this question value most is definite examples. Would it be worth while, do you think, to put this in some form of statement and present it to the committee having this measure in charge?

There are many industrial plants that are not directly competitive, and yet are indirectly competitive. Take, for example, the Wausau Sulphate Fiber Co., 12 miles south of here. It makes what is called craft paper and pulp. This is a very tough wrapping paper and sells for a considerably higher price in the market than the ordinary wrapping paper used by butchers, grocers, etc. There are not many mills making this kind of paper as yet in the country, although there is a fair demand for it. It supersedes the lower grade of wrapping papers because it is tougher, and a light sheet can be used in place of a heavier sheet of the lower class of wrapping paper. I am a director in this mill. I am also a director in the Marathon Paper Mills Co., having a plant about 5 miles south of here, and this last company makes wrapping papers, but they are what are called specialties; that is, design paper and things of that kind. Then, 5 miles north of here, at Brokaw, is the Wausau Paper Mills plant, and a great deal of the product of this last mill is wrapping paper of a lower grade.

In one sense none of these are competitive, and in another sense they are competitive. I don't know what would be their status under this law; whether being indirectly competitive these mills would be construed to be competitors. In other words, the customer who was using a low grade wrapping paper of no very great strength but quite bulky for its strength might be induced to use Mosinee Craft, which gave a less tonnage or weight for the same strength of paper. As a matter of fact, I would say there is no direct competition between these mills, and yet I don't want to say there is not some competition of an indirect kind. It is something like the competition between a $15 suit of hand-me-down clothes and a $50 suit made of first-class cloth. The customer who could get the $15 suit might be compelled to buy the $50 suit, and, on the other hand, the man who would like the $50 suit and he couldn't get it, might be compelled to buy the $15 suit.

In the same way, hemlock lumber is competitive with the best quality of white pine and western fir, which is very strong and durable and is used extensively even in this part of the country for heavy timbering and plank and supersedes tamarack, white and Norway pine, and hemlock, which are products of this section.

As far as my being a common director in the Mosinee plant and the Marathon plant, I could easily dispense with one of these directorships and so could the company, and I am not talking with reference to any personal element in this matter. Of course I helped to organize and build up these two propositions, which, I suppose, is one reason why I am a director in them. But either one of them could easily get along without my service as a director. But I don't know how this section 4 that I have referred to can be enacted into law without entailing inconvenience and hardship upon thousands of institutions that are being conducted honestly and along absolutely competitive lines. I know these three paper mills I have referred to—the one at Mosinee, the Marathon mills, and the one at Brokaw—are in more or less competition, and they are really competitive. Each one has a different manager and managerial force, and they go out after business without regard to the interests of either of the others. Mr. Alexander is a director in the plant at Brokaw and is a director in the Marathon mills, and it would be hard to dispense with him as a director in either plant, and still I have been afraid that if this section 4 went into effect the result would be that he would have to resign from one or the other of these directorships, to the detriment of the business of such concern.

Of course I know that this section 4 was designed as one method of preventing illegal combination in restraint of trade, and I am thoroughly in sympathy with this purpose, but I don't believe the situation warrants such a law and that if enacted into law it will do great injury to thousands of business institutions and business men who are, and always have been, conducting their business honestly.

Under the language of the law I wouldn't know whether I was eligible to the penetentiary or not if I remained director in the Marathon mills and the Wausau Sulphate Fiber Co., and if I was a director in a lumber-manufacturing concern at Portland, Oreg., and of another in Wisconsin, or in Alabama, I would have a like ignorance as to my responsibilities. If I was a director in a small corporation manufacturing hemlock and hardwood at some place in northern Michigan and a director in another small corporation manufacturing hemlock and hardwood in Marathon County, Wis., would I be violating the law by continuing these directorships if the law went into effect? I know there are thousands of business men engaged in industrial enterprises, especially in the lumber business, who occupy just this position. In fact, I think the lumber business furnishes a larger number of illustrations and typical cases than almost any other business.

I can see that there would be many and perhaps illegitimate methods of meeting the difficulty and I am satisfied the law would lead to these methods. For instance, what are called "dummy directors" would be selected. I know of one concern in the lumber business that has I think only five stockholders and they are all directors. The only way to qualify another person as director would be to assign him a share or a few shares of the stock. If one of the directors in this company was also a director in a lumber-manufacturing corporation a thousand miles away or a few miles distant, he would have to resign and let this dummy director take his place in one of the corporations.

Another method would be for one of the corporations to purchase the property of the other corporation and probably such purchase would not of itself constitute a violation of the antitrust statutes. If a Michigan corporation manufacturing hemlock and hardwood had timber holdings tributary and I was a director in this corporation, and also a director in a corporation engaged in the same business in Marathon County, Wis., the Marathon County corporation could buy the property of the Michigan corporation, or an independent corporation could organize to buy the property of each of the corporations. Such transactions are very common and are

not made for the purpose of stifling competition, but for many other good and sufficient reasons, nor would it be possible that such transactions could have any effect to stifle competition unless they should embrace very large property interests and engross a very large production of lumber.

I have the same feeling regarding interdictions and restrictions that I have referred to as I have toward our system of protection. The evil effect of artificial and unnatural restrictions upon trade and commerce can never be fully estimated. One great argument against protection, to my mind, is that no one can estimate all of its evil effects. We can only see a few of them, and you know that I have been unalterably opposed to protection for the last quarter of a century, and never more opposed to it than since I have become interested in the manufacture of paper and in the lumber industry through the ownership of timber lands.

I would appreciate it very much if you could inquire and see whether any suggestions have been made to the committee having this bill in charge along the lines of this letter. I don't know that I am acquainted with any member of the committee, and I am writing to you because of my acquaintance with you, because you may help in thrashing this matter out. If you think it would be of any avail to present any of these suggestions to the committee, I would be glad to do it either in a written statement or by appearing before the committee and making these suggestions, which I could amplify by the use of a little time.

I know of many business men who are considerably concerned about these provisions in the proposed laws and bills which you sent me and I am referring now to country business men, not to financiers in the larger cities or men engaged in great enterprises like those of the Steel Corporation. I think the provision regarding interlocking directors in industrial corporations are not warranted by any evil that now exists or that could exist in this country. I do think that interlocking directors in banks and trust companies of large cities has been productive of evil, and also interlocking directors of transportation companies and construction and supply companies. Possibly some provisions can be framed up so that the evil things can be reached without unjust interference with legitimate business. I thought that as to member banks in the larger cities interlocking directors could be forbidden, making the inhibition apply to, say, central reserve cities or something of that kind. That would leave country banks free to carry on their affairs as they do now.

I have thought that, as to industrial corporations, a provision might be framed up that would inhibit interlocking directors in industrial corporations that were producing more than a certain per cent of the total product of the country, say, 5, 10, 15, or 20 per cent, fixing it at at some point where there would be no danger that the interlocking directors would bring about monopoly or unreasonable restraint of trade.

I can only make a suggestion along this line as I have not thought it out. I apologize to you for this long letter and shall appreciate the consideration you can give it.

Yours, truly,

FEBRUARY 6, 1914.

Hon. THOMAS F. KONOP, M. C.,
Washington, D. C.

MY DEAR CONGRESSMAN: I overlooked one thing: I see by section 2 of bill No. 3, to prevent certain persons from being directors, etc., that a person who is a director in any State bank or trust company is not eligible as a director in a member bank operating under the Federal reserve system. As I read it at first I overlooked this additional inhibition. I thought that the inhibition related to common directors in two member banks.

I am absolutely convinced that outside of central reserve cities all these inhibitions are absolutely harmful and unduly interfere with the natural conditions of trade and commerce, and that there is absolutely no evil in the country districts of the United States that justifies such a law. I would suggest in the matter of dealing with interlocking directors in industrial corporations engaged in interstate business the line prohibition might be based on the amount of capital stock of such corporations. As, for instance, like this: That no person who is a director in one of these corporations should be eligible as a director in any other corporation where the capital stock of either corporation exceeded $2,000,000, or where the aggregate capital stock of both corporations exceeded, say, $3,000,000.

I am only illustrating the amount of stock that would form the basis. Such a provision could be so framed as not to excuse any other acts of either corporation that

might constitute restraint of trade. It could be drawn so as to simply provide that having common directors would not be per se in restraint of trade.

I don't believe the generality of country business men and bankers understand the full scope and meaning of this proposed bill as it is now drawn, for if they did understand it, it would arouse universal protest.

Yours, truly,

NEAL BROWN.

Amend section 2 of tentative committee bill No. 3, H. R., "A bill to prohibit certain persons from being and becoming directors, officers, or employees of certain national banks or of certain corporations," by striking out section 2 and substituting therefor the following:

SEC. 2. That from and after two years from the date of approval of this act, no person shall at the same time be a director or other officer or employee in two or more member banks of a Federal reserve bank under the Federal reserve act in any city having a population in excess of 500,000 inhabitants, according to the preceding United States census, and no private banker or person who is a director in any State bank or trust company not operating under the provisions of said act shall be eligible to be a director in any such member bank.

Amend section 4 of tentative committee bill No. 2, H. R., entitled "A bill to prohibit certain persons from being or becoming officers or employees of national banks or of certain corporations," by striking out section 4 and substituting therefor the following:

"SEC. 4. That if, after two years from the date of the approval of this act any two or more corporations engaged in whole or in part in interstate commerce have a common director or directors and the aggregate capital stock of such corporations exceeds the sum of ten million dollars, or if the aggregate product dealt in by such corporations shall exceed ten per centum of the total product dealt in in the United States during the preceding calendar year, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations; and if such corporations shall have been theretofore, or are, or shall have been by virtue of their business and location of operation, natural competitors such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce under the provision of and subject to all the remedies and penalties provided in an act approved July second, eighteen hundred and ninety, entitled, 'An act to protect trade and commerce against unlawful restraint and monopolies.'"

CHICAGO, ILL., *February 10, 1914.*

DEAR SIR: Inclosed please find copies of requests sent to stockholders for proxies for annual meetings. You will note these requests are issued by the secretaries of the companies and usually by order of the directors.

When the law proposed to prevent the election of interlocking directors is formed, it should include a provision making it a penitentiary offense for the officers of any company to send out circulars such as the inclosed with the name of any person printed upon them; it should also contain a provision making it a penal offense for the secretary, or any other officer of any company to refuse to give a complete list of the stockholders of any corporation to any stockholder who makes a demand for same.

By adopting provisions such as outlined above minority stockholders will have some chance to elect directors who will operate companies honestly and for the best interest of all the stockholders.

Yours, respectfully,

S. F. MILLER.

Proxy. No. preferred ———. No. common ———.

Know all men by these presents, that I, ———, do hereby constitute and appoint Rolla Wells, Murray Carleton, D. R. Calhoun, R. H. Stockton, G. H. Walker, and O. L. Holman, or any one of them, attorney for ——— and in ——— name, place, and stead, to vote as ——— proxy at a meeting of the stockholders of the Laclede Gas Light Co., to be held at its office, Eleventh and Olive Streets, in the city of St. Louis, Mo., on Tuesday, February 17, 1914, between the hours of 9 o'clock a. m. and 12 o'clock m.,

for the election of directors for the ensuing year and for the transaction of such other business as may properly be brought before said meeting, and also at any meeting to which said meeting shall be adjourned; according to the number of votes ——— should be entitled to vote if personally present at said meeting or adjourned meeting. All former proxies are hereby revoked.

Witness ——— hand and seal, this ——— day of ——— 191—.

——— ——— [L. S.]

Witness: ———.

THE PEOPLE'S GAS LIGHT & COKE CO.,
Chicago, January 20, 1914.

Inclosed please find proxy running to the directors of The People's Gas Light & Coke Co. for use at the annual meeting of the stockholders to be held at the office of the company in Chicago on the 10th day of February, 1914, in accordance with the by-laws of the company, or at any adjournment of such meeting.

If unable to personally attend the meeting, will you kindly date and sign the attached proxy in the presence of a witness and mail the same to the company in the inclosed envelope?

Yours, respectfully,

THE PEOPLE'S GAS LIGHT & COKE CO.,
By L. A. WILEY, *Secretary.*

Proxy to vote.

Know all men by these presents, that I, the undersigned stockholder, do hereby appoint Samuel Insull, John J. Mitchell, James A. Patten, Edward G. Cowdery, and James F. Meagher, of Chicago, Ill., and each or any of them, to be my substitutes and proxies, with power of substitution for me and in my name and behalf, to vote at the annual meeting of the stockholders of The People's Gas Light & Coke Co., to be held at the office of the company in People's Gas Building, corner of Michigan Boulevard and Adams Street, Chicago, at 11 o'clock a. m., on the 10th day of February, 1914, and at any adjournment of such meeting, as fully as I might or could do were I personally present at said meeting.

In witness whereof I have hereunto set my hand and seal the ——— day of ———, 1914.

——— ——— [L. S.]

Witness, ———.

[Proxy. Northern States Power Co. Annual stockholders' meeting February 16, 1914.]

Know all men by these presents that I, the undersigned, being the owner of ——— shares of the capital stock of Northern States Power Co., do hereby constitute and appoint H. M. Byllesby, R. J. Graf, and W. J. Maloney, or either or any of them, my true and lawful attorney in my name, place, and stead, to vote upon the stock owned by me or standing in my name, as my proxy, at the annual meeting of the stockholders of said company, to be held at the office of the company, 394 Du Pont Building, in the city of Wilmington, Del., on the 16th day of February, 1914, or on such other day as the meeting may be thereafter held, by adjournment or otherwise, according to the number of votes I am now or may then be entitled to cast, hereby granting my said attorney full power and authority to act for me and in my name at the said meeting or meetings, in voting for directors of said company, or otherwise, and in the transaction of such other business as may come before the meeting, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may do in my name, place, and stead.

In witness whereof I have hereunto set my hand and seal this —— day of February, 1914.

——— ——— [SEAL.]

Witness, ———

[Notice. Annual meeting of stockholders. Northern States Power Co. February 16, 1914.]

The annual meeting of the stockholders of Northern States Power Co. will be held on the 16th day of February, 1914, at 10 o'clock in the forenoon of that day, at the office of the company, 394 Du Pont Building, in the city of Wilmington, State of Delaware, for the purpose of electing a board of directors and receiving and acting upon the reports of the officers, and for the transaction of such other business as may properly come before the meeting.

In accordance with the laws of the State of Delaware, no stock can be voted on which has been transferred on the books of the company within 20 days next preceding this election.

ROBERT J. GRAF, *Secretary.*

Dated February 3, 1914.

[Alabama, Tennessee & Northern Railway. John T. Cochrane, president.]

MOBILE, ALA., *February 16, 1914.*

HON. OSCAR W. UNDERWOOD,
Washington, D. C.

MY DEAR MR. UNDERWOOD: I understand there is a bill pending in the Judiciary Committee of the House of Representatives which if passed would make very drastic changes in the present antitrust act, and while I assume that the leaders of the House would not permit a law to become effective that would be as far-reaching as I am told the first draft of this bill is, I am taking the liberty as one of your friends of asking you to give the matter special attention with a view of not allowing anything to go into this bill that would practically destroy all possible markets for small industrial plants or short railroads, the sale of which in many instances to some larger corporation not at all in direct competition would very much enhance the efficiency of the enterprise and its benefit to the public.

While we do not contemplate a sale of our property, and wish to keep it as it now is, a strictly independent enterprise, which you probably know was conceived and carried out by native Alabamians until we now have about 200 miles of railroad in operation, I feel from my experience that a law which does not allow combination or sale under any circumstances, even if there was only 1 or 2 per cent competition, or very indirect competition, would result in loss to the public and accomplish no real good.

For example, in the case of railroads it has generally been regarded as lawful for a railroad company to acquire a branch or connecting line where the dominating characteristic of the acquired line was that of a feeder or connection, and the mere fact that there was a very small amount of competition between the two lines as to unimportant traffic would not render the acquisition unlawful.

But the bill now under consideration, as I understand it, appears to prohibit any agreement which operates to prevent competition in transportation or which operates to bring about any arrangement by which free and unrestricted competition is prevented. Apparently the amount of the competition is immaterial. Therefore the result would seem to be that no railroad company could acquire another railroad if there was any competition whatever between them, and the fact that the amount of competition was infinitesimal would not seem to relieve the transaction from its illegal character. The same result would seem to follow in connection with the consolidation of two small industrial enterprises or the acquisition of one by another. The resulting combination might not control as much as 2 per cent of the total output in a particular line of business, and yet if the two enterprises had theretofore been in competition the extinguishment of that competition would seem to violate the provisions of this bill, although they would not violate the antitrust act as it stands.

I would appreciate it if you would write me explaining what the bill does mean, and which I shall keep confidential if desired, and whether it will be passed in a way that it could be construed, for instance, that it would be unlawful for some large system of railroad not reaching Mobile, or in fact being two or three hundred miles from Mobile, to make an arrangement with our road by which they could get an entrance into Mobile, either by purchase or trackage arrangement. You can readily see if we could put the Illinois Central or some other big system into Mobile what it would mean to this port, and yet the Illinois Central in no way competes with us, unless it is infinitesimal or indirect. Certainly there would be no direct or general competition.

I would appreciate it very much if you had the time to give me a general outline of what you think about this, and any assistance that you can consistently give in looking after our side of the matter, as well as the other side, will be appreciated, and

If you think it advisable for me to take this matter up with Mr. Clayton, chairman of the committee, or any others, I should be very glad to do so, but until I hear from you I probably will not write any one letters, for I am sure you can better advise us in the matter and can say whether or not there need be any alarm, etc.

I am interested, as you know, in getting additional capital to complete my road. A little more capital would put us on the north end into the Birmingham district and give us a connection with two additional systems of railroad which do not reach the port of Mobile, and on the south would enable us to build about 30 miles of gap between our present terminals and our main line, which we now have to cover over the rails of the Southern Railway. It is very desirous for us to get in here over our own line, and I think that you, with your general knowledge of affairs, will appreciate that such an independent line as mine is a benefit, not only to the port but to the whole State of Alabama, and I certainly hope that Congress will soon declare itself in a way as to give such confidence as will result in the financing of such undertakings as mine and others which are legitimate and are not in any way speculative or against the spirit of law or honesty.

Yours, very truly,

JOHN T. COCHRANE.

[Seth Low, 30 East Sixty-fourth Street, New York.]

FEBRUARY 17, 1914.

HON. HENRY D. CLAYTON,
Chairman House Judiciary Committee, Washington, D. C.

MY DEAR JUDGE CLAYTON: I have not forgotten your request that I try to put some of my suggestions in writing, but I have not been able to do so before to-day.

So far as the definitions bill is concerned, I greatly hope that it will not be pressed. In its present form, as I outlined in my testimony, the effect of it would, in my judgment, be disastrous. So far as definitions relate to offenses already pointed out by the Supreme Court as constituting evidence of monopolizing, further definition is evidently unnecessary. If the bill were to go beyond these things, as the pending bill does, I can not see how it is to escape either or both of two dangers. Such a bill is substantially certain to write definitions which will result in litigation before it is authoritatively known what they mean. It is equally sure, in my judgment, that definitions broadly framed are likely to have very unintended results. In this connection I venture to call your attention, on the chance of your not being familiar with it, to a speech made by Senator Platt, of Connecticutt, when the Sherman bill was under consideration. (21 Cong. Rec., pp. 2720-2731.) This speech, I think, was influential in determining the Judiciary Committee of the Senate at that time to put the Sherman Act in its present general language and to avoid more particular definition.

In regard to Mr. Bartlett's bill (H. R. 1873), I am not enough of a lawyer to attempt to rewrite the bill, but the general idea which I tried to express at the hearing in relation to trade-unions and farmers' cooperative associations, it seems to me, to be properly expressed should be in some such way as this:

That trade agreements between employers and persons employed, or seeking employment, with the object of regulating hours of labor, wages, and conditions of service are, and are hereby declared to be, lawful; but when persons employed or seeking employment, by virtue of any arrangements, agreements, or combinations, directly interfere with the free transportation or sale of merchandise in such a way as to constitute such a restraint of trade as is forbidden by law, such restraints of trade shall be subject to the same laws affecting restraints of trade as apply to business corporations.

That cooperative societies or associations of farmers formed primarily for the purpose of enabling their members to purchase their supplies in common, and to sell their products in common, and based upon the agreement of such members to give all of their business to such cooperative associations are and are hereby declared to be lawful; but whenever such cooperative societies or associations, as such, practice monopolizing or any other restraint of trade which is forbidden by law, such societies or associations shall be subject to the same laws affecting restraints of trade as apply to all business corporations.

Cooperative societies or associations organized primarily for the purpose of buying household supplies, or any other articles needed by their members, and based upon the agreement of such members to give all of their business to such societies or associations are, and are hereby declared to be, lawful; but whenever such cooperative societies or associations of consumers, as such, practice monopolizing, or any other restraint of trade which is forbidden by law, such societies or associations shall be subject to the same laws affecting restraints of trade as apply to all other business corporations.

The foregoing suggestions indicate clearly enough, I hope, for your purpose the line of distinction which seems to me ought to be made. It ought not to be an offense either for laboring men or for farmers to organize in the only way that is possible for success, in order to enjoy the right of collective bargaining; but, when so organized, if, in their collective bargaining, they offend against the laws forbidding monopolization, I do not see how they can be exempt from such laws without creating classes in America in a way which heretofore has never been recognized.

I am not well enough versed in the law to understand the effect of saying, in the law, that the relations between employer and employee constitute a personal and not a property right. The right of organization, the right of collective bargaining, the right to strike, all of those things do seem to me to be personal rights. Any indirect restraint of trade springing from the exercise of these rights appears to me to be incident to their enjoyment; but if such rights were to be exercised with the express purpose of restraining trade, I am not clear that this should be permissible.

In the same way I speak with great reserve on the subject of injunctions. In the past, as I said in my testimony, I think labor has had a real grievance. Some lawyers with whom I have talked think that the remedy is to be found in enforcing reasonable rules regarding the duration of ex parte injunctions, and in providing for prompt hearings, and for the determination by some one other than the judge making the injunction of contempt proceedings brought thereunder. I submit this suggestion without any personal recommendation upon the subject.

Thanking you for the full opportunity which you have given me to express my views, I am, my dear Judge Clayton,

Yours, very truly,

SETH LOW.

[M. J. Whittall.]

NEW YORK, *February 18, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee, Washington, D. C.

DEAR SIR: The writer appeared before you recently in reference to the matter of a uniform resale price, and incidentally there fell into his hands reports of the hearings on other bills, among which I was interested in the feature of one bill which made it compulsory to sell every distributor at the same price.

It occurred to me that this would result in considerable embarrassment to us at certain seasons of the year. We have probably pursued the policy set forth in the proposed bill more strictly than anyone in our industry. In fact, we think we are the only one in our industry to have a uniform price in every retail dealer, regardless of size, after they have qualified as retail dealers.

However, twice each year we go through our lines and discard a certain number of patterns to make room for new ones. The stock of these patterns is disposed of at the best obtainable price to some one or more retail dealers. The cut would usually be least 10 per cent. All the patterns included in these sales have in all probability been sold at the higher price up to within 24 hours of our decision to clean them out. Would you construe this as being a violation of the proposed law? We do not see any possible way to improve upon our present methods.

I can appreciate the evil that your committee is trying to reach, but it appears to me that it will bear more heavily on those who are endeavoring to conduct their business along right lines than on the few offenders.

Yours, very truly,

M. J. WHITTALL,
Per A. W. COLL, *Agent.*

[The Fruit Auction Co., 200-202-204 Franklin Street. Victor K. McElheny, jr., president; A. A. Hutchinson, vice president.]

NEW YORK, *February 19, 1914.*

Hon. HENRY D. CLAYTON,
House of Representatives, Washington, D. C.

DEAR SIR: I desire to write to you regarding the new antitrust bills now pending before Congress.

Attitude of business men.—The press has stated that these bills are administration bills; also, the administration has stated (*a*) that until recently very few business men have communicated with the administration regarding the bills, although the

administration desires to hear from all business men; (b) that recently a number of business men have communicated with the administration regarding the bills, from which the administration has deduced that business men have discounted the legislation and that the measures in a general way met their approval. The press also has stated that the administration has declined to wait until the United States Chamber of Commerce would have a referendum in regard to these bills. That body asked the administration to defer action until the chamber of commerce could secure the answer of 300,000 business men regarding these bills, but the administration has stated that it intended to pass the bills without further delay.

I desire to respectfully say that if the administration thinks the business men are not keenly interested in this legislation the administration has been greatly misinformed. Only recently have business men been able to secure copies of the bills, and therefore it is only recently that they have been in a position to "wake up" in regard to the matter. Business men have not yet realized that these bills are in fact for the suppression of business rather than for the suppression of trusts. In fact, some business men feel rather stunned at the attitude of the administration and think that possibly it is no use to give the administration any advice in regard to the matter since the administration is determined to pass the bills regardless of their effect on legitimate business. The excuse for haste seems to be to permit Congress to adjourn June 15.

Regarding this matter, I desire to say that the currency and tariff legislation just enacted as compared with this antitrust legislation were very simple problems. It must be remembered that the currency and tariff bills enacted have been the result of many years of discussion. In fact they were discussed long before antitrust legislation was thought of. Currency legislation has been a bone of contention since the beginning of the Government and any number of tariff bills have been before Congress from time to time with the resultant public discussions. The currency and tariff legislation recently enacted are the final result of many years of thorough public discussion. In regard to both the currency and tariff legislation it must be remembered there have been commissions appointed with large powers that made extended investigations both here and abroad covering extended periods of time. So that the attitude of the administration in asking for the business men to express their views on the one hand and then declining to wait for the United States Chamber of Commerce to get the views of its members in regard to this important legislation on the other hand is simply inexplicable. Surely these antitrust laws at least require the same serious consideration that has been given to the currency and tariff legislations.

Trade commission bill.—I think it will be admitted that it is an advantage to have as few laws as possible and to bring within the laws as few individuals as possible providing, of course, the rights of others can be respected. This trade commission bill takes in every business concern in the country and puts upon the shoulders of a commission of five men the regulation of practically the entire business of the nation.

I think it will be conceded that the Interstate Commerce Commission is a sadly overworked body and the duties it is proposed to confer on this new trade commission are a mere drop in the bucket compared with the duties conferred on the Interstate Commerce Commission.

As the bill embraces all the business of the country I think it will be conceded that only about 10 per cent of the business concerns can possibly receive any attention from the commission. With respect to the other 90 per cent the commission will have absolutely no interest in them or in any reports or data received from them. Why, therefore, burden the commission with the care of this 90 per cent? This will lead to the evil that the commission will have information in regard to a lot of small concerns that are not of any public interest and this information will be at the mercy of rivals in business and other interested people (including larger concerns) and great harm will come to a great number of small concerns. The reports and data received will be more or less public documents because it is absolutely impossible to say that where a commission receives information that it is not public property. Some individuals who are interested will get these facts (I do not care how well you guard them) and use them to the detriment of the company reporting. It seems to me that there is a line that can be drawn and that line is that no concern should be brought within the act that is not doing a business of public interest and it could be well said that a concern which has a gross annual income of less than say $3,000,000 is not a concern that is of public interest. I believe the use of the words "gross annual income" is better than the use of the words "gross annual business" in that the former are fixed and known as in the income tax requirements whereas the latter will require judicial interpretation.

Another thing, I feel confident that the trade commission bill as it stands is unconstitutional. I do not believe the Constitution permits a commission solely for the purpose of "smelling around." I think that is contrary to the spirit of our institutions. When this country was first settled and government was first inaugurated we had a great number of political offenders. That is, people who had done things which were not considered to be immoral in themselves. In the administration of our laws we do not permit a man to go into another man's home in order to "smell around." It must be shown that the defendant has committed a crime or is about to commit a crime. So in regard to the trade commission bill, unless it is in furtherance of a decree of the court or unless it is shown that the defendant has committed a crime, or unless the commission's proposed inquisitorial powers come within the police power of the State, I do not believe the courts will permit a committee entering into a man's business just for the purpose of "smelling around." Take the administration of our criminal laws. You ordinarily can not interrogate a man about something not connected with the thing for which he is being tried. You ordinarily can not go through the history of his life and bring up things to his prejudice, and so I think the courts will draw a halt on this legislation, being zealous to protect his private affairs from undue publicity. Another thing, I have very serious doubts whether the part of the act which says that the doctrine of res adjudicata shall apply to a party where by the nature of the case the other party is not equally bound, is unconstitutional.

Trade relations bill and the Sherman law definition bill.—It seems to me that the Sherman Act as at present constituted includes within its prohibition every act that should properly be prohibited. It includes within its prohibition all unfair practices and anything that is unreasonable or detrimental to the public. The Sherman Act has been on the statute books since 1890, and it has only recently been defined so that business men understand what it means. The new legislation proposed leaves the Sherman Act unchanged, but adds other matters that will take years of litigation to determine their effect, and will consequently add years of further business uncertainty. Uncertainty is one of the things that the administration has desired to abolish, but it seems to me you are courting further uncertainty if this legislation is enacted. I think it is conceded that unfair practices should be cut out. No one now advocates such things. At the same time you should not legislate against something that is not prejudicial to the public interests or that is not unreasonable. The courts in interpreting the Sherman Act have stated that in its interpretation it would apply rules of reason. It seems to me there can be no serious quarrel with such a doctrine. In a recent decision Mr. Justice Holmes has restated the rule. In Nash *v.* United States (229 U. S., 373) the court (Mr. Justice Holmes writing the opinion) said: "Those cases (the Standard Oil and Tobacco Trust cases) may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated act, prejudices the public interest by unduly restricting competition or unduly obstructing the course of trade."

If the new legislation is an attempt to eliminate the rule of reason, or in other words to legislate that a reasonable thing shall be considered to be illegal, it seems to me that you are simply at great effort marching up hill in order to march down again.

You might as well attempt to declare that the golden rule is unreasonable or that it is illegal to attempt to bring about the brotherhood of man.

What assurances do you have that the Supreme Court will not apply the rule of reason to this new legislation if it is enacted? If it does, then you are just where you are at present, only with the added disadvantage that we will have injected into business years of uncertainty before such a decision has been handed down. I do not believe there is much doubt that if the proper case would be presented to the Supreme Court it would decline to declare illegal a reasonable thing, notwithstanding the administration's attempt to enact the contrary. In fact, the application of the rule of reason is in a broad sense merely an application of the golden rule.

We have been accustomed to look to the Commonwealth of Australia for anything radical in the line of legislation. In 1910, with the Sherman Act before them, they passed a new antitrust act. They called it a "trade preservation act," and in that act it is a defense to a suit if the act complained of is not a detriment to the public or is not unreasonable. I have not been able to find whether they have a trade commission. I doubt it.

Under the proposed legislation no agreement whatsoever, whether reasonable or unreasonable or whether a detriment to the public interests or not, can be entered into between different concerns. The absurdity of such a doctrine is shown by the following:

The business of this company is the selling of fruits at public auction. All the California fruits that come to this city are sold at public auction on Erie Railroad Pier 2 North River. There are at present three auction companies. They begin the sale in the morning at 9 o'clock and sales often continue without interruption until 5 in the afternoon. In order to give the clients of each auction company a square deal the auction companies rotate as to position. That is, say the company selling first Monday will sell second on Tuesday and will sell third on Wednesday, etc. That arrangement is absolutely necessary in order to be fair to all. Otherwise, as it is an advantage to sell first, we would have three sales going on at the same time and the buyers would be divided up between the three sales and it would be impossible to secure the market value of the goods.

If the above legislation is enacted it would be impossible for those three companies to have such a reasonable arrangement. They will be compelled to hold their sales in different parts of the pier at the same time instead of one continuous sale in the one auction room, to the great detriment of the farmer and the buyer. Of course, to merely state the foregoing is to show the absurdity of any law interfering with such cooperating. Doubtless you will say that no court would declare such cooperating illegal and doubtless that that is so, but it would only be because of applying the rule of reason to this new legislation, in which event I ask as above, What then becomes of the new legislation?

All sorts of cooperations throughout the country will be illegal if the proposed legislation is enacted into a law. There is a wave of cooperation throughout the country and nearly all of it is reasonable cooperation. All farmers' organizations as well as all business organizations will have to cease in their cooperation. To say that business men are opposed to any legislation which means the death of legitimate business is stating a very simple proposition. In fact, I believe that if you pass laws that say that business men can not cooperate reasonably in their business and if you apply those laws impartially you will send a large portion of the business men to the penitentiary. I should think the administration would hesitate before they would stand sponsor for such unfair legislation.

Yours, very truly,

VICTOR K. MCELHENY, Jr.

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives,
Washington, D. C.

DEAR SIR: I am very much interested in the trust legislation now being considered by the Judiciary Committee of the House of Representatives, but as a temporary indisposition prevents my appearing before your honorable body, I beg to submit the following statement in the hope that it may be of service in the important work that you are now undertaking.

The President has read to Congress his message on "trust legislation." He suggests that bills be introduced prohibiting "interlocking directorates," making individuals liable for the acts of corporations, suggesting a commission to assist corporations to keep within the law, and a bill giving definitions of the acts which it is intended to prohibit by the Sherman law.

This last measure is an especially wise one, if it is drawn with such care that its provisions can not be misunderstood. Business has been between "the devil and the deep sea." If corporations did not compete they would be punished, and if they competed too much they would be punished, and just exactly how far they must compete no man knew. The drafting of a law which will make this clear will require great business as well as legal knowledge, and unless care is exercised our last condition may be worse than our first.

Generally, however, every good citizen will greet the suggestions made with approval. Whether the Sherman law in its origin was wise or not is no longer a living question. It is the law, and all good citizens are and have been anxious to comply with it. The present activities of Attorney General McReynolds show a wise and statesmanlike grasp of the principles involved and of his duty. He is seeking to aid corporations and individuals to so adjust their affairs as to be within the law. Let there be no mistake. The business men of this country have been willing and anxious from the first to obey the law, but no one knew what the law was. On every question that has been raised lawyers, judges, courts, and even the court of final resort, the Supreme Court of the United States, has been divided. When such supreme authorities can not agree, how is it possible for a layman to decide or to decide correctly the many questions involved? Business must continue, and corporations and business

men, driven by the necessities daily presented to them, have been unable to wait for decisions of courts of the last resort before taking action.

Will you pardon me if I make one suggestion? In no debate that has taken place has it ever been pointed out that a distinction should be made between commodities consumed in our own market and commodities that we export. It may be wise to pass laws the operation of which will depress the price of commodities consumed at home, if we believe that by so doing we will benefit the great mass of our citizens; but is it wise to use the same machinery to depress the price of commodities that we export, because this means that the amount of commodities which we receive in return from foreign countries will be lessened and thereby the whole of our people will be to that extent injured? Two commodities in particular may be noted—copper and cotton. In each case we export 65 per cent of our product. The application of the principles of the Sherman law in the case of copper is exactly the opposite of the methods of the German Government in the potash case. The German Government recognizes that a reduction in the export value of a commodity, of which it holds a natural monopoly, is an injury to the whole people, and therefore it legislates to prevent undue competition and makes the producers combine to maintain prices. We, on the contrary, make it a criminal offense for our producers to consult and make any agreements in regard to the reduction of production or the regulation of the prices of copper. The result is that we give from 3 to 4 pounds of copper which we export in exchange for 1 pound of tin which we import. Now, it does not cost any more to produce the tin than it does the copper; but the owners of tin mines recognize that their supply is limited, and they insist upon receiving full values.

It is evident that there is a great difference existing between mines and our other great sources of natural wealth—our fields and our forests. You may overwork the land until its fertility be destroyed, but this can readily be restored. You may cut down your forests, but they can be regrown in a generation. Once you exhaust a mine, however, it is gone forever. To the common mind, our deposits of coal, iron, copper, lead, zinc, etc., seem to be so enormous as to be infinite; but "60 years is but a day in the lifetime of a nation," and no man can to-day point with certainty to a supply of the ore of any metal which will last more than 60 years if consumption continues at its present rate and no new supplies be discovered. Is it not, therefore, worthy of the attention of the President and of Congress that special steps should be taken to safeguard our mines and save for our children's children some part of this natural wealth that we are now giving away to foreigners?

In the case of cotton the condition is much the same. The increasing demand for cotton goods readily absorbs the continually increasing product of the world. Sixty-five per cent of each of our cotton crops is exported. The people interested in the production of cotton compare as ten to one to the people interested in the manufacture of cotton. The methods employed in marketing this crop in the past have been such that the farmer and planter have been forced to receive less than the economic value of their cotton. The great bulk of the tenant farmers have made but a scanty living, and often the result of 12 months' work of themselves and family was a debt and not a profit. The writer has always regarded this as a serious evil. The stability of government depends upon the man owning and living on the land being satisfied. The farmer it the foundation upon which society rests. Men engaged in transportation, in manufacturing and distributing are mere adjuncts to the man who works directly with the powers of nature in producing the real things upon which we depend for our existence.

The Sherman law has been used with great strictness to prevent the farmers and planters of the South obtaining a reasonable price for their product. The writer, after careful investigation, is convinced that the manipulation of the so-called cotton-indictment suits cost the South at least $100,000,000, of which $65,000,000 was a loss to the entire Nation.

These so-called cotton-indictment cases have been settled in pursuance of the wise policy of the present administration by the Government suggesting and accepting a plea of nolo contendere and the imposition of a small fine, thus disposing of the cases without making a distinct precedent. This is fortunate. To consider these cases as a precedent for the future would be an actual misfortune to this country; and if there be any doubt on the question, it is one of the points that the President and Congress should consider and clear up. The facts are these:

The cotton crops of 1906-7, 1907-8, and 1908-9 were unusually large, and being in excess of the consumptive demand stocks increased. It has long been the custom of the cotton trade to begin in December of each cotton year to sell, or make offers to sell, cotton for delivery during the months of the ensuing season, thus "offering to sell the bear's skin before the bear was killed." This merry game went on in the winter of 1908 and spring of 1909 to such an extent that cotton was actually offered for delivery

over the cotton year 1909–10 as low as 8¼ cents. This price, though not the lowest money record in the history of cotton, was economically one of the lowest, because when in 1897 cotton was quoted as low as $28 a bale, say 5.6 cents a pound, 1.14 bales of cotton would buy 100 bushels of corn and a barrel of pork; whereas at the price of 8¼ cents it would have taken two bales of cotton in 1909 to buy 100 bushels of corn and a barrel of pork.

Generally about 60 per cent of each cotton crop is sold in the months of September and October; and as the manufacturers can not buy this amount, the balance is bought by merchants who carry the cotton for delivery to the spinners in the latter part of the year. To save themselves from market loss, they make on the various exchanges of the world what they call "hedge sales"—that is, they sell cotton for future delivery, and when the real cotton which they have purchased is sold they buy back these contracts. The result is that in September and October of each year there is a heavy pressure on the exchanges, during which time the quotations on the various exchanges are naturally depressed; and later in the year, when the "hedge sales" are being bought back, the excess buying power tends to advance the price.

A number of individuals and firms, noting this tendency, have for a long time made a business of buying contracts in the fall and carrying them to resell in the spring; and, of course, the operation of these buyers is as legitimate a part of marketing the cotton crop as is the selling of "hedges" by the merchants. The operation is similar to if not identical with the methods employed by the Lloyds Insurance Co., where a great risk on the part of a merchant is divided between a number of insurers, each one taking a small part.

The gentlemen who were afterwards indicted in the cotton cases were, with one exception, usually engaged in this business, and in the spring of 1909 were the principal buyers. Later in the year it developed that the farmers, discouraged by the prices, which were much below the cost of production, were not employing the usual care in preparing their crop, and the natural conditions were such that careful observers were convinced that the crop was going to be a very small one. Spinners and speculators, however, had become accustomed to large crops and low prices, and, resisting the tendency of the market to rise, continued to make offers to sell at low prices until the market was what is technically called "oversold." The result was that by September and October prices had advanced to 12½ cents, and, when it became clear to everyone that the cotton crop was going to be not only a small one, but a disastrously small one, prices advanced by December to 16½ cents in all the markets of the world; and this advance applied to Brazilian, Egyptian, and Indian, as well as to American cotton. The more conservative of the "hedge" buyers sold their cotton in December; but some of the more optimistic went on pyramiding their paper profits, so that in January, when there was a flurry in the stock market and credit became difficult to obtain, the bears made an attack upon the market, put down prices, and called on the most prominent bull for margins to which he was unable to respond. The forced sales made for his account broke the price of cotton on the New York Cotton Exchange about $15 a bale, while the actual cotton in the markets of the world fell only about $2.50 a bale. The operator effected a settlement with the leader of the bear faction; but the bears, emboldened by their success and hoping to find other operators in a similar condition, pursued their tactics of making offers to sell; but the price in New York was so much below the price in any other part of the world that orders from all over the world came into the market, with the result that prices were promptly carried back to their old level, and the bears found their last position worse than the first. They had made heavy contracts for delivery at prices which showed a heavy loss, and they were unwilling to take their medicine and pay up. As almost invariably happens when bears fail in their attempt to destroy the value of some one else's property, they "squealed." For some reason or other the community always expects the bull to pay up, but regards it as quite the proper thing for the bear to lay down on his contracts and to evade them if he possibly can.

In this case the bears promptly applied to the then Attorney General and he turned over the whole power of the Government to their assistance. Detectives and Assistant Attorneys General were sent to New York, where they sought, by offers of immunity, to obtain evidence upon which to base indictments, and such indictments were obtained. The allegations in the indictments bore little or no relation to the actual facts in the case, but were presumably intended to present a question of law, which was raised by demurrer.

The circuit court of the United States decided the demurrer against the Government. The Government then appealed to the Supreme Court and that court, by a divided bench, found that the court below must have assumed the indictment to allege as a fact that the defendants had conspired to buy up and control the entire crop of cotton and to withhold it from the market until they could receive undue and

monopolistic prices; and, further, that the court below had then found that such acts did not constitute a breach of the Sherman law—a finding which one lawyer is reported to have said was equivalent to "finding that the judge of the court below was a congenital idiot."

The case being again sent to the court below, the new administration abandoned the old indictments, and, following certain language in the decision of the Supreme Court, obtained a new indictment, on the accusations that the defendants bought from speculators (defined to be persons not having the cotton which they had agreed to deliver) knowing that the result of such purchases would be that the speculators would be forced to go into the market and buy cotton in competition with the regular consumers and that this competition would result in prices above the normal and fair prices. No consideration was taken of the acts of the bears, or the effect of their action in making offers to sell in case these offers were not accepted. Of course, if the bears can go on making offers to sell at constantly lower prices, and bulls do not dare to accept these offers, because of the Sherman law, our farmers and planters in the South will have to be content, as they were in the past, with a bare living, for their prices will be adjusted for them by the foreign spinners and their agents.

I suggest that while you are clearing up the Sherman law, it will be very well to clear up this point and take note of the fact that the reasons which apply the law to articles which we consume ourselves do not apply to articles which we sell abroad.

One good result of the contest has been this: The clique that for many years controlled the New York Cotton Exchange has through the force of public opinion been largely deprived of their power. So much public attention was called to the exchange and its methods that it no longer dares to attempt the worst of the evils familiar in the past. The high prices for the two years 1909–10 and 1910–11 added so greatly to the wealth of the South and so firmly established the credit of many farmers and planters that the old and wasteful method of marketing has been much changed. Fairer and more normal prices have been obtained, especially for the unprecedented crop of 1911. Think of it. Attorney General Wickersham indicted the defendants because the price of 16¼ cents was made for American cotton against a crop of 10,500,000 bales, when the world took a 16,000,000-bale crop and paid up to 13½ cents. Some time the South will appreciate the work that has been done for her, and will in some form show her appreciation and esteem for Frank B. Hayne, Eugene Scales, and William P. Brown. In the meantime, the United States Government is the richer for the fines imposed upon these gentlemen, and the poorer in that it has made an unwise, unjust, and unfair application of the Sherman law, and has committed an act of injustice in punishing individuals for seeking to maintain an economically fair and equitable price for cotton against the efforts of those who sought to arbitrarily depress it.

ROBERT M. THOMPSON.

The Chamber of Commerce. C. W. Hobson, president; T. E. Jackson, first vice president; H. A. Olmsted, second vice president; J. R. Babcock, secretary; A. V. Lane, treasurer. Directors: W. E. Greiner, Jno. W. Philp, Jas. A. Stephenson, Fred E. Johnston, A. M. Matson, H. A. Olmsted, Louis Lipsitz, W. P. Upham, Alex Sanger, C. W. Hobson, Geo. B. Dealey, Sam P. Cochran, T. E. Jackson, Herbert Marcus, W. C. Lemmon, M. M. Crane, J. W. Atwood, S. W. King, Jr., Tom B. Cranfill, F. E. Keith, Z. E. Marvin.

DALLAS, TEX., *February 19, 1914.*

HON. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives, Washington, D. C.

DEAR SIR: The chamber of commerce of the city of Dallas respectfully protests against certain portions of the bill introduced by you, and referred to the Judiciary Committee, of which you are chairman, being entitled "A bill to supplement an act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

The portions to which we desire to object may be found in section 9, in which it is said:

"That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation."

We submit that the language of section 9 is too sweeping It in effect provides that it is a crime to attempt to monopolize trade or commerce among the several States, or with foreign nations, or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller. It then becomes necessary to inquire what would be deemed an intent to injure. If one competitor by lowering the prices should take away a customer from another competitor it would be an injury to that competitor from whom the customer is taken. That legal maxim, we presume, will obtain in construing the bill, that everyone is presumed to intend the necessary consequence of his own act. When by lowering his price he takes a customer from a competitor, he thereby injures that competitor to the extent of that customer's patronage, and is guilty of the crime denounced by this section of the bill.

Assuming that the quality and quantity are the same of the goods sold, there is but one condition that this section will permit the merchant to consider in the matter of fixing the prices, and that is the freight rates. Yet, it is known in the commercial world that there are many items apart from the freight rates that must be considered in determining whether there is a just or unjust discrimination in the matter of prices. All of the constitutional and legal restrictions against railroads and common carriers discriminating make this necessary distinction. Those provisions of the constitution and statutory law of the various States do not seek to prevent discrimination, but only unjust discrimination. They leave the courts to determine whether the facts upon which the discrimination is sought to be based make it just or unjust. It is impossible for any legislative body, however great its wisdom, to anticipate all the conditions that ought to be considered in passing upon a question of that character. The merchant himself can not always anticipate some of the factors that he must consider in fixing prices. To arbitrarily limit him to the differences in freight rates as the only condition that would justify a difference in prices is not believed to be conducive to public good, or prevent the kind of monopolies that the bill seeks to punish.

It will be noted that the part to which we object can be eliminated without in any sense affecting that portion of the bill which seeks to make the lowering of prices for the purpose of destroying competition a crime. We limit our criticisms to that part which makes the lowering of prices with intent to injure criminal, because we have shown that no customer can be taken away from another competitor without injuring that competitor, and applying the maxim that everyone is intended to presume the necessary results of his own actions, the competitor thus securing a customer would be presumed to intend to injure the competitor from whom the customer is taken.

We do not believe that this is the object of the author of the bill, and feel that in making this protest that as soon as his attention is directed thereto he will not insist on the portion to which the objections are made.

It will be noted that our criticisms of the measure are constructive rather than destructive. We are assuming that the legislative plan outlined by the bill will probably be carried out. But we insist that it is necessary in order to maintain competition to make the fixing of prices more elastic than this bill permits. The discrimination in prices to which the bill should be limited should be unjust discriminations only. This is the rule, as we have heretofore shown, as applied to common carriers. No less liberal rule should be applied to the commercial interests of the nation. No arbitrary definition of unjust discrimination should be made. That should be left to the judiciary to determine. But if any definition of unjust discrimination shall be insisted upon it should be limited to such as are intended to destroy competition, and which are reasonably calculated to have that effect.

Respectfully submitted.

DALLAS CHAMBER OF COMMERCE,
C. W. HOBSON, *President.*
J. R. BABCOCK, *Secretary.*

[SEAL.]

By action of board of directors, executive session, February 17, 1914.

[National Federation Retail Merchants. M. J. Maloney, president; J. R. Moorehead, secretary.]

LEXINGTON, MO., *February 21, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: On behalf of a million and a quarter small retail merchants, a great number of whom I personally represented in a hearing before your committee some days since, I wish to present in their behalf, and at their request, that in considering amendments to the Sherman antitrust law that you insert the following amendment to tentative bill No. 1:

"*And provided further,* That it shall not be deemed an attempt to monopolize or to restrain commerce among the several States to disseminate, through trade associations or otherwise, truthful information as to the methods, practices, or policies of persons, firms, or corporations engaged in commerce among the several States or with foreign nations."

I know the question may be raised as to whether or not such an amendment would partake of the nature of a boycott. In reply to this we would say that we presented to the Committee on Interstate and Foreign Commerce of the House a request that they include in the bill authorizing a trade commission, a supervision of all merchants' trade associations as well as corporations.

If this could be done this trade commission could have supervision over all the acts of voluntary trade organizations, such as the retail associations are.

If some relief of this kind can not be afforded to the small retail merchant, and if he is to continue to be subjected to the disadvantage of prosecution on account of taking concerted action, he will have no opportunity of protecting himself against a more powerful competitor.

Our only object in proposing such an amendment is that the greatest publicity may be given to the acts, policies, and purposes of large corporations doing an interstate business. We are willing to stand or fall under supervision and publicity.

I understand it to be your desire, and the desire of Congress and the President, to cure the evils of business and protect the weaker element in their pursuance thereof. We believe that publicity will do this very thing, and that no relief can ever come from prosecutions or lawsuits. Any business that is not willing to stand publicity as to their policies of doing business has a right to be suspected of not being altogether fair.

I, therefore, in behalf of the small retail merchants of the country, ask your earnest favorable consideration of the above amendment in making up any additional legislation to our antitrust laws.

Respectfully, yours,

J. R. MOOREHEAD, *Secretary.*

[The Sterling & Welch Co.]

CLEVELAND, *February 23, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
Washington, D. C.

DEAR SIR: We hereby give our reasons why the manufacturer should have the power to control the resale price of his merchandise.

First. He is in danger of being forced out of the market, or compelled to abandon the particular article or cheapen its quality by the cutting of the price to a point where it is no longer profitable for the dealer to handle it.

Second. It is to the interest of the dealer to provide the customer with the best merchandise obtainable to retain and increase his customers. This can not be done if price cutting forces the profit below the cost of doing business.

Third. Consumers as a class are better served by a constant supply of a good article than by the opportunity afforded a few to buy it at less than cost for a very limited time.

Fourth. Profit is the object of all business. Therefore, it is evident that in cutting prices to a point below actual cost or the cost plus the expense of doing business, the price cutter is not interested in the sale of the particular article; but, rather by leading the public to believe his price on this article is the prevailing standard of prices throughout his establishment in disposing of all other merchandise.

This is deceiving the public. Frequently, when designs and colorings are involved, the least desirable of the advertised article is intermingled with the most attractive of an inferior quality to accomplish his object.

It is manifestly unfair that anyone should be protected in the power to destroy another's business simply to build up his own.

Respectfully submitted.

THE STERLING & WELCH CO.

FEBRUARY 24, 1914.

To the CHAIRMAN OF THE JUDICIARY COMMITTEE,
Washington, D. C.

DEAR SIR: If you could put in the new bills now being drafted some clause making it a misdemeanor by fine or imprisonment or both for anyone giving or accepting a monetary bribe in the sale or purchase of goods you would efface a great evil now existing in most lines.

For instance, to make the penalty $1,000 for the concern selling the goods and one year for the officers of the company and $500 and six months to the agents of either the seller or purchaser.

This would put a ban on considerable of the graft business.

Yours, truly,

W. G. LAHEY,
256 Eighty-fourth Street, Brooklyn, N. Y.

It's fierce, in some lines especially.

[National Jewelers Board of Trade. Athur Henius, president; Albert L. Stearns, treasurer; Edmund N. Stone, C. P. A., secretary.]

15 MAIDEN LANE, NEW YORK, *February, 24, 1914.*

Hon. HENRY D. CLAYTON, *Washington, D. C.*

DEAR SIR: This organization is composed of a membership of 1,000 of the leading manufacturing and wholesale jewelers and those in kindred trades in the United States. It is a cooperative organization not operated for profit.

At its annual convention held in New York City, on February 11, 12, and 13, 1914, the inclosed resolutions were unanimously passed, and we respectfully submit same for your consideration.

Yours, very truly,

NATIONAL JEWELERS BOARD OF TRADE,
EDMUND N. STONE, *Secretary.*

[Resolution passed at the annual convention of the National Jewelers Board of Trade held at the Hotel Astor, February 11, 12, and 13, 1914.]

Whereas there are a number of bills pending before Congress for the amendment of the Sherman Act; and

Whereas these bills are not understood by merchants; many of whom would undoubtedly be unjustly hampered in the free and proper conduct of their business if they had become laws; and

Whereas there ought to be a thorough examination and free criticism of every part of these bills to the end that the splendid spirit of our merchants shall not be broken by the enactment of laws which are economically unsound;

Be it resolved, That the National Jewelers Board of Trade in convention assembled heartily approving the efforts of the administration to prevent or punish all forms of monopoly or business oppression, nevertheless believes that the Sherman Act, properly administered, is a sufficient instrument to accomplish those ends.

Be it further resolved, That in the event that further legislation is imperative, such legislation should receive the closest scrutiny, and merchants should be given every opportunity to be heard by Congress after they have learned the exact scope and power of the proposed laws.

Be it further resolved, That it is generally not feasible for merchants to go to Washington to appear before the committee having these bills in charge and we respectfully suggest that the far reaching effects of these proposed laws would justify hearings in different commercial centers of the country to the end that all merchants may have equal opportunity to speak on matters which so closely concern them.

Be it further resolved, That copies of these resolutions be transmitted to the President, the Senate, and the House of Representatives.

[Resolution passed at the annual convention of the National Jewelers Board of Trade held at the Hotel Astor, Feb. 11, 12, and 13, 1914.]

Whereas the good and welfare committee of the National Jewelers Board of Trade reports that our national stamping act is neither broad enough in scope nor sufficiently effective to check fraudulent marking of gold and silver, gold and silver plate, platinum, and other metals employed by the jewelry trade, and has recommended that this act be amended or replaced by a complete and effective law; and

Whereas it is the settled policy of the National Jewelers Board of Trade to submit all questions of this kind to the different organizations and various industries which make up the jewelry trade to the end that only such legislation be proposed as shall substantially present the views and wishes of the entire trade.

Be it resolved, That the board of directors of the National Jewelers Board of Trade be and is hereby directed to call a conference of all representative organizations, manufacturers, wholesalers, and retailers in the jewelry trade, and to include in such conference representatives of individual retailers, wholesalers, importers, and manufacturers who may not be represented by organizations or even if represented may desire to participate in such conference.

Be it further resolved, That the board of directors of the National Jewelers Board of Trade appoint a committee to represent the National Jewelers Board of Trade at such conference.

Be it further resolved, That no vote or agreement of the conference shall be binding on any organization taking part therein, but all recommendations shall be reported back to the organizations sending representatives to the conference to the end that each organization may register its wishes or final determinations after receiving the report of its own representatives.

Be it further resolved, That any amendments to, or substitute for the national stamping act which may be adopted by substantially all the organizations represented in the conference shall be presented to Congress by a committee of the conference elected or appointed in accordance with the wishes of the conference, but every constituent organization shall have the right to have at least one representative on such committee.

[Louisville Board of Trade. Logan C. Murray, president; William Heyburn, first vice president; John J. Saunders, second vice president; James M. Johnson, third vice president; Bernard Bernheim, fourth vice president; H. A. Peter, fifth vice president; Oscar Fenley, treasurer; James F. Buckner, jr., superintendent and secretary.]

LOUISVILLE, KY., *February 27, 1914.*

CHAIRMAN OF JUDICIARY COMMITTEE,
House of Representatives, Washington, D. C.

DEAR SIR: By direction of the board of directors I forward you herewith a copy of preamble and resolutions bearing on the antitrust bills now being considered by the Judiciary Committee of the House, and on antitrust legislation generally, unanimously adopted by the board at a meeting held February 25, 1914.

Very truly, yours,

JAMES F. BUCKNER, *Superintendent.*

[Preamble and resolutions adopted by the board of directors of the Louisville Board of Trade at a meeting held Feb. 25, 1914.]

The Judiciary Committee of the House of Representatives is now considering a bill designed for the purpose of prohibiting and preventing monopolies and restrictions in interstate trade, and amending and defining the meaning of the existing antitrust law, and the committee is now giving hearings to those who may desire to submit their views on the subject, and the bill when in shape to suit the views of the committee will be presented to Congress for enactment into law.

This board of trade represents large business interests engaged in interstate trade which will be affected, and which will have to conform to every requirement of the law when enacted.

The directors of this board believe the great mass of the business men of Louisville, and of all sections of the country, sincerely desire to conduct and carry on their business fairly and in conformity to the laws, and they fully realize that the growth of the country and of business has made necessary the adoption of Federal statutes regulating and controlling interstate trade. They believe the laws passed should be not only just, and so that business, both big and little, when fairly and honestly con-

ducted may prosper, but that they should be plain and explicit, and leave no doubt as to what business can do and what business can not do.

The directors of this board know from both observation and experience that the greatest drawback and hindrance to the satisfactory and successful conduct of business is the uncertainty as to the meaning of the law.

We are strong believers in the wisdom of the President in what he said on this subject in his address to Congress January 20, 1914. He then said:

"The business of the country awaits also, has long awaited and has suffered because it could not obtain further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices being now abundantly disclosed can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."

In our judgment the legislation proposed in tentative bill No. 2, now being considered by the Judiciary Committee of the House, is far from meeting the suggestions and the well-considered opinions of the President as set out in his address of January 20, 1914, to the Congress. The bill as it is now before the committee does not "explicitly and item by item state in such terms as will practically eliminate uncertainty," what the law itself means, and the penalty. We believe a number of the most important sections of the bill are plainly susceptible of more than one construction, and they are susceptible of constructions that if so construed would cause a great injustice to honorable business people and would prevent the practical and proper carrying on of business: Therefore be it

Resolved, The directors of the Louisville Board of Trade hereby most earnestly protest against the passage by Congress of tentative bill No. 2, now being considered by the Judiciary Committee of the House, for the reason that it is indefinite and does not plainly state what business may do, and what it may not do, without violation of law, and because important provisions in said bill are plainly susceptible of different constructions, both by business men and by the courts; and for the further reason that the passage of the bill as it now is would result in greater confusion and uncertainty as to what business can do and what it can not do than exists at present, with the consequent loss to business and to the country.

Resolved further, That the Senators and Representatives in Congress from Kentucky be respectfully requested to vote against said bill as it now is, and until it is so altered and amended as to conform in letter and in spirit to the views and recommendations of the President as expressed in his address to the Congress January 20, 1914.

FEBRUARY 27, 1914.

HON. HENRY D. CLAYTON,
Chairman House Judiciary Committee, Washington, D. C.

DEAR JUDGE CLAYTON: As promised, I am sending you herewith:

First. Copy of a letter of the Commissioner of Internal Revenue of October 22 to me, reporting on the number of corporations, classified according to capitalization.

Second. Copy of his letter to me of November 10, 1913, reporting on the number of banks, classified according to capitalization.

I shall be glad to meet with you and Mr. Carlin at your office on Monday at 11.15 to take up further the matter we discussed on Wednesday, if this will be agreeable to you and Mr. Carlin.

Yours, very truly,

LOUIS D. BRANDEIS.

OCTOBER 22, 1913

LOUIS D. BRANDEIS, Esq.,
161 Devonshire Street, Boston, Mass.

DEAR SIR: In further reply to your letter of the 7th instant, addressed to the honorable the Secretary of the Treasury, relative to the number of corporations in the United States having a capitalization of the various amounts stated in your letter, you are informed that of the 305,336 corporations making return for the calendar year 1912, 296,670 have a capital of less than $1,000,000; 4,688 have a capital of $1,000,000 and over but less than $2,000,000; 1,399 have a capital of $2,000,000 but less than $3,000,000;

677 have a capital of $3,000,000 and over but less than $4,000,000; 292 have a capital of $4,000,000 and over but less than $5,000,000; 861 have a capital of $5,000,000 and over but less than $10,000,000; 652 have a capital of $10,000,000 and over but less than $50,000,000; 62 have a capital of $50,000,000 and over but less than $100,000,000; 35 have a capital of $100,000,000 and over.

No data are available which will show how many of these corporations are banks or trust companies. It would be possible by going over the returns to ascertain approximately the information with respect to these, if you shall deem that information necessary.

Respectfully,

(Signed) W. H. OSBORN, *Commissioner.*

NOVEMBER 10, 1913.

LOUIS D. BRANDEIS, ESQ.,
161 Devonshire Street, Boston, Mass.

DEAR SIR: Referring to your letter of September 29, 1913, and the replies thereto contained in office letters dated October 13, 1913, and October 22, 1913, you are further informed that there are in the United States 24,697 banks and trust companies, of which number 24,345 have a capital of $1,000,000 and over, but less than $2,000,000; 56 have a capital of $2,000,000 and over, but less than $3,000,000; 21 have a capital of $3,000,000 and over, but less than $4,000,000; 7 have a capital of $4,000,000 and over, but less than $5,000,000; 18 have a capital of $5,000,000 and over, but less than $10,000,000; 8 have a capital of $10,000,000 and over, but less than $50,000,000. The highest capitalization of any of these is $25,000,000.

It is understood, of course, that this list of banks and trust companies was included in the figures given you under date of October 22, 1913.

Respectfully,

(Signed) W. H. OSBORN, *Commissioner.*

[H. A. Noah, attorney at law.]

ALVA, OKLA., *February 28, 1914.*

HON. HENRY D. CLAYTON,
Chairman Committee on the Judiciary, House of Representatives, Washington, D. C.

DEAR SIR: Herewith I am taking the liberty to hand you certain criticisms of the pending tentative bills known as the antitrust bills, in the form of a carbon copy of a letter this day mailed to Hon. Dick T. Morgan, of your committee.

Yours, very truly,

H. A. NOAH.

[H. R. No. ——. A bill to supplement an act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.]

"SEC. 9. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent thereby to injure or destroy a competitor, either of such purchaser or of the seller: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of difference in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or owners of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase."

The aim of the Sherman Act, unless it has been entirely misunderstood, was to foster competition and to prevent combination which might tend to stifle competition. The clause quoted, with its provisos, forbids competition where grade, quality, and quantity are the same, makes it obligatory upon the mine owner, as distinguished from

every other class of business man, to sell to every solvent offerer to purchase, and, fairly construed, though inconsistently enough, would entirely destroy the authority of the Interstate Commerce Commission to fix the rate of the commodity dealt in by railroad companies, transportation, since it concedes the right of the seller of a product to charge a different and presumably lower price for the large than the small quantity. It must also appear to be inconsistent with the spirit of the original act, as well as with the specific letter of the companion bill, entitled "A bill to include within the meaning of every contract, combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce among the several States or with foreign nations, and within the meaning of the word 'monopolize,' certain definite offenses and to prohibit the same," the third paragraph of the first section of which declares: "Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any other commodity."

The original act (Sherman Act) was passed 24 years ago and has been under fire ever since. During that time it has come to be, perhaps, as well understood as legislation of such far-reaching effect may. While it is still to be decided by the circumstances of each case what is a "reasonable" restraint of trade and what is a "reasonable" return upon an investment, it may fairly be doubted whether any satisfactory definition of that very elastic phrase fitted to measure any and all cases of purported violation can ever be expressed in language. Otherwise, while difference of opinion may occur as to the construction in special cases, the act is fairly well understood. The proposed new legislation, which is undoubtedly intended to define, must inevitably be held to extend rather than amend or modify, since the act itself in a later section provides that nothing contained shall be construed to "curtail" the provisions of the older act. Just how far the extension of the meaning of the act would go must be a question for the courts, and another weary period of years must pass before the business community would feel that it knew approximately what the act, as amended, modified, and extended, did mean and what might safely be done in interstate commerce.

Section 10 of the new act, while subject to all of the objections urged as to section 9, is subject to another practical objection.

It attempts to prevent exclusive contracts for the sale of goods, with the final effect that the manufacturer, jobber, and wholesaler would be left without the right to select their customers, and might not arbitrarily refuse to sell to any solvent offerer to purchase, and at the same price, as to said purchaser, where neither grade, quality, or quantity differed.

Sections 12 and 13, while laying the foundation for extensive litigation, can not be said to be equivocal. Under these sections (by sec. 12) the unfortunate dealer in interstate commerce, provided he is so unfortunate as to be found to have transgressed any of the criminal features of the old or new act, though the litigation endure for a generation he is denied the ameliorating effect of time, as expressed in the statutes of limitation and holds, or might hold, his entire fortune subject to later litigation by his competitors or customers, while section 13 authorizes a new and additional form of injunctive relief, which will probably be highly appreciated by the labor unions.

The second bill (title, supra) brings within the provisions of the Sherman Act combinations and agreements:

"First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

"Second. To limit or reduce the production or increase the price of merchandise or of any commodity.

"Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

"Fourth. To make any agreement, or arrive at any understanding by which they directly or indirectly undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, reduction, or transportation of any product, article, or commodity."

Section 2 declares such acts unlawful. Section 3 fixes the penalty. Section 4 makes the directors, officers, and agents acting in the unlawful matter personally liable for a misdemeanor, with the same penalties, and section 5 provides that nothing in the act under discussion shall operate to "curtail" the effect of the Sherman Act. How far it may modify, amplify, or extend the meaning of the older act is left for the construction of the courts.

What effect these new provisions would have is entirely problematical, except that it can hardly be doubted that their enactment would add to the prevailing uncertainty and certainly would foster anything rather than competition.

A third bill also pending before your committee is entitled "To prohibit certain persons from being or becoming directors, officers, or employees of national banks or of certain corporations."

This is the "interlocking-directorate act." Its fourth section provides:

"* * * if after two years from the date of the approval of this act any two or more corporations engaged in whole or in part in interstate or foreign commerce have a common director or directors, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations, and if such corporations shall have been theretofore, or are, or shall have been, by virtue of their business and location of operation, natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce under the provisions of and subject to all the remedies and penalties provided in an act to protect trade and commerce against unlawful restraints and monopolies."

This proposed act is fortunate in that it leaves substantially nothing to conjecture or for construction.

By the first section, individuals, members of partnerships or officers of corporations manufacturing or dealing in certain railroad supplies, including coal, and officers of banks or trust companies, are forbidden, in effect, to invest in railroad or other public service stocks in companies conducting an interstate business; that is, such persons are forbidden by reason of their business to become directors of public-service corporations, and so forbidden to, in the most effective way look after their own interests, the result of which in the ordinary course is to discourage such persons from investing in the class of securities mentioned. The shoe manufacturer, who may or may not have some knowledge of railroad, telegraph, or telephone affairs, may become a director of a public-service corporation, but not the locomotive builder, whose life has been devoted to the acquirement of exact knowledge on at least one branch of the many necessary to the practical direction of such a corporation; nor the owner of a steel-rolling mill, nor the coal-mine owner, each presumably because conflicts of interest might arise in which the director might be more interested in selling than in buying. The financial affairs of the corporation must be conducted by persons not actively engaged in banking.

It seems to me that the agitation with relation to directors of corporations is misplaced. The director of a corporation, or the partner in a partnership, both at common law and under the statutes, owes to his corporation or partnership his utmost endeavor, his best knowledge, and his loyalty. In transactions for the corporation or partnership in which, either for his own direct or indirect profit or for the profit of any third person, he knowingly permits the corporation or partnership to be overreached, he makes himself personally liable in damages and may, if the statute so provide, also be liable criminally. Suppose that he is the director in two corporations, one of which is buying of the other, whether steel rails or credit is unimportant, he owes to both his best endeavor. He owes to neither any duty which will compel or permit him to overreach one in the interest of the other.

Certainly such relations may permit abuses to creep in, but such abuses may be readily corrected as the law now stands. On the other hand, by refusing to men who may by their dual authority be tempted to favor one corporation as against another the right to sit on more than one board of directors, the community and the stockholder in the corporation and in each of such corporations are thereby deprived of the services of the most competent men. Certainly each should be held to the utmost loyalty to the buying corporation. It seems to me to be the occasion for a balancing of the evils and good which may result. The community is entitled to the best possible service consistent with fair return to the owner. In great affairs, as in public-service matters, that best possible service may only be realized by the use of the ability of the best possible men. If such men are also interested in business which makes them at times sellers or possible sellers to such a corporation, they are still bound by the rule of absolute loyalty to the corporation. As you will remember in the recent Frisco tangle, Mr. Yoakum, with other members of the board of directors of the parent road, is charged with having paid excessive valuations of the Brownsville line, among others. He was a member of the syndicate which built the Brownsville road, and probably the leading spirit in that syndicate. If, as a director of the Frisco, he bought this other line at a valuation which was excessive, he is, with the others, personally liable to the Frisco. On the other hand, if it was a fair purchase, if the Frisco has really been benefited by it, or if honest men might disagree as to the good faith of the transaction, in spite of the dual character in which he acted he can not and should not be liable. On the other hand, without just such a man at the head of Frisco affairs it is altogether probable that a great stretch of country now served by this line would have remained perhaps for many years without service or without adequate service. The country can not afford to discourage such men unless they are clearly, intentionally corrupt and

wrong. It may do without their services, of course, or confine them to a limited business, but the country will move more slowly.

The title of this bill emphasizes the idea that it is directed against certain great banks or men or both. Incidentally it is certain to accomplish grave wrong to many smaller institutions and men. You will note that section 2 deals with the banking community, private bankers being expressly suggested. One naturally thinks of the New Haven and of the Morgan house. Let us assume that the banking house is responsible for the New Haven receivership and that it (the banking house) has secured excessive profits through its handling of the financing of the road's business. Still the same rule applies. Absolute loyalty to the corporation is the plain duty of the director. Should all of the rest of the business community be punished for the future because this banking house with this particular railroad has betrayed its trust? Understand me, I am by no means saying that it has. I do not know. Probably you do not. As I do not know if Mr. Yoakum was right or wrong, as probably you do not, and it seems to me wrong to condemn unheard. More and worse than this seems to me to be the fostering of legislation which will not only punish the supposed guilty but involve the innocent in entanglements which it may take years to unravel. Let me illustrate. In practically every western community there are men engaged in the banking business who are interested in many banks. They are directors of many. They have, and you will be able to think of specific instances, by long courses of honest and conservative dealing built up reputations for skill and careful management which make their very names assets to the small struggling bank in the small struggling community, of which we have so many in this agricultural community. Under the proposed legislation, not only would such men feel obliged to withdraw from the directorates of banks other than one, but, also, since they could no longer control the handling of the smaller class of bank, they would feel that they could only be safe with their investments by placing them where they could be permitted to look after them. More than this, in many instances the stockholders of such banks have invested because of the personality and standing of the banker. They would naturally follow his example and withdraw from the field. As you well know, there are many small communities which need banking facilities, but in which banks can only be sustained by the strength and experience of the men behind them. Such communities under the proposed legislation would inevitably be hampered in their growth for perhaps several years and until the business of the section had grown sufficiently to profitably support a distinctly local bank. It may be said that no bank should be established until the community can support it. Experience, however, is that the small bank is the nucleus of the business growth of the community and is a pioneer, waiving present profit with the hope of the future to sustain the investor. What is true of this section of the country is also true of very many other sections.

I understand these bills to be merely tentative; that they do not necessarily represent the ideas even of the author, but are subject to suggestion of modification. With all deference I wish to suggest that no possible good can grow out of the interlocking directorate act as such. If the existing laws, criminally, are insufficient to oblige fair dealing by directors, by all means strengthen them, but leave us the opportunity to use our strongest men in as many ways as is possible. Common sense is not as common as its popular definition might seem to signify.

If it seemed possible to effectively define, by general definition to fit all cases or practically all, with certain and only certain exceptions, the meaning of the Sherman Act it might be wise. Unfortunately that act, in the nature of things, deals with a phase of human affairs which, while broadly stated, is always the same, yet in the application it must be found that each case must stand on its own circumstances; that is, what is monopoly and what tends to create monopoly may be susceptible of one definition at one time and an entirely different definition at another time or at another place. You will remember Bishop Hatto and his famous monopoly of grain. His tower contained about as much as a carload, of which in a good year a single station on the railroad may ship a thousand.

I am aware that it has been suggested from some quarters that the passage of the directorate act would have the effect merely of electing on many boards dummies who would in reality represent the ideas of the real owners, while the latter would be relieved of civil or criminal responsibility. I take it that the object of these bills, all of them, is to accomplish something, not merely to appear to, and that that object in the case of this particular bill is to take away from the corporations, save one, not merely the bodily presence of the influential man, but also his influence. Those corporations need him, need his experience, his influence, and his sense of responsibility, and in my judgment should not be deprived of either.

Yours, very truly,

H. A. NOAH.

[The Henry & Wright Manufacturing Co. R. C. Henry, president; Joseph H. King, vice president; D. M. Wright, secretary and treasurer.]

HARTFORD, CONN., *March 10, 1914.*

Hon. AUGUSTUS LONERGAN,
Washington, D. C.

DEAR SIR: We desire to call your attention to section 10 of the tentative so-called "five brothers bill," now being heard by the Committee on the Judiciary of the House of Representatives, and urgently request that you use your influence to see that section 10 is wiped out completely, on the grounds that it will do serious damage to the manufacturing industry of the country.

This ground is based on the easily understood fact, that it is manifestly unfair to give more value in manufacturing goods for a dollar to one man than to another and it is absolutely impossible for the manufacturers to prevent this condition unless they are allowed to appoint sole agents in any fixed territory who will hold to guaranteed prices, and the guaranteeing of the price on articles of manufacture by any one concern does not kill competition in any sense of the word, as it never prevents other manufacturers from producing and selling the goods in any way they see fit, unless the goods in question are protected by patents which are recognized as legal monopoly, and also unless the manufacturer is allowed to make an agreement with the sole agent whereby he will handle his product solely and not in connection with a competitive product, the passage of the section would open up a condition whereby the agents could nominally handle and accept the agency for a certain line of manufactured goods for the sole purpose of sidetracking the sale on those goods in favor of some that paid a possible higher commission.

We respectfully request that you look carefully into the situation and advise us whether or not you agree with us in our contention, and if we may look to you to oppose the passage of section 10.

Yours, very respectfully,

D. M. WRIGHT, *Treasurer.*

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY G. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 28.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, March 10, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. I desire to say, gentlemen of the committee, that Mr. Whittier has handed to the chairman of the committee two letters and requests that they be read into the record.

(The letters referred to are as follows:)

[Robert H. Ingersoll & Bro., Ingersoll and Ingersoll—Trenton watches. 315 Fourth Avenue.]

NEW YORK CITY, *March 9, 1914.*

HON. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

SIR: I notice from the stenographic transcript of the proceedings before your committee of Friday, the 6th instant, that one of those who appeared made the statement that the Ingersoll dollar watch is sold by the Waterbury Clock Co. to us for 26 cents each. This statement is so grossly erroneous and so misrepresents the real worth of the watch that its repetition might do us great injury. I beg to request of you, therefore, that you let it be known to the members of your committee that the cost of these watches is substantially double the figure quoted to your committee. Anyone who has any knowledge of manufacturing costs ought to know that 26 cents is absurdly impossible. The case alone costs a big fraction of this amount, to say nothing of supplying the 125 parts of the watch, putting them together, regulating, timing, and guaranteeing satisfactory performance during a year.

Respectfully,

WM. H. INGERSOLL.

[The B. V. D. Co., 65-67 Worth Street.]

NEW YORK, *March 9, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: I am told that in the testimony given last Friday by E. W. Bloomingdale, Esq., representing the Retail Dry Goods Association of New York, he testified that Robert Reis & Co. are the sole owners of the B. V. D. product.

Being in position to know differently, in behalf of this company, I ask of you to see that this correction is made.

The facts are that neither Robert Reis & Co. nor any member of said corporation, now, or in the past, have ever directly or indirectly owned any stock of the B. V. D. Co. The firm of Robert Reis & Co. are wholesale customers of the B. V. D. Co. This company has plenty of such customers.

Yours, truly,

ABRAHAM ERLANGER,
President the B. V. D. Co.

The following matter was later received and ordered printed:

SUPPLEMENT TO TESTIMONY OF ABRAHAM ERLANGER OF FEBRUARY 18, 1914.

[The B. V. D. Co., 65-67 Worth Street.]

NEW YORK, *March 9, 1914.*

Mr. J. J. SPEIGHT,
Clerk House Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: I inclose you papers asked for (see record, p. 743) and herewith also complete my testimony of February 18, 1914, by sending extracts from various letters, which will indicate the injury that price cutting does.

I quote these literally.

From New Bedford, Mass.: "We do hope that you find some way to restrict merchants of cutting prices on your B. V. D. garments, and though we were one of them, it was not before half a dozen others started to cut price and we had to follow suit."

A party writes the following from Detroit, Mich.: "Surely such action as this will do your goods and myself no good. I have sold about $200 worth of B. V. D. this season, and I feel that the action of selling B. V. D. at 79 cents ($1 goods) is unjust to me."

The following received from Camden, N. J.: "Said party is selling and extensively advertising B. V. D. at 35 cents per garment (50 cent goods) and is selling them in quantities, too, yet you expect honest tradesmen to buy your goods and uphold the price, and then pay for them. Surely you should find some way to get at this fellow, for he did the same thing last year. Please give this some attention this year or you will find imitation B. V. D. on my shelves next year."

From Biddeford, Me.: "We do not believe in throat cutting. We believe in 'Live and let live.'"

The following is a communication from Hartford, Conn.: "Your thesis on the students of economics sounds very well, but commercially speaking does not fill the bill. We can not wait until Congress, which you well know is a slow moving body, passes legislation to right what you consider a wrong. We are strong believers, as you are, in maintaining prices, but are not believers in sitting still and seeing our competitors undersell us. We still believe that you, having established a price, it is up to you to see that it is maintained. We think we have acted very fair and have shown a great deal of patience in this matter and assure you that at any time the price is restored to the old basis, we will only be too glad to fall in line."

From San Antonio, Tex.: "You will note the price for which B. V. D.'s are being sold for in San Antonio. We are large users of B. V. D. underwear and sell over 300 dozen per season, and we have been subjected to this competition not only from this concern but also other concerns in San Antonio, and we are writing you to ascertain whether this can not be stopped. We at all times maintain the correct selling price on B. V. D. underwear, and we believe that you intend for all users of your merchandise to do the same."

The following from Brookline, Mass.: "I am writing this letter to you for protection on B. V. D. prices. Well-known party here has a sale this week and is selling B. V. D. at 35 cents (50-cent goods). Now, I can not, nor will I, sell my stock at 35 cents, yet my sales are nothing since he started this sale."

From Mercedes, Tex.: "We have a merchant in town that sells them for 75 cents per suit ($1 goods). We can not meet those prices. He advertises them in the paper and keeps them in the window at these prices."

From East Lynn, Mass.: "I would like to see you soak this man, as he cuts the prices on everything."

The following comes from Trenton, N. J.: "One firm is selling them at 37 cents and two firms at 39 cents (50-cent goods). These merchants are all close competitors, and we are naturally somewhat provoked at your inability to maintain prices. We trust you will use your best influence to immediately stop this practice."

This from Pottsville, Pa.: "Kindly take up the matter referring to cut prices on your garments, as we wish to keep a standard price."

This comes from Perry, N. Y.: "Someone has cut the price to 90 cents a suit ($1 goods), and of course that puts us in a bad light, as we have always sold at $1 a garment."

This from Davenport, Iowa: "We are not in sympathy with the action. We might add that we took this concern to task for this unwarranted and unfair cut, and he claims that others cut the price before he did. We hope you will be able to effect a harmonious agreement, and we assure you that you can count upon our cooperation."

From Birmingham, Ala.: "We have never cut B. V. D. before our neighbors cut them, but have always cut the price after our neighbors done so to protect ourselves As to your request asking us never to cut the price of B. V. D., we wish to say that nothing would suit us better than to make our legitimate profit at all times, and if you can show us that our neighbors and other merchants in this city have agreed with you not to cut the price at any time of the year, why, we will be more than glad to give you a written contract never to cut your garments."

From Washington, Pa.: "I am not a price cutter. As other stores in Washington advertised and displayed your goods at cut prices, did not feel that I could do otherwise."

Yours, truly,

ABRAHAM ERLANGER,
President of the B. V. D. Co.

[The B. V. D. Co., 65-67 Worth Street.]

NEW YORK.

GENTLEMEN: We inclose you copy of your orders given to us.

We send you the patented B. V. D. union suit agreement signed by us and ask you to sign same, returning to us one copy and retaining one for yourselves. This agreement has been revised to meet conditions as they exist at present.

If for any reason you decide not to sign the same, please note carefully that your order for the goods has been accepted by us only upon the conditions named in said agreement.

Note carefully the conditions, so that nothing is done to injure us, your fellow jobbers or retailers who deal in these goods.

Very truly, yours,

THE B. V. D. Co.

This agreement made this.....day of....., 191.., in the city of New York, State of New York, between the B. V. D. Co., hereinafter called the company, and.....of....., hereinafter called the second party, witnesseth:

(1) Whereas the B. V. D. Co., as the exclusive licensee under letters patent No. 852,306, dated April 30, 1907, is manufacturing B. V. D. union suits, and is prepared to issue licenses to sell such patented goods upon certain conditions hereinafter referred to.

(2) The parties hereto agree that all orders for said B. V. D. union suits, given or to be given by the second party to the company, shall be considered as given and accepted on the conditions herein set forth, and all such B. V. D. goods are and shall be delivered to the second party upon and subject to the conditions herein set forth.

(3) In order to prevent the creation of special privileges to some dealers as against others, and that the public may obtain the goods at a fair and uniform price, and be protected against substitution, the license to sell or dispose of such patented goods is such that they are licensed to be sold or disposed of only at prices not below those herein mentioned, to wit: When sold or disposed of at wholesale, then to be sold or disposed of not below the wholesale prices hereinafter set forth, and when sold or disposed of at retail, not to be sold or disposed of below the retail prices hereinafter set forth.

(4) The second party agrees to do whatever they can toward supporting said license, and agrees to call the attention of all their customers to the fact of said license, as well as to the license as printed or attached to any box containing said patented articles.

(5) Upon knowledge or information that any particular retailer is endeavoring to create a special advantage for himself over his neighbors by depreciating the value of the patented goods or by advertising them for sale at prices below the fair market value hereof, the second party shall not deliver to such retailer any more of said patented articles.

(6) Said union suits are not to be consigned for sale by the second party to any one.

(7) All union suits now or hereafter ordered by the second party are and shall be delivered by the company to the second party on condition that the following minimum prices to retailers and to consumers respectively shall be faithfully maintained by the second party, not only as to such suits delivered directly to the second party by the company, but also as to all such union suits, no matter from whom obtained.

SCHEDULE OF PRICES.

(8) Price to retailers or dealers f. o. b. city of wholesaler, 2/10-60 extra or equivalent.

	Per dozen.	Price to consumer per suit.
UY	$8.25	$1.00
U1	8.25	1.00
U1D	8.50	1.00
U1H	8.75	1.00
U1HD	8.87½	1.00
U2	12.00	1.50
U2D	12.50	1.50
U2H	12.62½	1.50
U2HD	13.00	1.50
U3	12.00	1.50
U3D	12.50	1.50
U3H	12.62½	1.50
U3HD	13.00	1.50
U4	15.50	2.00
U4D	16.00	2.00
U4H	16.25	2.00
U4HD	16.75	2.00
U5	16.00	2.00
U6	16.00	2.00
U6H	16.75	2.00
U7	16.00	2.00
U8	16.00	2.00
U9	16.00	2.00
U10	24.00	3.00
U10H	24.87½	3.00
U12	24.00	3.00
U15	24.00	3.00
U15H	24.87½	3.00
U16	24.00	3.00
U50	37.50	5.00
U1X	10.25	1.25
U1DX	10.50	1.25
U1HX	10.75	1.25
U1HDX	10.87½	1.25
U2X	14.00	1.75
U2DX	14.50	1.75
U2HX	14.62½	1.75
U2HDX	15.00	1.75
U3X	14.00	1.75
U3DX	14.50	1.75
U3HX	14.62½	1.75
U3HDX	15.00	1.75
U4X	17.50	2.25
U4DX	18.00	2.25
U4HX	18.25	2.25
U4HDX	18.75	2.25
U6X	18.00	2.25
U6HX	18.75	2.25
U10X	26.00	3.25

(9) The second party shall not sell or dispose of any such patented goods to any other wholesalers anywhere, unless said other wholesaler then has a contract with the Company similar to this contract and is then living up to the same, in which case, the second party may sell to such wholesaler at any price that may be agreed upon between them.

(10) If any of said goods shall be sold or disposed of by the second party, at wholesale or retail, respectively, below the respective prices in the respective schedules herein set forth, except to wholesalers with whom the Company has a contract as hereinbefore provided, or shall violate any other of the provisions of this agreement, the Company shall have the option to declare the license to sell or dispose of such patented goods, revoked and canceled, and if such option is exercised, then the Company may retake all of said patented goods which said second party may have in their possession or under their control; the Company after receipt of said goods to pay the net price originally received by it for said goods.

(11) If the second party shall violate any of the provisions of this agreement, the Company shall at its option have the right to cancel all unfilled orders and contracts which it has or shall then have from the second party.

(12) The aforesaid license will be modified by the Company as to soiled goods, provided the retailer agrees as a part of his order for such soiled goods, that if advertised or placarded he will designate them as "Salesmen's samples" or "Soiled samples" and that this designation will be so prominent that the impression will not be created in the minds of the public or buyers, that the value of clean B. V. D. goods is being depreciated.

(13) All acceptances by jobbers of orders from retailers for soiled goods, to be indorsed "Accepted on condition that such soiled goods if advertised or placarded must be designated as 'Salesmen's samples' or 'Soiled samples.'"

(14) If the company shall be prevented by fire, accidents, earthquakes, strikes, lockouts, or labor difficulties, from filling orders given by the buyer, then it shall be required to fill such orders only in proportion to its reduced output, and the portion of such orders remaining unshipped on the following July 31, may then be canceled by the Company.

(15) No orders for B. V. D. union suits shall be considered as accepted by the Company, except subject to the conditions herein specified, and until such orders are accepted in writing by the Company in New York City. This contract, as well as all orders given thereunder, shall be considered as made at New York City, and to be binding in the United States, its Territories, and all its possessions, including Porto Rico, Hawaii, and Philippine Islands.

Signed and delivered in the presence of—

.....
.....

THE B. V. D. Co.,
....., *President.*

(This license notice is placed on every box):

NOTICE.

Price, $1.00 per suit.

Made for the B. V. D. Co., by the Erlanger Underwear Manufacturing Co., of Baltimore, Md., U. S. A.

Patented U. S. A. April 30, 1907, No. 852,306.

This garment U1 is licensed to be sold to consumers for $1.00 a suit. If delivered by jobbers to dealers for sale to consumers it is licensed to be so delivered upon the special terms embodied in the regular printed jobbers' license. No license other than the above is granted under the patent.

The above notice specifies the license granted by the patentees under the patent and is not intended to define rights other than those derived from the direct license under the patent.

NEW YORK, N. Y.

We have received orders from you for two-piece B. V. D. garments manufactured by us (which garments we will hereinafter speak of as B. V. D. goods), which orders and subsequent orders accepted by us we are about to and will fill under and subject to the conditions hereinafter set forth.

After the shipments to you we have and will have on hand in our stock B. V. D. goods of the same style and quality as those shipped to you, and we will continue manufacturing B. V. D. goods of the same style and quality.

The price of B. V. D. goods, as you well know, has been established by their quality and merit.

In order that we may sell at the proper price such other B. V. D. goods as we have and will still have on hand, and continue to manufacture B. V. D. goods of the same style and quality as those about to be sold to you, it is and will be necessary that wholesalers of our goods similar to those about to be shipped to you should receive a legitimate profit on such B. V. D. goods—that is, the difference between our wholesale price and the prices to retailers hereinafter set forth, which experience has shown to be a reasonable profit—it is therefore necessary that you shall not sell any B. V. D. goods which shall be shipped by us to you at a price less than the prices hereinafter set forth.

Your title to the B. V. D. goods, which we will deliver to you under the orders which we now have from you or any subsequent orders, is and shall be subject to following condition, to wit: That if you sell or dispose of any two-piece B. V. D. garments to any wholesalers, except as hereinafter set forth, or to any retailers or anyone else, for less than the prices hereinafter set forth, the title to all of the B. V. D. goods which shall be delivered by us to you then in your possession or control shall revert to us, and we shall have the right to retake the same, we to return the net price paid by you to us for such goods so retaken by us, or, if you owe us any amount at such time, the net price of such goods shall be credited to you, and all unfilled orders from you which we may have shall, at our option, be canceled.

There is no objection to your selling our B. V. D. goods to such wholesaler as we have accepted orders from for this or the coming season (the list of these in your city we will send you later) at such price as you and such wholesalers may agree upon.

The following are the prices herein referred to f. o. b. city of wholesaler:

	Per dozen.	
Y6K-Y23	at $3.60	less 2/10 days, 60 days dating or equivalent.
15K-76N	at 4.12½	less 2/10 days, 60 days dating or equivalent.
15KD	at 4.37½	less 2/10 days, 60 days dating or equivalent.
73N	at 4.30	less 2/10 days, 60 days dating or equivalent.
25K-25N	at 4.37½	less 2/10 days, 60 days dating or equivalent.
20K-20N	at 5.75	less 2/10 days, 60 days dating or equivalent.
23K-23N	at 5.75	less 2/10 days, 60 days dating or equivalent.
35A-35N	at 8.00	less 2/10 days, 60 days dating or equivalent.
35H	at 8.37½	less 2/10 days, 60 days dating or equivalent.
38A-38N	at 8.25	less 2/10 days, 60 days dating or equivalent.
38H	at 8.62½	less 2/10 days, 60 days dating or equivalent.
39A-39N	at 8.25	less 2/10 days, 60 days dating or equivalent.
40A-40N	at 8.25	less 2/10 days, 60 days dating or equivalent.
41A-41N	at 8.25	less 2/10 days, 60 days dating or equivalent
41H	at 8.62½	less 2/10 days, 60 days dating or equivalent
42A-42N	at 8.25	less 2/10 days, 60 days dating or equivalent
43A-43N	at 8.25	less 2/10 days, 60 days dating or equivalent
47A-47N	at 8.25	less 2/10 days, 60 days dating or equivalent
48A-48N	at 8.25	less 2/10 days, 60 days dating or equivalent
49A-49N	at 8.25	less 2/10 days, 60 days dating or equivalent
91A-91N	at 12.00	less 2/10 days, 60 days dating or equivalent
92A-92N	at 12.00	less 2/10 days, 60 days dating or equivalent
93A-93N	at 12.00	less 2/10 days, 60 days dating or equivalent
93H	at 12.37½	less 2/10 days, 60 days dating or equivalent
94A-94N	at 12.00	less 2/10 days, 60 days dating or equivalent
95A-95N	at 12.00	less 2/10 days, 60 days dating or equivalent
B30	at 4.75	less 2/10 days, 60 days dating or equivalent
B31	at 4.75	less 2/10 days, 60 days dating or equivalent

Quarter (1/4) sleeve shirts in styles 20 to 95, inclusive, are designated by letter "H" added to style number, and sell at 37½ cents per dozen above price of the sleeveless shirts of like number.

The drawers in sizes 46-48-50, are 75 cents per dozen higher in price than the prices above listed.

The shirts in sizes 48 and 50, are 75 cents per dozen higher in price than the prices above listed.

In sizes 52 and 54* in both drawers and shirts the price is $1.50 per dozen higher than the prices above listed.

For size 56* in both drawers and shirts, the price is $2.25 per dozen higher than the prices above listed.

*No drawers and shirts made larger than size 52 with the exception of styles 15K-76N-73N.

	Per dozen,
11	at $8.75 less 2/10 days, 60 days dating or equivalent.
22	at 12.00 less 2/10 days, 60 days dating or equivalent.
33-44	at 16.50 less 2/10 days, 60 days dating or equivalent.
66	at 16.50 less 2/10 days, 60 days dating or equivalent.
55	at 19.00 less 2/10 days, 60 days dating or equivrlent.
1L-2L	at 12.50 less 2/10 days, 60 days dating or equivalent.
3L-4L	at 16.50 less 2/10 days, 60 days dating or equivalent.
8L	at 19.00 less 2/10 days, 60 days dating or equivalent.
9L	at 22.50 less 2/10 days, 60 days dating or equivalent.

In case we shall be prevented by fire, accidents, earthquakes, lockouts, strikes, or labor difficulties from filling orders given by you we will fill the orders as soon as practicable, and only in proportion to our reduced output, and all orders remaining unshipped by the following July 31 may be canceled by us.

We beg to thank you for your orders.

Yours, truly,

THE B. V. D. Co.

Per.....

The CHAIRMAN. The committee will take pleasure in hearing from Mr. Charles A. Ireland, the president of the National Hardware Association.

STATEMENT OF MR. CHARLES A. IRELAND, OF IONIA, MICH., PRESIDENT OF THE NATIONAL RETAIL HARDWARE ASSOCIATION.

Mr. IRELAND. Mr. Chairman, while I have no particular apology to offer for my appearance here, I do desire to say that I was called here hurriedly and have not had very much time in which to prepare myself.

I say that, in view of the fact that all these circumstances and surroundings are so foreign to what I am acustomed to. I also desire to ask the committee to appreciate the fact that I appear before you in the rôle of a small country merchant who desires to present to you briefly our side of the case. I believe I can do that in much less time, and possibly with more satisfaction to myself and, I hope, with better satisfaction to you, by being allowed to complete the remarks I have to make on this subject. I will say at the beginning that the National Retail Hardware Association was organized some 14 years ago and has 36 affiliated States. We have a membership of about 15,000 active members, with several thousand more who are affiliated with us in the sense that we are representing about two-thirds of the 30,000 active retail hardware merchants in the United States.

I have not taken into consideration the fact that there are a large number of general merchants who handle hardware goods, so that in reality to-day we are speaking for a large body of men who are interested in the sale of this class of merchandise.

I desire to say for your information that 75 per cent of the membership of the National Retail Hardware Association is composed of members who live in towns of less than 10,000 inhabitants, so that in reality in coming to you to-day and asking for a hearing we are representing the smaller class of retailers in the country.

The policies of the National Retail Hardware Association possibly may be of interest to you so that you may know just what our work has been along this line. I would say for your information that we have advocated for years, as an organization, the enactment of the things now before your committee. In order that you may know just what our purposes are, I desire to read into the record a brief statement of the things we advocated seven years ago, so that you may understand that the views we are presenting this morning are the same we have had and which we have been advocating for quite a long time.

We believe in a safe and more uniform retail credit system.
We believe in truthful advertising and honest measures and weights.
We believe trading stamps and all schemes of a lottery nature should be abolished.
We believe in maintaining a reasonable, restricted minimum selling price on specialties.
We believe that peddlers or transient tradesmen should pay a license for the privilege of competing with the established merchants.
We believe that any law that will close a market for a local tradesman and leave it open to mail-order concerns is unjust, unreasonable, and inconsistent.
We believe that our association work is a great educator for the merchant and results in better and broader merchandising.
We believe in honest men in public office and economical business administration of national, State and municipal affairs.
We believe that good roads are equally as important as deep waterways, and the National Government should assist and encourage both alike.
We believe legislation that encourages centralization of trade, capital, or population at the expense of country towns and communities should be opposed and defeated.

Mr. Chairman, as a preface to my remarks I desire to say that we are here asking for no favors. We are here simply asking for a free field and a fair fight.

I desire to say here and now, Mr. Chairman, that in my judgment the National Government can, if they see fit, or if they should be lax in the discharge of duties which will eventually come to them, legislate the smaller retailers out of business.

I do not desire to be understood as stating that I believe that this is the policy of Congress, because I realize the fact that you are legislating for the great body of the American people and for their best interests.

Furthermore, I desire to say that our activities in all these years have been along the lines of getting a lower price for our members and urging upon them the necessity of meeting, as far as possible, any and all competition in their respective communities.

We have what we call a trade relations committee, whose duty it is to work out, as far as possible, all the sources of supply to aid our members in securing lower prices.

We assume, gentlemen, that we are in reality the buyers of the respective communities in which we live, and that we can not remain indifferent to the prices being paid by our customers.

There is another thing I desire to call to your attention, and that is the fact that the consumer in almost all instances is not a judge of values. Hence he is entitled to protection.

I desire to call your attention briefly to the fact that the catalogue houses and department stores are prone to take the trade-marked and well-known goods of established value and sell them at a cut price, and then take advantage, oftentimes, of the lack of knowledge of values of their customers.

Mr. THOMAS. Do you want to fix prices?

Mr. IRELAND. The term "fixing prices" is not one we have used, nor do we ever propose to use it.

There has been a tendency and is a tendency in all lines to standardize certain transactions. I desire to say, Mr. Chairman, for your information, that the impression seems to be abroad that the establishing prices has a tendency to raise the cost of the commodities that are necessary in the homes of the consumers. I desire to say to you, after an extended business life, that the standardizing of price or, as you term it, the "fixing of prices"—I do not like the word and that is the reason we do not use it.

Mr. THOMAS. It is all the same thing, however.

Mr. IRELAND. Possibly: but in reality this thing has been in vogue until a recent decision of the Supreme Court of the United States, and I desire to say to you that the ultimate consumer is not concerned in what price he pays for particular kinds of goods. He is more concerned in what it costs him to buy his wants for the home during the year.

I would say right now, Mr. Chairman, that I have read over some of the bills that are before Congress and the one bill which I was able to understand—and I admit that I have no way of understanding some of the legal phraseology of the bills—is the bill commonly known as H. R. 13305.

I desire to say, Mr. Chairman, that I believe that in the end the ultimate consumer, especially in the country towns, who deals more largely, possibly with his own dealer, and knows the conditions that surround the purchase and sale of the goods, is able in this way to get a better price in the long run for the various articles which he buys.

I desire to call your attention to this point of view, that a great many concerns are taking trade-marked and trade-named articles and selling them at cutthroat prices, and in order to make up the losses thus sustained they have to get for the other goods sold a sufficient amount to make that up. Then they determine very largely what is their proportion of the gain, and I believe in this way, oftentimes, the ultimate consumer is charged an undue price.

Mr. THOMAS. I do not wish to disturb you in your argument, but I would like to have some information. I understand you represent the retail hardware dealers of the United States?

Mr. IRELAND. Yes.

Mr. THOMAS. And your association has about 15,000 members?

Mr. IRELAND. Fifteen thousand active members; yes.

Mr. THOMAS. Fifteen thousand active members. You have meetings every year of your association?

Mr. IRELAND. Yes; we have State and national meetings.

Mr. THOMAS. Now, has that association standardized, as you call it—I call it fixing prices—at which they will sell these goods; have you fixed the prices through that association?

Mr. IRELAND. We have not. Neither have we any intention of fixing the prices. The intention is to permit the manufacturer who manufactures goods of merit, to enable him to determine at what price that article shall be sold to the ultimate consumer, and I desire to say for your information that we have been able to learn that the average manufacturer does not make his money on a limited number

of sales, but that by placing the prices at a low cost or a reasonable cost for a standard article he is able to make his money very largely on account of the fact that he is able to sell those large quantities of goods of established and well-known value.

Mr. THOMAS. Would you be willing, for instance, to have a farmer fix the price of pork chops to you?

Mr. IRELAND. To fix the price of them to me?

Mr. THOMAS. Yes; the farmer raises the hog and he has to go through many years' experience in order to raise that product. Are you willing that the farmer should fix the standard price on beef and other products which he raises to the members of your association?

Mr. IRELAND. I would say that I would have no objection to the farmer fixing the selling price of his products, if that is based upon the same fair estimate of profit values that the American manufacturer did when he fixed his resale price, for the past 20 years, prior to the recent decision of the Supreme Court.

Mr. MORGAN. Right in that connection, I would like to ask you a question. Suppose a farmer would raise a certain brand of potatoes of a certain character, or a certain kind of lettuce, or, for instance, he would brand a certain kind of butter, brand it in a certain way; do you not think the farmer could legitimately go to a grocer and say, "You can sell my butter and retail it if you will sell it at a certain price." Would that not be along the lines of the right which you claim the manufacturer ought to have?

Mr. IRELAND. In a way.

Mr. MORGAN. You do not believe the manufacturers ought to unite and fix the price on various kinds of articles, neither would you think the farmers ought to combine to fix a price on their products. But if a farmer desires to fix a resale price on some certain products, do you not think the farmer would have the same right to fix the price of that product as the manufacturer thinks he ought to have to fix the price of his product?

Mr. IRELAND. You mean if he conforms to the provisions of the bill?

Mr. MORGAN. I am talking about it as a matter of right.

Mr. IRELAND. I would have no objections to that, sir.

But I desire to say that it is not possible for a manufacturer to get an undue profit for those goods and to continue to get a volume of business in those goods necessary to allow him to make money.

I would say that the national Retail Hardware Association is not asking for and does not intend to ask for an unfair advantage.

We do believe this, that if the country town is to remain upon the map there must be given to the retailer who handles a limited number of articles some sort of protection. By reason of the fact that a great many of these large houses are able to take quite a number of articles upon which he depends for the keeping up of his business, I think you should leave him a sufficient amount to maintain his business.

Mr. DYER. In connection with that, did not your association protest against the enactment of the parcel-post law in the last Congress on the ground that it would be inimical to the interests of the retail hardware merchants?

Mr. IRELAND. We plead guilty.

Mr. DYER. What have you to say to that now?

Mr. IRELAND. The facts of the case are, as conditions exist, I do not think there is very much to say.

Mr. DYER. So far you have not noticed it to any great extent, have you?

Mr. IRELAND. I would say in connection with this matter, our reason for opposing the parcel post was with the idea of preventing the passage of any legislation along this line such as was proposed in the early days, by the establishment of a flat rate. We opposed that and we felt in the passage of the present parcel-post law, and we were assured by our Members of Congress that there would be no action taken looking toward the lowering of the rate or the changing of the conditions surrounding the passage of that law without its being brought before a particular committee for a hearing.

But I find, when I go to my Senator, the junior Senator from Michigan, Mr. Townsend, that they have had very little to say about this. So we find ourselves confronted with a peculiar condition; but I do believe this, that the Government should know the exact cost of the performance of the service they are rendering in that line, and the cost of the maintainance should be paid for by those who use the system. But I do not care to go into a discussion of the parcel post at this time.

Mr. DYER. I simply wanted to ask you that, as to whether or not your fear in regard to this proposed legislation, or as to the existing conditions had changed now, in view of the decisions of the Supreme Court, and whether in view of that decision your fears are not now as groundless, more or less, as they were in connection with the parcel post.

Mr. IRELAND. I deny that our fears were not groundless.

I desire to say another thing, and that is this, that the goods upon which there is a restricted minimum price are handled by the dealer at a less profit to him than any other line of merchandise that he usually carries. We are able to do this by reason of the fact that the goods are well known, that it requires not so much effort and less expensive salesmanship to sell this class of goods.

There are one or two other things I desire to say and then I will have finished.

I am simply here to speak to you in behalf of the smaller retailer and in behalf of the country town. While we have been informed through the newspapers and through the magazines in past years that the greatest error which was confronting the American Nation was a great monopoly such as the Standard Oil Co. and other concerns of that kind, I desire to say to you, Mr. Chairman, here and now, that in my judgment, as an American citizen who has given this subject a lot of thought and study, and it has been my privilege during the past two years to have spoken in almost all of our affiliated States to the merchants, that the greatest danger that confronts this great Nation to-day is the possibility of the elimination of the country town and the things that go with it.

I am here gentlemen, to ask you, not for any special favors for myself, because I do not need them—I can get along without them—but I am here to ask you to think carefully and well as to what the possible outcome will be unless there is a check to this tendency to congestion and the movement from the farm and the country village.

I desire to say to you that I believe the one thing which the United States needs now and will continue to need as long as the Nation shall exist is the splendid type of manhood which comes to-day from the country town and the farm. I thank you, gentlemen.

Mr. DYER. I want to ask you whether or not there is any trust in the hardware business?

Mr. IRELAND. I have not known of any.

Mr. DYER. There is strict competition along all the lines of hardware?

Mr. IRELAND. Absolutely. The competition in trade-marked goods, upon which there is a minimum price, narrows down to the point of service, and ability of the merchant to get the trade away from the other fellow on the same class of goods, by reason of the fact that he possesses the ability to give better service.

Mr. DYER. The value goes with those articles?

Mr. IRELAND. Absolutely.

Mr. DYER. You know of the goods which have the trade-mark "Keen Kutter," which are manufactured by a company in my city?

Mr. IRELAND. Yes.

Mr. DYER. Those goods not only are recognized and have a wide sale, but they are recognized as having great value behind them?

Mr. IRELAND. Nothing better.

Mr. NELSON. Do they require of you hardware men in dealing in these articles that you shall handle them exclusively?

Mr. IRELAND. They do not.

Mr. NELSON. Or do they give some special merchant in a city the exclusive right to handle them and deprive the other merchants of the privilege of handling the same articles?

Mr. IRELAND. Oftentimes it is advantageous both to the manufacturer and to the retailer, and oftentimes to the jobber and the retailer to allow the retailer to sell certain kinds of goods; for instance, the Keen Kutter. For instance, in my own little city my competitor handles the Keen Kutter and I handle the Diamond Edge goods, manufactured by another concern in the same city, and there is no connection between the prices charged by the two concerns, and neither is there any connection between the prices charged by the retailer, but they both have the suggested retail price.

Mr. DYER. By reason of that is it not a fact that they give better value?

Mr. IRELAND. Absolutely. There is another thing I would like to say.

Mr. NELSON. For instance, take the case of the Keen Kutter. Are you barred from selling it when your competitor sells it?

Mr. IRELAND. Possibly not, but I would not want it.

Mr. NELSON. Have you inquired whether you may sell the Keen Kutter goods if your competitor sells them?

Mr. IRELAND. I have never had occasion to take that up.

Mr. DYER. You say you have never has occasion to take that up?

Mr. IRELAND. I never have had occasion to take that up. But I can cite you another case along that line. There was a fire in our place, and we had an order for some saws from the Michigan Reformatory, and it became necessary for us to buy saws, and we went to

our competitor and bought his saws and sold them on the order we held from the Michigan Reformatory, receiving the suggested retail price.

Mr. NELSON. There has been a question in my mind for some time as to how far the practice of exclusive contracts prevails. For instance, there were some people here who wanted us to permit them to make exclusive contracts with merchants. Is that done in the hardware business?

Mr. IRELAND. No; it is not. While it prevails by consent it is not required. I want to say this also, that for years we had to contend in our hardware association with this condition. A great many of the trade-marked goods possess trade-marks which are of real value. They are sold with less profit to the retailer than the ordinary lines of goods we can handle, and they require less salesmanship to sell them. Oftentimes a great many retailers were prone to continue selling these goods, and we have gotten to the point where we feel that if we are to continue to keep the position we hold in our respective community as the buyers for our customers whom we must meet over and over again, that we must in the very nature of things, if there were no moral side to it, give our customer all he is entitled to for his money. We are not asking you to allow us to rob anybody.

Mr. MORGAN. What per cent of the goods sold by the average retail country store, I mean in the hardware line—what per cent of the goods are what you call specialties, or trade-marked goods?

Mr. IRELAND. That is a very hard question to answer, but it is a very small percentage.

Mr. MORGAN. Can you give the committee some approximate idea.

Mr. IRELAND. I would say that in my opinion there would not be any possibility of its exceeding 5 per cent.

Mr. MORGAN. Not over 5 per cent. It would really cut very little figure, either with the dealer or with the people.

Mr. IRELAND. That is true, but on the other hand, there is this tendency to take those trade-marked goods of established value and use them as a bait, and then, in view of the fact that the consumer has very little knowledge of actual values, possibly to overcharge him in the items upon which he has no information.

In my judgment, nothing will tend more to result eventually in this one thing, and that is his passing.

Mr. MORGAN. Now in the large cities, the difficulty which the small retail merchant has is caused by the department stores?

Mr. IRELAND. Very largely.

Mr. MORGAN. But in the country, in towns of one to five thousand inhabitants, you have not that kind of store to contend with, have you? And is it not a fact that your difficulty is with them and with the big mail-order houses?

Mr. IRELAND. I would say in answer to that—and it was not my purpose to go into a discussion of the mail-order business; but when we come to think that last year there was over $300,000,000 worth of mail-order business in the United States, and over $100,000,000 worth of that was done by one mail-order firm in Chicago, and they have invested in factories which they own $6,000,000, and they have $4,500,000 more in various other enterprises from which they get their goods at a 10 per cent basis above the manufacturing cost, it seems to me the time is not far distant when, unless there is some-

thing done that takes away the burden now being placed upon the small retailer of ordinary means and ordinary ability, it will be impossible for him to continue for all time.

Mr. NELSON. You do not argue then that because the mail-order house has sources of manufacture whereby they can get articles cheaper, that we should subsidize the retailers?

Mr. IRELAND. No, sir. The thing we are asking for is this, to prevent these great mail-order houses from taking goods that cost say, $12 a dozen, the best price we can buy them for, to take that article, which has a household name, and which is a household word with every customer we have, and sell that at a price less than the dealer's cost. What for? Simply for the purpose of poisoning that man's mind with the fact that the dealer in the community in which he lives is a robber.

Mr. DYER. How can we prevent that?

Mr. IRELAND. Gentlemen, you are asking me——

Mr. DYER (interposing). In view of the recent decision of the Supreme Court of the United States.

Mr. IRELAND. You mean in doing that?

Mr. DYER. How can we enact the necessary legislation; what would you suggest?

Mr. IRELAND. I would say that in my judgment for years we had supposed that the manufacturer had the right to do these things, and you will remember that the Supreme Court of the United States, as I remember it, reversed its own decision on a very narrow margin, and I have no desire to criticise the Supreme Court of the United States, but that is a fact; and by that decision the right was taken away from the American manufacturer to fix the resale price of his goods.

Mr. DYER. Then you think we ought to amend the Sherman act so as to give the manufacturer the right to fix the price, regardless of the decision of the Supreme Court of the United States?

Mr. IRELAND. I do not know just how you would do that. But in reading the various bills before the committee, there seems to be at least one bill which I can understand, and that is the one I referred to, which simply places us back in the position, as I understand it, where we were before the decision of the Supreme Court.

I do desire to say that I believe a safeguard should be thrown around the passage of that legislation which will make it impossible for any manufacture to acquire a monopoly in this way.

Mr. MORGAN. You said that the mail-order houses did a business of $300,000,000 last year?

Mr. IRELAND. Yes, sir.

Mr. MORGAN. Do you know how much business is done by houses other than those; have you figured that out.

Mr. IRELAND. I have not that information.

Mr. MORGAN. I know from my own investigation and inquiry that there is about $20,000,000,000 worth of manufactured goods made in this country in a year, and the other dealers sell all the rest except that $300,000,000 worth?

Mr. IRELAND. That is true.

Mr. MORGAN. Is that not really such a small percentage of the total business that under present conditions there is really no great injury done to the average retail merchant?

Mr. IRELAND. I wish you might attend conventions with me in a great agricultural State for just one month. This volume of goods is bought largely in the great agricultural States.

Mr. MORGAN. I am from an agricultural State myself, where there are a great many small cities, and I have talked frequently with the merchants and farmers in that State. Of course, I know they do not look at it from the same viewpoint, but I have so far not heard very much complaint about the effect of it.

Mr. IRELAND. That is true, but when you stop to think that the mail-order business is increasing from 10 to 15 per cent a year it is going to prove a pretty serious thing.

Mr. MORGAN. You think it will keep going until the retail merchants will finally be thrown out?

Mr. IRELAND. Yes, sir. And there is another thing you must consider, that when the time has come when the small retailer has been driven out of business then it will be an easy matter for a few large houses to get together and make a gentleman's agreement or possibly have a pleasant dinner some evening where the gentlemen present will have an understanding as to the conditions that will obtain as they relate to the matter of competition.

If there is nothing further you desire to ask me, gentlemen, I would like you to hear Mr. Corey. I have taken a good deal more time than I intended, and I want to apologize for occupying so much of your time. I am here simply representing the small retailers and the country towns. This question is eventually going to mean, in my judgment, almost the very perpetuity of this great Nation.

I thank you very much, gentlemen.

Mr. DYER. And also the manufacturers in the cities.

The CHAIRMAN. We will be glad to hear you now, Mr. Corey.

STATEMENT OF M. L. COREY, OF ARGOS, IND., SECRETARY OF THE NATIONAL RETAIL HARDWARE ASSOCIATION.

Mr. COREY. Mr. Chairman, and gentlemen of the committee, it is not my purpose to take up very much of your time, because the ground has been covered so thoroughly by Mr. Ireland.

But there is one point I want to touch upon, and in regard to which a question has been asked, and that is in relation to the matter of parcels post.

It is true that we fought that for a good many years, not so much because we feared the passage of the measure as it finally went through the House, but because we felt it was merely an entering wedge. That word was mentioned all the time. The gentlemen who appeared before the committee at that time used it and it was frequent in our arguments and we felt that our grounds were well taken on that one point.

Mr. DYER. You thought that was the beginning of the end of the retail merchants?

Mr. COREY. Yes. We were told that the matter would be adjusted so that Congress would regulate it. We felt we could go to Congress and that they would be reasonable in handling this matter.

What has happened? The stamps which were used in the first place, and which told you how much they brought in were abolished.

Then the weight limit was raised from 11 pounds to 50 pounds, and we are told now that it will be raised again to 100 pounds. Then the zone was enlarged, and there were even people working around here who would have liked to have had the zone feature done away with entirely. Then the c. o. d. feature was established, whereby the Government would bring the money back to the dealer.

Now, on March 15 books will be added to the list of articles carried by the parcels post. I would like somebody to tell me whether books will include the catalogues that mail-order houses are sending out. I am free to say I do not know anybody who does know that yet. Our Congressmen told me they did not know.

Suppose that books are included. The mail-order houses are now paying from 22 cents to 26 cents each for shipping out those books—their catalogues. They will save $1,500,000 to $2,000,000 on the matter of postage alone which they pay for sending out their books and delivering them.

The CHAIRMAN. You mean their catalogues?

Mr. COREY. Their catalogues; sending them out and delivering them to the people.

Mr. NELSON. Let me ask you a question right there. I am very much in sympathy with you, and I want to get your viewpoint upon the idea that we are legislating for the greatest good of the greatest number of people. The very facts you mention indicate, do they not, and indicate very strongly, that this parcel post is serving the greatest number of American people, and it also indicates that they want it that way. Why should we stop doing what they seem to want, giving them the opportunity of getting their goods through the parcel post?

Mr. COREY. Are you serving the great mass of people when you carry those catalogues for a less cost than they are paying for having them carried now? Is that serving the people? Is it not rather giving the benefit to two or three big mail-order houses?

Mr. DYER. I do not think that was contemplated.

Mr. COREY. But is not that the effect?

Mr. NELSON. Let me follow that question by another. You would like to have the parcel post serve the mass of the people, but you would also like to prevent the use of the mails by the mail-order houses for this purpose?

Mr. COREY. I do not think they ought to have—just let me give you some facts.

Last night I passed down one of your streets, and my attention was called by a gentleman who is the traffic manager for one of the large Chicago houses. I asked him what he was doing here. He said he was here to see the Postmaster General; that their business had increased from 42,000 packages to 75,000 packages and he was here to make arrangements to carry those packages. His business had increased from 42,000 to 75,000 packages a day, and most of those packages are sent to the country people. That means 474,000 packages every week and 29,124,648 packages a year. Do you wonder what is the matter with the small town?

Mr. NELSON. But it does not meet the difficulty. If the farmers or the consumers want this, they are in the majority. What right have we to prevent their getting what they want?

Mr. COREY. We are all consumers. But when it comes to the matter of the farmer alone the farmer has not anything particular to

do about it. The other people have the business. They are trading with a few houses and the business is being concentrated. You say it is doing the greatest good to the greatest number. That is a hullabaloo which has been talked out during the last few years

Mr. NELSON. You do not believe in that then?

Mr. COREY. Yes; in one way; in the right way. The construction of it is usually put to the benefit of some class. Now, I consider the greatest good to the greatest number to be that which will build up this great American people.

Mr. NELSON. You want to build up the retailer first?

Mr. COREY. No, sir; let him go along right with the balance. We have done very well, thank you, but we want to hold our own.

Mr. MORGAN. Do you not believe there are only a few mail order houses now?

Mr. COREY. Yes, sir; but is it not a fact, and according to the natural laws of trade that if the parcel post affords great facilities to that business, will there not naturally be a large increase in the number of these mail order houses, and will it no result in a readjustment of business along the lines that are most economical? You do not think it possible, do you, that a few mail-order houses will make extravagant profits for many years without having large and vigorous competition?

Mr. COREY. I believe it is possible for the few mail-order houses that are in existance to-day to prevent the establishment of other mail-order houses, because of the position they hold in the trade. They can keep any other mail-order houses from buying as cheaply as they can buy. They are already maintaining their own sources of supply. Everything strengthens them. You take a large department store, if they can buy from them and the mail-order houses so much more cheaply, and these mail-order houses and big stores can get their goods so much cheaper than the small merchants, they are going to drive the small merchants out of business.

Mr. MORGAN. For instance, I live in a little town of 5,000 inhabitants. The merchants there have much more capital than the merchants in the small town in the same county which has only 500 or 1,000 inhabitants. Following out that line of argument, will not the merchant in the small city wipe out the merchant in the small village?

Mr. COREY. Well, in our particular lines of work the practice all through the West has been this: It has been to get a price, an even price. You speak about prices. If you will go the source——

Mr. MORGAN (interposing). That is not answering my question. You say the big mail-order houses in the cities will absorb and will destroy the merchants in the smaller cities and towns.

Now, then, if that be true, following out the same line of logic and taking into consideration the city of 4,000, a county seat, the merchants there have a much larger capital than the merchants, the smaller merchants, in the smaller towns and villages in the same county, in the same trading vicinity. According to your logic the merchants in the town of 4,000 or 5,000 inhabitants will kill off the merchants in the town of 500 inhabitants?

Mr. COREY. No; I think not.

Mr. MORGAN. Why not?

Mr. COREY. They will not, because it will be impossible for that merchant in any town of ordinary size to be in a very much stronger situation than the merchant in the small town. The merchant in the small town has much less expense in running his business.

Mr. MORGAN. Does that not apply equally as you go up?

Mr. COREY. No, sir; not when you get beyond a certain point. You would not compare a small manufacturer with a manufacturer of the immense resources which the Standard Oil Co. has, for instance.

Mr. NELSON. It seems to me you are taking an unfair position there, because the Sherman antitrust law prevents combinations and and monopolies, and, of course, if the mail-order houses combined they would be in violation of the Sherman antitrust law. What you are really complaining of is the fact that your competitor has such large resources without violating the Sherman antitrust law.

Mr. COREY. I do not want to go into a discussion of the Sherman antitrust law, but I will say that you are up against a very hard proposition when you undertake to solve the distribution problem. If the retailer is in a position, if the retail hardware, for instance, is in a position to buy his merchandise at something near the same price that the large mail-order houses are buying their goods for, we will find the competition proposition down below. It is the discrimination in prices at the source which is working our trouble.

Mr. DYER. Do the consumers get the goods, on the whole, any cheaper from the mail-order houses than from the retail merchants?

Mr. COREY. I have investigated that matter a great deal, and I have even gone far enough to send to the mail-order houses and have bought the goods from them. In some cases, they do give better value, but in other cases we give better value than they do.

And if you are seeking for an explanation of that you can walk down any of your streets and undertake to buy goods of a certain quality, and you will find that nearly every store has a little different price. As a matter of fact, there is, on the average, a very little difference in all prices on the same quality of articles in the advertised price, the lowest advertised price on an article finally becomes a regular retail price everywhere, and the mail-order houses have advertised their prices, and to-day we are up against the matter of endeavoring to get a price at which we can sell in competition.

Mr. DYER. The fact is that on the average nothing is gained by the consumer by purchasing from the mail-order houses, but it is disadvantageous to a great body of American people who have employment on account of the selling by the other dealers, for instance, the traveling men and the other employees?

Mr. COREY. That is true. I would like to refer to one other thing, and that is one which I think will explain the whole matter. We are unable to meet the guaranties of the mail-order houses. For instance, the mail-order houses will give you a guaranty in their catalogue on paint something like this: "We guarantee this paint to be the highest grade ready-mixed paint, regardless of price, and guarantee it to wear longer, with equal climatic conditions, for at least five years. We guarantee that this paint at the end of seven years will look better than any other paint at the end of two years. We guarantee that it will adhere to wood, tin, and other substances, and we guarantee it to be superior to any other paint made, regardless

of price, and that it will cover double surface and last twice as long as any other paint made."

Now, gentlemen, that particular paint was analyzed by the Government agricultural experiment station of North Dakota, and their analysis showed that 24 per cent of the fluid portion of that paint was nothing but water.

Mr. NELSON. That is pure fraud, then.

Mr. COREY. That is what we are up against. The retailer who has his customers right in his own little town and talks to them day after day has got to tell the truth about his goods.

Mr. NELSON. Will not that practice, if continued, very soon kill the mail-order business and take care of that matter?

Mr. COREY. No; I do not think it will.

Mr. DYER. Why does not your association ask the Attorney General to invoke the arm of the law and prosecute that firm for using the mails to defraud?

Mr. COREY. That is what we are up against. The same thing is done along that line in the case of many other articles. The advertisement will say, for instance, "Here is an article for which your retail dealer is charging you $10, and we will give it to you for $5." You walk down the street and you will see that frequently displayed in the windows. You will see it marked down from $10.98 to $5.49, for instance. Such things are in the catalogues of the mail-order houses all the time, and that has a bad effect on the minds of the customers, so far as the retail merchants are concerned. They do not patronize the mail-order houses because they are getting service or getting better value; it is not a matter of economy or a matter of saving any amount of money; it is simply a matter of being deluded.

Mr. MORGAN. How do you propose that Congress shall change what you are talking about?

Mr. COREY. I am not telling you what to do; I am telling you what the conditions are, and we are looking to you to figure out a remedy.

Mr. MORGAN. We are having hearings on trust legislation.

Mr. COREY. I know that.

Mr. DYER. I think I am responsible for bringing this matter into the discussion.

Mr. COREY. Gentlemen, I have taken up a great deal more time than I had expected; I have taken up a great deal too much time.

Mr. NELSON. We have taken up your time by asking you questions.

Mr. COREY. I came along to-day to find out what the situation was down here. I assure you our people are interested in this matter. We do not expect anything unreasonable; we know you are up against a very hard problem. We are simply trying to impress upon you the seriousness of it. The hardware merchants of this country are not down and out by any means, but we can see the way things are tending. Our interest is in the small towns; we do not want to see them put off the map.

Mr. NELSON. Will you expect us to do more than this, if we can do it: To prevent unfair combinations in restraint of trade or monopoly or such practices as are unfair which flow from attempts to restrain trade or create monopolies? That is about all you expect, is it not? You do not expect we shall pass legislation that will boost the retail business?

Mr. COREY. Will that in any way curb the big fellows? Is that legislation that would affect the small man more than the large man? All we ask is a fair show in the fight for trade. If you can furnish up something that will get it, we will be satisfied.

I am very much obliged to you, gentlemen, for giving me this opportunity to express my views and for listening so patiently to me.

Mr. WEBB. We are very much obliged to you, Mr. Corey. The committee will be glad to hear now from Mr. L. R. Putnam, of Fayetteville, Ark.

Mr. FLOYD. Mr. Chairman, I desire to introduce to the committee Mr. L. R. Putnam, of Fayetteville, Ark., who is not only from my State, but from my own district, and I hope and believe that you will give him a fair hearing.

STATEMENT OF L. R. PUTNAM, OF FAYETTEVILLE, ARK.

Mr. WEBB. Mr. Putnam, will you give your full name, address, and occupation?

Mr. PUTNAM. My name is L. R. Putnam; I live at Fayetteville, Ark.; I am a native of that town and have been in business there for 16 years.

Mr. WEBB. In what business?

Mr. PUTNAM. The manufacture of and retail dealing in lumber and builders' supplies. We have a location also at a different town, where we handle hardware and furniture.

I simply came here as an expert retailer, if I may express it that way. These gentlemen who have preceded me, and whom I have never seen before, have pretty well covered the ground I had in mind. I have looked over some of the evidence taken before your committee. I find it is rather confusing, both to you and to me, as to what our people want. I have finally made up my mind that the most necessary thing for the little fellows throughout the Southwest and the Middle West, where I am familiar with the conditions, is just simply to make everybody do business on the square as nearly as possible. There are some facts you hear a great deal about, and I do not believe you are as familiar with them as you might be. This gentlemen here, Mr. Morgan, says he comes from a small district.

Mr. MORGAN. A big district, but a small town.

Mr. PUTNAM. He has found that there has grown up a feeling between the country people and the town people that is contrary to patriotism and neighborliness, which has made this country great, but he has no doubt that this feeling ought to be overcome, and he probably does not know how to get at it. My idea is that the advertising that these gentlemen have spoken of has brought about this condition. The fact is, gentlemen, the men who write the advertisements for these big mail-order houses draw more money in 10 years than Shakespeare got in his entire existence. And they are worth all the money they get, for the time being. Big salaries get high-class men, and that leaves the little fellow in a rather hard condition, since he is not able to compete with them in this advertising proposition. He has not the nerve nor the inclination to stand up and look a man in the face; in my case all of my life has been with the same people—and this small man has not the nerve nor the inclination to misrepresent anything he has to sell.

But I believe that the advertising they send out in these little sheets and books do not have as much effect as some of the advertising in the better class of journals. The catalogues themselves, of course, are books of art. It would do you good to study them.

They set forth how hard it is to trade with the little fellows.

I have in mind one of these catalogues which has a series of pictures which show the woman of the house, who first comes out and harnesses up her horse and then drives 5 miles to a town or a village and goes from one store to another, and none of them have what she wants, and then she comes back, and during the drive home it pours down rain, and as a result of that she gets an attack of sickness and then she dies. That is the picture they draw. Then they proceed to show you how easy it is to trade with the Chicago mail-order house. They show you how this woman gets a big catalogue, about the size of your family Bible, and takes it in and opens it up and spreads it out on an easy chair, and looks through it and finds there advertised everything known to the human race which a man could buy. Then she takes up a piece of paper which is in the catalogue and fills out an order at the prices stated and then puts it in an envelope, which also came with the catalogue, and steps out and buys a post-office money order from the rural free-delivery carrier and sends along her order. The next thing she knows she finds the stuff delivered to her, and there you have it all spread out before you. You have no idea what that has put into the minds of the country people in the Southwest. They are in line with the cotton-mouthed politicians, who have worked havoc down there. But those fellows do not get to Washington, I am glad to say.

We have quite a herd down there now. But these people have done untold injury to the patriotism and neighborliness and we have got to do something to overcome it.

I am not here to propose a law. When we elected Charlie Floyd down there we thought we had a good man who could do that.

Now, I have no set speech which I came up here to deliver. I simply came up here with the expectation of furnishing you some expert advice, if I could, in relation to this matter of advertising, which I think will be interesting to you. I hold in my hand a paper which is said to have a circulation of over 2,000,000 copies a week. I believe in that paper; in fact, I think it is the paper which is responsible for giving Roosevelt the number of votes which he got.

Mr. NELSON. Is that the reason you believe in it?

Mr. PUTNAM. I believe in it on account of its circulation and on account of the quality of the paper. In this copy of the paper which I have here there is an advertisement which I want to read to you to show how these houses get at the people. This is where they have our boys whipped.

Here in this corner of the advertisement he shows a picture of a "strong door" for 77 cents. I happen to be in the business of making doors. In the first place, he can not save a man 50 per cent on his doors. I know that from my experience in that particular line of business. I am holding my own very well in my business, but the country is in a bad state, and I have come here at the solicitation of the dealers about my part of the country, and I want to put the matter before you as it actually is.

I read that particular advertisement and it annoyed me, and I wrote to the Curtis Publishing Co., which is a great big concern in Philadelphia, which publishes the Saturday Evening Post, the Ladies' Home Journal, and the Country Gentleman. I called their attention to this advertisement, and told them that it was a misrepresentation, and I had understood they censored their advertisements closer than that. I told them I thought a man had to make good with the stuff he advertised in their journals, or they would not publish his advertisements. They did not answer that first letter, but I sent them in another letter.

Finally I got a nice letter from the western manager of the Curtis Publishing Co. in Chicago. He started in to brand me as an association man, and charged that we had gotten together and made up that letter and sent it to them. I went back at him in a fair way, and after that he and I passed several letters.

Since that time this advertisement has not appeared in the Saturday Evening Post. That was in 1912.

Now, I want to call your attention to this door. You have looked at doors. There is a picture of the door that to the ordinary man who is not familiar with doors, in a practical way, would appear to be a good door. The advertisement says it is a "strong door," and it leads you to believe that it is a good door. Let us take it for granted, for example, that you and your wife are dissatisfied with the back-kitchen door at home, and you have about made up your minds to put in another door. If you are a man of average means, you usually talk about such things for a while before you decide on what you are going to do and where you are going to buy the stuff you want. So on your way down town to your office you will stop at a retail lumber yard and say, "What is a good strong door worth?" Well, if you came to my place I would take you to my door department and I would ask you what kind of a door you wanted. Then you look them over. I ask you where you are going to use the door, and you tell me you want an outside kitchen door. That ought to be a good strong door. I would show you the best door I had. It would be a door that was free of defects, a door that would hold the paint well and would stand all kinds of weather; and you would ask me the price of the door, and I would say I would make you a good strong door like that for $2.50, and with that price I would make a legitimate profit. You would look it over and you would go back and talk it over with your wife, and that night you would take up the Saturday Evening Post and read an advertisement telling you where you could get a good strong door, in Davenport, Iowa, for 77 cents. Then you and your wife would talk it over and you would say Putnam was holding you up, and was trying to skin everybody, and he ought to be put in jail.

I will tell you about that door. I can look at that door and tell you what door it is. For a door to be used in the way you want to use this particular door, you ought to have as good a door as you can get. But this door which is advertised is the cheapest door known to the trade. That door has been made up from parts that are the strippings from running door stock. That door has been put together with a paint bath, dipped in paint and then grained on the outside. It is the cheapest door that is made, yet the man who advertises that door tells you it is a "strong door." That would be the last door

in my door department which I would ever expect to show you when you came in and asked to see a "strong door." That advertisement is put in there for the purpose of misleading, and for the purpose of creating in the minds of the people the idea that they can make a lower price than anybody else can make.

These houses will sometimes make a price on goods, taking their stock all the way through, for which they can not get the goods to our country and sell them as cheaply as we sell them.

Mr. NELSON. How can Congress by law prevent misleading advertisements, and is not the remedy for that in your own hands? You can show your immediate constituents or patrons that this is a fraud, that that thing is a mere delusion, and that they can not do it, and that the door is just as you described it here to us. Would that not end their desire to patronize that firm?

Mr. PUTNAM. What opportunity have you for doing that?

Mr. NELSON. But when a man got one of those doors and had one experience with that kind of door would he not be your patron after that?

Mr. PUTNAM. According to P. T. Barnum, the American people are easily gulled. They like it.

I do not want you to help me to get a price, but I want you to help me fight. Indeed, I have made up my mind that I can not put my claims down to some little personal difficulty I am having. If I am not an efficient business man I will have to get out of the game. All we want is to have you make these men do business on the square.

Mr. NELSON. How can we prevent them from hiring experts who will go to the limit in selling their goods?

Mr. PUTNAM. How did you do this? Our papers are full of matter connected with the congressional race down in our country. There are some of the nicest items in the world about these men who are in that race, but at the bottom of those items it says "advertisement."

This matter is marked "advertisement," and it shows you that it is not an editorial. When it comes out in the Saturday Evening Post we have confidence in it, but if it comes out in a local paper and has not the word "advertisement" at the end of it, it looks right.

Mr. MORGAN. Do not the people know that all these things that appear in the papers are advertisements? They know that, do they not?

Mr. PUTNAM. They do know it, but they do not know whether they are all true.

Mr. MORGAN. You do not think the Government could censor advertisements in the newspapers in any way, do you?

Mr. PUTNAM. I should think you would have a traffic commission of some sort which could handle propositions of that kind. That does not look unreasonable to me.

Mr. NELSON. Have you thought of the number of commissions we would have to have if these commissions were to pass upon advertisements as to whether they are anywhere near the truth or not? That is to say, do you think it would be practicable?

Mr. PUTNAM. To force these people to tell the truth in advertising?

Mr. NELSON. To have a committee sit in Washington to pass upon them?

Mr. PUTNAM. I have not worked out the proposition.

Mr. NELSON. From a common-sense point of view, what would you think of a commission in Washington passing upon advertisements—as to whether they were really the truth or not?

Mr. PUTNAM. You pass upon the fare between two stations in the United States or two cities—the Interstate Commerce Commission passes upon that.

Mr. DYER. It is now a violation of the law for anybody to use the mails for the purpose of defrauding. These people use the mails. Is not your remedy ample now, to file your complaint with the Attorney General?

Mr. PUTNAM. How are you going to get at this thing? Each little individual man can not do that.

Mr. DYER. The Department of Justice will investigate it if you complain that a certain firm is using the mail for the purpose of committing fraud. They will investigate it, and if there is a violation of law, if such a violation is discovered by the district attorney, the grand jury will, no doubt, return an indictment. It is a violation of law now to use the mails for the purpose of defrauding, and all these concerns you speak of do use the mails to carry on their business.

Mr. PUTNAM. They usually send their catalogues by freight or express.

Mr. DYER. But people write to them and order their goods by mail, and they write a letter to the customers in reply.

Mr. PUTNAM. It is possible, then, to gain information pertaining to these advertisements through an association, or would you put it up to a little crossroads fellow who has a general store?

Has he got to look it up, or could he belong to an association that could look up this information in regard to that?

Mr. MORGAN. I wish you would read section 4 of bill No. 1890, which was introduced by myself, and tell us whether that would reach the proposition you are talking about, as to what Congress might do.

Mr. PUTNAM. This section says:

That every practice, method, means, system, policy, device, scheme, or contrivance used by any corporation subject to the provisions of this act in conducting its business, or its management, control, regulation, promotion, or extension thereof, shall be just, fair, and reasonable and not contrary to public policy or dangerous to the public welfare; and every corporation subject to the provisions of this act in the the conduct of its business is hereby prohibited from engaging in any practice, or from using any means, method, or system, or from pursuing any policy, or from resorting to any device, or scheme, or contrivance whatsoever that is unjust, unfair, or unreasonable, or that is contrary to public policy or dangerous to the public welfare, and every act or thing in this section prohibited is hereby declared to be unlawful.

Mr. MORGAN. Now, suppose we were to enact a section something like that, to be general in its nature, and then we should give the trades commission which it is proposed to create authority to execute that law. Would that not cover practically all the things you men complain of?

Mr. PUTNAM. It is pretty hard to pass on that in a moment, but I believe it comes pretty close to it.

Mr. FLOYD. In answer to Mr. Dyer's question you said it would be impossible for the individual merchant to take up this matter, and you said something about your association. What is to hinder

your particular association from getting this information and exposing to the public these fraudulent advertisements?

Mr. PUTNAM. While I am a director in the Southwestern Lumbermen's Association, consisting of men in Arkansas, Oklahoma, and Kansas, and while I am not up on the details, I understand that we have been indicted, or that the secretary of our association has been implicated in some way for belonging to a bureau of information which has dispensed information of that sort. I supposed it was against the law.

Mr. BEALL. That was information in regard to the price on retail lumber, was it not?

Mr. PUTNAM. No, I think it was in regard to the matter of doing business of concerns which were selling to the consumers and also attempting to sell to the dealers.

Mr. FLOYD. In other words, if I understand from the testimony that has been brought out here, somebody undertook to indict or prosecute these associations for violations of the Sherman law for doing that particular thing.

Mr. PUTNAM. That is my understanding, Mr. Floyd.

Mr. WEBB. But it is not contrary to law to expose fraud, either by an individual or an association, is it? You would have the right to expose such a fraud as you have detailed here, whether it was done by an individual or an association, would you not?

Mr. PUTNAM. I suppose that would be within the law. But it is practically impossible. Of course it is well enough to talk about what you would like to do and what you would like to have. But you have to take it as it is.

Mr. Floyd will tell you that there are hundreds of little fellows all through his district who would not know what to do with the information if they had it, unless they could report it to an association.

Mr. DYER. Have you not an association of which these people are members?

Mr. PUTNAM. Yes.

Mr. DYER. Now, in my city we have just lately had 12 or 15 fake doctors indicted and convicted and some of them have been sent to jail for using the mails to defraud in selling cancer cures, and things of that kind. That fight against them was begun by the medical society of that city. They called in the Post Office Department, and the Post Office Department sent its inspectors out there to investigate and get the evidence. It seems to me your association ought to be able to do the same thing to these people who misrepresent these things.

Mr. PUTNAM. I understand that it is against the law to report these things to an association and then for them to take it up.

Mr. DYER. It ought not to be against the law to do that.

Mr. PUTNAM. You are right about that.

Mr. FLOYD. I do not think it is against the law, myself, but it is undoubtedly true, from some of the testimony we have had here that persons have been indicted and prosecutions have been instituted for that particular thing. Mr. Barry, who was before us, testified that members of his association has been indicted and that there was some kind of a suit against him for an alleged violation of the Sherman Act, and has been for a number of years, and it is the theory that it is within the law which has intimidated you at this time.

Mr. PUTNAM. Yes; that is so.

At this point I wish to read into the record the amendment to section 9 of the tentative bill No. 1, which we lumbermen and others who have studied this situation believe is both right and necessary:

And provided further, That it shall not be deemed an attempt to monopolize or to restrain commerce among the several States to disseminate through trade associations or otherwise, truthful information as to the methods, practices, or policies of persons, firms, or corporations engaged in commerce among the several States or with foreign nations.

I also desire to incorporate as a part of my remarks an address by Hon. L. C. Boyle, of Kansas City, Mo., former attorney general of the State of Kansas in which is set forth more fully than I can do just what is claimed by the Government in these prosecutions against western lumbermen. This address was delivered at the twenty-fourth annual convention of the Southwestern Lumbermen's Convention, held at Kansas City, Mo., January 24–26, 1912.

The address is as follows:

THE ASSOCIATION FROM A LEGAL VIEWPOINT.

(By Hon. L. C. Boyle.)

Mr. Chairman, ladies and gentlemen, members of the association, your executive committee has requested me to address you on the status of the litigation now pending, wherein several lumber associations are involved. In undertaking a review of these suits I shall of necessity deal at some length with the subject matter of the litigation.

On June 23, 1911, an indictment was filed in the Federal court at Chicago against 14 secretaries of lumber associations. The Government's charge was to the effect that these secretaries, with others, conspired to influence the lumber trade to refuse to deal with those manufacturers and wholesalers who sold to the consumer direct. A majority of the indicted secretaries met for the purpose of devising ways and means to the end that the Government's attack be resisted. To accomplish this purpose, the following lawyers were employed: Judge Milton D. Purdy and Mr. William A. Lancaster, of Minneapolis; Mr. C. D. Joslyn, of Detroit, and myself. After a careful study of the indictment, the attorneys for the secretaries filed a demurrer. The demurrer raised this question, among others: Granting the statement of facts in the indictment to be true, yet the Government had not stated a legal ground of complaint against the secretaries. On September 16, 1911, the attorneys met in Chicago for the purpose of arguing the demurrer. This we were unable to do as the Government was not ready. The secretaries had instructed us that it was their desire to push the litigation with all expedition possible, and this for the reason that wide publicity had been given to the fact that they had been charged with a violation of law. The mail-order houses, in flaring pamphlets, had circulated the country. I can assure you the alleged offense of the lumber dealers did not diminish in the paper aspect of criminality under the subtle skill of the fiction writers employed by the mail-order institutions. We were unable, however, to move and were also advised that it was the purpose of the Government to institute civil proceedings against a number of the associations. Although no positive statement was made, yet it is tacitly understood that the criminal action will be dropped and the Government will undertake to accomplish its purpose along civil lines. In any event the indictment, like Mohammed's coffin, hangs suspended in the inextricable tangle of the law's delay, and in the meantime the unhappy secretaries remain as an awful example for mail-order house paragraphers to point a moral (?) or adorn a tale. Thus does our parental Government, when persistently urged, pull fine roasted chestnuts out of the fire for those whose cunning plans are carefully veiled, and sometimes the veil is pure gossamer.

Following the indictment the Government instituted proceedings in chancery to restrain lumber dealers' associations from continuing their alleged conspiracies. The exact nature of the conspiracy charged is rather nebulous. In all, three suits, thus far, have been instituted, and against the following associations: Colorado and Wyoming, pending at Denver; Michigan, pending at Detroit; and the Northwestern Association, pending at St. Paul.

The common purpose in each suit is to enjoin the said associations "From agreeing, combining and conspiring and acting together, to prevent each and every one of them from carrying on interstate trade, or to prevent in any manner interstate trade and

commerce of lumber and lumber products in free and open competition between wholesalers, manufacturers, and jobbers, and retail lumber dealers everywhere."

I can neither illuminate nor explain this alleged conspiracy. In some dim way, however, the pleader seeks to charge these associations with a conspiracy in restraint of trade. In the Michigan suit The Scout, edited by that valiant fighter, Arthur L. Holmes, is made a party.

In all probability the Michigan suit will come up first. If the Michigan case is rounded out and fully tried before we get into the other cases the whole question at issue may be settled in this one fight. It is true there are some lines of demarcation in each case, yet the fundamental question is the same in all.

Touching these civil suits, it has been the policy of the attorneys in charge to avoid all delay possible. Therefore no dilatory pleas have been resorted to, and in each case answer has been filed, thus joining issue on every charge made by the Government in its bill. Mr. Joslyn advises that he expects the taking of proof will commence about February 1.

Through the medium of your trade journals, and the various secretaries, the trade will be advised of the situation as it develops.

You can well understand that this is neither the time nor the place to go into an analysis of the legal questions involved in this controversy. However, I see no impropriety in calling attention to certain phases of vital points directly and indirectly connected with this litigation.

The Government brings its bill under what is commonly known as the Sherman antitrust law. The law was enacted July 2, 1890. The following excerpt is the portion of the law pertinent to this inquiry: "Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared illegal."

From the voluminous bill filed by the Government this concrete statement may be formulated: The retail lumber dealer, through the secretary of his association, and also by means of his trade journal, keeps himself advised as to those manufacturers and wholesalers who sell to the trade direct.

Although there is much more matter set out in the bill, yet the ultimate point at which the Government is driving is the denial to the retailer of adopting ways and means by which he may keep himself informed as to whom his real competitors are.

It is not charged that there is any conspiracy to fix prices, although the mail-order pamphleteer brazenly states this to be the fact.

Measuring the charge in the bill with the yardstick of the Sherman antitrust law, the query results: "Is it restraint of trade, within the meaning of the law, for retailers to take such steps as may be necessary to discover if the manufacturer from whom they are buying supplies is selling direct to the trade?"

The first rule to be applied in interpreting a statute is to examine into the evil sought to be remedied. It is a matter of current history that the Sherman law was enacted to curb the aggressions of great corporations. In the Standard Oil case Chief Justice White, speaking of the Sherman law, stated: "The debates in Congress conclusively show that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."

With these utterances from the Chief Justice of the United States before the Attorney General and his assistants (for we must assume they are familiar with them), it is difficult to understand the tortuous process of reasoning by means of which it is sought to apply this same law to a poor devil who has, with infinite toil and patience, built up a two or three thousand dollar yard in some small, wind-swept town in Kansas, or who, as a pioneer, has taken his small stock to some valley town in the snow-gripped hills of Colorado.

No one but a space writer for a mail-order catalogue could possibly indulge in such flights of imagery. The wonder of wonders is, How did they get the idea into the head of some assistant attorney general?

Let us look at the question from different angles. Let us do so frankly and without fear. There is nothing in this whole controversy from which we need to run—"Let the galled jade wince, our withers are unwrung."

Since men bartered and sold the retailer has been a fixed equation in the economic life of every people. In the early days he was both manufacturer and distributor. As the country became settled and the wants of a developing civilization increased, the inventive genius of man discovered the use of machinery. Under

the guiding hand of a boy more shoes could be turned out in a day than the old-fashioned cobbler could make in a month. Manufacturing became a distinct line of business. The development of factories created the demand for the wholesaler and jobber. The retailer remained in his old position—the neighbor of the people. As trails were blazed through the virgin forests, or as men faced the dangers of the trackless prairies, the retailer went into the vanguard. His store was set up on the frontier. His goods displayed. Husbandry and town building were made possible by reason of the courage and patience of these humble traders. Into the very warp and woof of our great West has gone the energy, thrift, and skill of the retailer. He is a living vital factor in our splendid civilization.

It is urged, however, that this essential factor in the development of our political, social, and economic life must be eliminated. That he has run his course. His race is finished. Let us briefly examine into the economic necessity for this effacement.

The insistent clamor to destroy the country merchant is something new in our history. In fact, this slogan was heard simultaneously with the birth of the mail-order house. The demand to eliminate the middleman applies only to country merchants. The mail-order houses confine their operations to country districts. Is it necessary to diagram the source of the influence back of this attack? However, with artful hypocrisy, it is urged that the farmer, who is the very staff of life to the Nation, is to be helped by the overthrow of this so-called middleman. I would gladly debate this question before a body of farmers—examine the situation in the light of reason and truth.

It is recognized that those who compile the catalogues for the mail-order houses are most skilled in the art of advertising. Wares are carefully exploited both as to price and quality. If the scope of this address would permit it, a startling array of facts could be shown on the point of quality in the goods sold by mail-order houses. Whether it be a saw, hammer, a bar of soap, or piece of scantling, the consumer must buy either from a description or an alleged picture of the article. In this blind-man's-buff method of trading the buyer must pay in advance. Thousands have been lured by the fancy word pictures of these highly paid artists. A large per cent of those who send their money to a distant city afterwards regret it and wish they had gone to their friend and neighbor, the retailer, where all wares are exposed to view and the buyer sees and handles the article before purchasing. Aside, however, from the question of quality, and for the sake of the argument, we will assume that on some articles a small per cent of saving can be made by buying through the mail-order houses. The question still remains, Can the farmer afford to cripple, much less eliminate, the country merchant? The country town is the farmer's local market. Here the thrifty housewife exchanges butter, eggs, and fowl for the merchant's wares. If times are good, the farmer deposits his savings in the local bank. If crops fail and a loan be needed, he goes to the local banker. The growth and prosperity of the town takes with it on an ascending scale the value of the farmer's land.

Aside, however, from these material interests of the farmer in the town, there are other considerations of infinitely more concern. The town is the religious, social, and educational center of farm life. The farmer sends his children to the town for the benefit of high-school education. On Sunday the ride to town is taken to hear some talented preacher. The country town of to-day is a miniature city. Lyceum lecture courses are given and modern theaters attract high-class talent. What has made all this possible? The energy, thrift, and fine civic enterprise of the country merchant. From him comes the taxes by means of which these splendid civic centers have been builded and are maintained. If you cripple or destroy the merchant, what becomes of the town? Goldsmith's "Deserted Village" will dot the plain and valley, a mute and mocking evidence of man's short sighted cupidity and his stupendous folly.

I am forced to believe that if the farmer and the laborer but understood the situation aright, the mail-order business would be short lived. There is so much more at stake than the saving of a few doubtful pennies. I am constrained to feel that if this matter could be fairly placed before the country consumer, aside from all questions of self-interest, his pride, his patriotism, his neighborly friendship would rally to the support of the retail merchant.

However, there is another angle from which I want you to view this question. I must hurry along, as I fear too much of your time has already been taken.

There is a growing demand on the part of the great majority of our people that unless some check can be placed on the ever-increasing concentration of the wealth of our country in the hands of great corporations and a few individuals there is grave menace to the very life of our political institutions. The very law the Government has invoked against the retailer was enacted as a weapon of restraint as against the greed

of great wealth. Does it not seem like the very irony of fate that this law, which was originally designed as a curb on the unfair aggressions of corporate activity, should be now leveled against the sole factor in our economic life that stands as a buffer between the great mass of consumers and corporate concentration? Eliminate the country merchant and the business of distributing the necessities of life, as a natural sequence, will of necessity center in the hands of a few great corporations. The Standard Oil will be as a pigmy as compared with such a trust. The only solution of the dilemma will be State and National socialism. Now, this word "socialism" is not a term of fear and horror. But if we are to steer the ship of state to that harbor let us do so with our eyes open, otherwise we may crash against some hidden reef. It is easy to tear down, but hard—yes, very hard—to build up. What is your remedy as against this impending danger? Organize! Organize! Organize! It is said angels often visit our friends in disguise. It may be the litigation that now confronts us is a blessing in disguise. It will prove such if it but has the effect of stimulating the retailer to arouse himself to the needs of the hour. Eternal vigilance is the price of liberty. In like manner militant and aggressive activity is the only force that will save the country merchant.

The Sherman law applies with much more applicability to labor unions than it does to any organized activity of the retail merchant. Union labor leaves a job in a body, and does it as a result of agreement. The laborer who would take the place of the striker is approached and urged not to work because the employer is unfair to labor. This is declared legal—and rightly so. Were I to follow a trade I certainly would join the union. Tremendous results for the uplift of the entire race have been accomplished through the struggle and ceaseless activity of union labor. Mistakes have been made, I grant you, but we are all the children of men. The point I make is this—the laborer in order to protect himself and family is permitted to state the facts as they are. If, however, a number of merchants should get together and agree that they will not buy from a manufacturer whose methods are unfair, and which, if unchecked, spells ruin, this becomes an offense under the law. What is the answer? The laborer is properly organized. The merchant is not. The laborer is in politics, the merchant is not, Awake, arouse yourselves, get busy. If you care nothing for your own welfare, you at least have children dependent on you.

It is urged that the cost of living is too high. The retail merchant is the man most available at whom a brick can be thrown. He is thereby made a vicarious sacrifice to appease the aroused populace. The most superficial investigation would convince anybody, much less a government official, that the retail merchant of the country has been getting no unjust profit from his transactions. Every year thousands of retailers are compelled to throw up their hands and quit. The retailer's balance as it appears on the country banker's book tells the story. He not only does business upon a reasonable margin of profit, but carries from season to season the farmer, whose crops have failed, and the laborer out of employment. And yet it is urged that both farmer and laborer would be benefited by the elimination of the retailer.

My friends, as I have said, your only safety lies in a close, militant, aggressive organization. Your country banker will be back of you when he understands the situation; your local newspaper must get back of you, as its existence depends on you; your local insurance agent will be back of you; every educational and religious element in your community will sustain you if you but make known the true condition. All we ask is a square deal. If the Sherman law applies to you, then the law should be amended. The courts do not seem to know exactly what the law means. It is time to pass a statute wherein terms are defined.

The rule of reason was applied in the Standard Oil case, and this was done to meet the business exigencies of that great organization. If the court will not apply the same rule when the little fellow is concerned, let all the little fellows get together and make a tremendously big fellow, and then he can apply the rule of reason himself. The lumber dealers can not do this work alone. All retail associations must get together in the national federation. There are a million of you when thus united. There are other millions, directly and indirectly connected with this million. Be a true patriot, a real citizen. Lay aside party differences and do something for the retail merchant, and when you do you will have accomplished something fine and enduring for your country.

Before closing I desire to say a word especially applicable to our own association. I am deeply interested in this organization and this for the reason that I am a member of it. Such investments as I have are bound up in the retail lumber business. I, therefore, do not come to you as a lawyer pleading a cause, but rather do I speak from the standpoint of a lumberman. Fortunately the Southwestern Association is not involved in the litigation pending. At the same time your interest is identical with the interest of those associations directly involved. It is vitally essential that

every member of this association become thoroughly acquainted with the importance of standing with the association in its effort to help these other associations win out. You should not only loyally respond to each call made upon you, but it would seem to me that every man should organize himself as a committee of one to bring in those dealers who are not as yet members of the association. This after all is the retailer's fight; the association is but the medium through which we can carry forward concerted effort.

In conclusion I desire to express my appreciation of the very great courtesy extended me by the organization in inviting me to be with you this morning.

True Patriotism.

(By William Allen White, Emporia, Kans.)

To Southwestern Lumbermen's Association, Kansas City, Mo.:

I am exceedingly sorry that I can not attend your convention. It seems to me that the lumbermen of this section are undertaking a work that should commend them to all good citizens. The preservation of the home trade to the home town carries with it the preservation of many of our American institutions. It seems to me that a lot of good things in American life will pass if the country town passes. And it will pass just so surely as centralization of retail mail order business in cities continues. The American country town, the town of from one hundred to one hundred thousand people, preserves better than the crowded city, and better than the lonely ranch and isolated farm life, the things that make America great. Here in these country towns the spirit of neighborliness is the prevailing spirit. Men come to know one another and when any two human beings come to know another, in the one who is intelligent and wise, respect always rises for the other. To know one's fellows always is to sympathize with them. Neighborliness spells fraternity. The American country town, with its broad circle of friendships, with its close, homely, simple relations between men, with its spirit of cooperation, and with its economic status that permits the creation of no indecently rich and no abjectly poor, the American country town, it seems to me, is the most hopeful of our American institutions. To destroy that town furnishing the market for the farmer and giving steady employment to labor, means a reorganization of our commercial, social, and industrial life that will be revolutionary—and more, a matter of doubtful value.

The mail-order house, therefore, becomes a menace to this country. The mail-order house unrestricted will kill our smaller towns, creating great cities with their terrible contrasts of life, with their cruel social relations, with their inevitable caste feeling that comes from the presence of strangers who are rich and poor, living side by side. Friendship, neighborliness, fraternity, or whatever you will call that spirit of comradery that comes when men know one another well, is the cement that holds together this union of the States. It is not created in great cities. Great cities give much in alms, but little in justice. Only as we know each other well can we treat each other justly; and the city is a wilderness of careless strangers whose instincts of humanity are daily becoming more and more blunted to suffering, because in the nature of things, suffering in cities must be impersonal. It is not the suffering of friends and neighbors, and kith and kin, as it is in the smaller town. So the mail-order house, crushing out our towns, is drying up the milk of human kindness in our hearts, and that brings us back to first principles; if we who live in these small towns of America can not see that our duty to our country lies first of all in our duty to our neighbors, then we are blind indeed to the basis of real patriotism, for after all, patriotism is only neighborly kindness; patriotism is not in cheering for the flag. It is not in feeling our eyes filled with emotional tears at hearing the Star-Spangled Banner; patriotism is just old-fashioned human duty; to sacrifice our neighbor—the man who helps the town with its taxes, with its public business, with its myriad activities for neighborly righteousness—to sacrifice that man and his business for the mere sake of saving a dollar on the purchase of a hundred dollars' worth of goods is just as unpatriotic as it is to spit at the flag. For the flag, if it means anything, means the golden rule; the flag means friendly burden bearing; it means mutual help in trouble; it means standing together against common foes. The motto of the mail-order house is every man for himself and the devil take the hindermost—and, you bet, the devil will. That spirit never fails to work; and the weak man, the unprotected man, the man alone—the man on the farm, at the end of the fact, when his farm market is gone, when his town is gone, when the spirit of selfishness and greed has left this country cold and hard and mean and neighborless—the farmer will

be the hindermost; so I am glad to know that this association is taking up this work—a cheerless, thankless, but necessary and patriotic task—and is pushing it to a successful conclusion. You have my heartiest sympathy and may call upon me whenever I can help.

Mr. FLOYD. If I understand you, Mr. Putnam, if it should be held by the courts not to be within the Sherman law so far as disseminating information is concerned, that you would have an opportunity to do it through your association, and you could get your information in that way.

Mr. PUTNAM. That would clarify the situation.

Mr. FLOYD. But if on the other hand the court should decide that the dissemination of information was within the prohibition of the Sherman law, and if your association did that, and it was in violation of the Sherman law, then would come the need of additional legislation to give you the opportunity to expose these frauds, as an association.

Mr. PUTNAM. That is the idea, exactly. If there is any other information I can give to you gentlemen I will be glad to do so. I very much appreciate your courtesy in allowing me to express my views on this matter.

STATEMENT OF ALBERT H. WALKER, ESQ., PARK ROW BUILDING, NEW YORK, N. Y.

Mr. WALKER. Mr. Chairman, I may not be a venerable man; but I have come down to you from a former generation. I made my first argument before a congressional committee in President Grant's administration. In every argument I have presented since then I have always been actuated by the desire to assist the committee in the particular work in which it was engaged, and not to occupy time by a recital of particular hardships, or to represent the interests of particular clients.

I am a practicing lawyer in New York City, and I have a good many clients, but I have not a client in the world who will be assisted in any way by anything I am going to say to this committee to-day.

In speaking to a congressional committee I always disregard the personal equation and everything else except my own views of the public interest and what is necessary for the public good.

As some of you gentlemen know, I have studied the Sherman law and all the jurisprudence connected with it for many years. My investigations of that subject began with a thorough study of the debates in both Houses of Congress when the Sherman law was enacted in the year 1890. I have carefully studied all the litigation and adjudications that have been had under State statute since that time. I have carefully examined the three tentative bills which are before your committee. I have some suggestions to make with regard to them.

I will first speak of the first two bills which are referred to in the committee print as bills Nos. 1 and 2.

After having studied those bills a long time I made up my mind that, as a matter of workmanship, they could be condensed into one bill which would tell a consecutive story and which would contain some necessary provisions that are not in either of the bills, and which would omit some provisions which are in one or the other of

the bills which seem to be unnecessary if not unjust. Therefore I shall present to this committee, as a part of my observations, a draft of a bill which I myself have made, as containing all the legislation which, in my judgment, is desirable as supplemental legislation to the Sherman law. This bill is rather short, and with the permission of the committee I will read it now for the information of all the gentlemen present.

The title of the bill is "A bill to prohibit, prevent, and punish certain forms of restraints of interstate and international commerce."

The bill provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. Every act in restraint of interstate or international commerce is hereby prohibited; and this prohibition, without being limited thereto, includes the following conduct:

1. Combining to fix prices, rates, or terms of purchase, sale, or transportation of any commodity; and evidence which proves habitual conformity in such prices, rates, or terms among two or more persons, partnerships, or corporations engaged in buying, selling, or transporting such commodities shall be received in all places as prima facie proof of such combining.

2. Combining to limit the production of any commodity, with intent to consequently advance the price of any commodity.

3. Combining to divide the business of furnishing purchasers with any commodity on a territorial line or on any other line.

4. Selling any commodity on condition that the purchaser shall refrain from buying from another seller.

5. Refusing to sell to any proposing purchaser without any legitimate reason and with intent to injure any business.

6. Discriminating between different purchasers or proposing purchasers in respect of price or terms of sale or time or manner of delivery with intent to injure any business.

7. Selling any commodity at less than a fair price with intent to injure the business of anybody by means of such unfair competition.

The effective, substantive portion of the Sherman law is its first section, which prohibits combinations in restraint of interstate and international commerce. That section was drawn by Senator Edmunds, of Vermont. I have corresponded with him about it lately, and he told me that when he drew that section and when he advocated it in the Senate in 1890 he held that restraint of trade is always wrong, but that it could not be divided into specific forms of wrong any more than fraud could be divided into specific forms of wrong, and that as the courts in England and this country have always declined to define fraud, so also Senator Edmunds was of the opinion that it was undesirable to attempt to define restraint of trade for fear that those persons desiring to do wrong would invent forms of restraint of trade outside of the definition. That was always his view and is his view yet, and I myself was inclined for years to think that that was the bottom of the matter and that Congress could not do anything in the way of making the prohibitions more specific.

Two years ago Senator Clapp, then chairman of the Senate Committee on Interstate Commerce, invited me to appear before that committee and say what I had to say about restraints of trade and afterwards to be interrogated by members of the committee. The session occupied a whole day, and I was asked whether I would favor any specific definitions of the restraints of trade which would violate the law, in addition to the general prohibition of restraints of trade then in the Sherman law. I told those gentleman that I thought it was possible to define a considerable number of restraints of trade in

specific language which would be held to be violative of the statute and at the same time obviate the objection of Senator Edmunds which he found to reside in all attempts at definition.

That view has possessed my mind ever since that time until, after several years of deliberation, I have made up my mind that these seven definitions of specific forms of restraints, to be prohibited by Congress would be supportable; provided Congress also provides that these prohibitions do not limit the general language of the Sherman law, but are supplemental to it, in the terms in which I express them.

Mr. NELSON. You have followed the decisions of the courts in the Standard Oil case and the Tobacco case, have you?

Mr. WALKER. I have; yes, sir.

Mr. NELSON. Have you found that by reading into the statute the word "unreasonable" that these specific definitions have become necessary to meet the broadening of the statute under the decisions of the Supreme Court?

Mr. WALKER. They will be found to be necessary just as soon as that obiter dictum, the so-called "unreasonable" obiter dictum passes into adjudication. All that the Supreme Court said on that subject in those cases was decidedly obiter dictum. No such question was before the court, because everybody admitted that those restraints were unreasonable. But Chief Justice White informed mankind that this is what we will decide when the questions come before us. Never yet has anybody been excused for any particular act said to be in restraint of trade on the ground that it was reasonable restraint of trade, and at present this is a moot question. But just as soon as the courts are called upon to pass that obiter dictum into judgment, then these specific definitions are necessary.

Mr. MORGAN. Is it your idea that the present Sherman law is not sufficient; that is, that under that law there can be restraints of trade that ought to be prohibited that are not prohibited by the law, and that these definitions will broaden the Sherman law?

Mr. WALKER. No. I hold that the first section of the Sherman law is ideally complete, and includes a prohibition of every wrongful act. But I am aware that many gentlemen do not understand the language of the first section of the Sherman law as I do, and that many of those gentlemen would think that that language does not apply to some things to which I think it does apply.

Mr. NELSON. In other words, that you have reduced the debatable area that surrounds that section?

Mr. WALKER. Yes, sir; I think I have.

Mr. MORGAN. Do you not think that you have made a great many things unlawful there, that would not be unlawful under the Sherman antitrust law, under the construction given to it by the Supreme Court?

Mr. WALKER. No; I do not. I think every one of the transactions which I define is unreasonable.

Mr. NELSON. If I have followed you correctly there, you have tried to specifically point out the evil without attempting to define it so that it would be too inclusive or too exclusive?

Mr. WALKER. Exactly what I have attempted to do is this. The first section of the Sherman law is its effective section. It prohibits restraints of international and interstate commerce. The question is what constitutes restraint within the purview of that

particular language. In my view of these seven things mentioned, they all come within the language.

Mr. NELSON. Have you compared those seven things with the specific things directly included in the La Follette bill?

Mr. WALKER. Which is the La Follette bill?

Mr. NELSON. I thought you had probably compared them.

Mr. WALKER. I have not done that.

Mr. NELSON. In the first La Follette bill prepared two years ago, and as it is at present, it was worked out by the Senator with the assistance of Mr. Brandeis, and they attempted to write specific things into the bill, and to put these added teeth into a general clause. How does your list compare with that list?

Mr. WALKER. It does not agree. My bill contains some very important items that are not in that bill, and that bill contains some things that are not here.

I can help the committee, I think, more than in any other way I know of, by speaking in detail of these seven different specific prohibitions. I shall speak of them historically, and I shall speak of them analytically.

The first one is, in my judgment, the most important. Among the things I would prohibit, I would define wrong conduct in exactly this language: "Combining to fix prices, rates, or terms of purchase, sale, or transportation of any commodity."

If that were enacted into law, it would be extremely distasteful to all the gentlemen who have spoken here this morning, because that is what they want to do.

There are some circumstances in which the public welfare and private justice might be advanced by permitting some classes of people to fix prices; but you can not adopt a statute of the United States that will apply to some gentlemen and will not apply to other gentlemen. And if you do not prohibit the fixing of prices, you will introduce a possibility of fixing prices that will do vastly more harm than any possible good which will result from permission to fix prices.

Let me state a concrete case. I know all about some conduct that has been perpetrated in this country for many years contrary to that provision. In one particular commodity it has cost the people of the United States $500,000,000 of pure plunder in the last 18 years.

Mr. MORGAN. What is that?

Mr. WALKER. In the transportation of anthracite coal in interstate commerce from the anthracite coal fields of Pennsylvania to tidewater.

How have those prices been fixed? They have been fixed by a gentleman's agreement, engineered by the late John Pierpont Morgan. It has been sufficient to hold all the coal roads together for 18 years; that gentleman's agreement that those coal roads shall receive $1.55 a ton for transporting anthracite coal of domestic sizes from the coal fields of Pennsylvania to tidewater. On smaller sizes lower rates are charged, but the lowest rate is more than $1 a ton.

Now, I have demonstrated from the reports of the Reading Railroad Co., the largest of those coal carriers, year after year, to the Interstate Commerce Commission, and to the Attorney General, and to everybody else that would listen to me, that those prices are more than twice what they should be, in order to yield a fair profit.

No human being has bought a pound of coal in this country in the last 18 years for any less than he would have paid if there had been no law on the subject. The Sherman antitrust law and the interstate commerce law have been a dead letter against that combination.

There are several reasons for this, and I know all about the subject.

But if Congress will enact exactly this provision of mine, and make it specifically a violation of the first section of the Sherman antitrust law to combine to fix prices for transporting merchandise in interstate commerce, that prohibition would apply to that particular extortion.

Mr. NELSON. Would it reach a gentleman's agreement, where there is nothing whatever on record?

Mr. WALKER. Certainly, and I have reached that by this additional language:

> And evidence which proves habitual conformity in such prices, rates, or terms, among two or more persons, partnerships, or corporations, engaged in buying, selling, or transporting such commodities, shall be received in all places as prima facie proof of such a combining.

Mr. NELSON. That would shift the burden of proof?

Mr. WALKER. Certainly; the burden to prove the absence of combination, which they never could carry.

Mr. MORGAN. Does not the Interstate Commerce Commission require the railroads to charge the same prices?

Mr. WALKER. There is not the slightest objection to the Interstate Commerce Commission fixing the prices for the railroads to charge. If the Interstate Commerce Commission tells the railroads what a fair price is, the Interstate Commerce Commission does not tell them they shall charge all of that price; and this provision would not be violated by them, in following the directions of the Interstate Commerce Commission.

Mr. MORGAN. The Interstate Commerce Commission have the power to tell them what they shall charge.

Mr. WALKER. Very well, but if the Interstate Commerce Comsign should do, as I am sure they ought to do, prescribe the prices these railroads may charge, and make those prices about half what they are now, and then enforce that order, as they have a right to do, the railroads would conform to that order. They would not be violating this law, because they would not be combining to fix prices, the prices being fixed by the Interstate Commerce Commission, as the representative of the Government.

Mr. MORGAN. The railroads now are asking for a general increase of rates?

Mr. WALKER. They are.

Mr. MORGAN. If they reduced the rates on coal they would have to make that up on something else?

Mr. WALKER. No; that is not right, because the very railroads that charge this excessive rate on coal, charge a fully compensatory rate on everything else. Let me go further into this matter; I know all about this.

I began investigating that particular thing in the year 1910. My investigation consisted in going to the Astor Library in New York City and getting the reports of the Reading Railroad for 20 or 30 years back. After I had got to the bottom of the matter, I laid the matter before Attorney General Wickersham, and also before the Interstate Commerce Commission.

In 1910 Mr. Wickersham sent Mr. Kenyon, now United States Senator from Iowa, to me for detailed information, and I gave him a large amount of detailed information. The Interstate Commerce Commission sent Mr. Marble to me in New York, for the same purpose, and I gave him a large amount of information.

Finally in December, 1912, Mr. Lane, now Secretary of the Interior, then chairman of the Interstate Commerce Commission, came to New York to my office for further information on this subject. I said to Mr. Lane: "I have devoted much time during years of my life to this subject without the slightest pecuniary interest in the matter, and I can prove whenever I get a chance that the coal roads are extorting for the transportation of coal more than 100 per cent more than a fair profit, and there has not been a time since the Hepburn law was enacted in 1906 that the Interstate Commerce Commission did not have power to stop that conduct." I also told Mr. Lane that the Interstate Commerce Commission had never exercised that power, and that nobody has ever bought a pound of coal during all that time for any less than they would have bought it if there had not been any interstate commerce law. Mr. Lane said to me that he was going back to Washington to lay the matter before the Interstate Commerce Commission. He laid the matter before the Interstate Commerce Commission, and that commission thereupon framed an elaborate system of questions to put to all the coal roads, in order to officially find out whether or not these roads were charging an extortionate rate.

The commission ordered those railroad companies to answer all those questions by the 1st of the following March—that is, March, 1913. The questions were so numerous that it was too short a time in which to answer them, and the railroads secured extensions of time, and finally all the answers were in at the end of June, 1913.

By that time Mr. Lane had been appointed Secretary of the Interior, and Mr. Marble, a most excellent man, had been appointed to succeed him. I called upon Mr. Marble early in July of that year, and he said to me that the Reading Railroad Co. had just deposited with the Interstate Commerce Commission their replies to the questions which the commission put to them about transporting anthracite coal, and he said, "I would like you to examine that pile of papers and see what you can find in it." He said, "I will give you the assistance of one of our experts, and you can go through those papers." I did so, and in less than 10 minutes I found out that the Reading Railroad Co. had made a mistake of a million dollars in its own favor.

That same afternoon I dictated and handed to Mr. Marble a signed report in which I proved from the figures of the Reading Railroad Co. that they were charging and receiving per ton-mile for transporting hard coal (the unit of charge being the ton-mile)—that they were charging and receiving for transporting hard coal in train loads of at least 1,200 tons 36 per cent more than they charged for dry goods in cases. Mr. Marble was surprised at that. I told him to look through that report and give it to his experts and see if they could find any error in it, and they never could.

Mr. Marble afterwards obtained authority from the Interstate Commerce Commission to go to Philadelphia to investigate that matter from the bottom. That investigation began there one Monday

morning in November, and on Wednesday night the poor fellow ate too much dinner and died on Friday. That death put into the treasury of the Reading Railroad Co., on account of the delay resulting therefrom, at least $5,000,000.

As soon as possible thereafter the work which Marble was compelled to relinquish was turned over to Commissioner McChord, who is now pursuing it as rapidly as he can. In time the Interstate Commerce Commission will enter an order reducing the rates chargeable for transporting interstate coal, in my judgment, at least 50 per cent, because, as I see in the daily press, the testimony which Mr. McChord has taken has proved that the cost of that service for which they receive $1.55 varies from 39 to 59 cents.

That is an instance, gentlemen, of an enormous extortion. I am speaking by the book on that matter; and I assure you gentlemen that the coal roads have plundered the people of the United States since Mr. Morgan's reorganization of the Reading companies in 1896 to the extent of $500,000,000 beyond any reasonable rate for the transporting of coal.

At the same time they have been charging abundantly for their other transportation, and the Reading Railroad Co. in its last annual report sets forth that its earnings amounted to 23 per cent upon its common stock. And I figured it out that those earnings were 29 per cent on that stock, and that stock has been watered more than 100 per cent in the last five years, being increased from $20,000,000 to $42,000,000. I assure you, gentlemen, that that great series of plunderings of the American people by extorting excessive prices have resulted from a gentleman's agreement among the coal railroads. If they were to put these agreements in writing which they make informally, they would violate the Sherman law in terms. That is why they did not make them in writing.

Mr. PETERSON. Do not these extortionate prices extend not only to the carrying of coal from the mines to tidewater, but also to the carrying of coal to the West by other railroads?

Mr. WALKER. Certainly. The extortion is quite as great in rate, but not so great in total, because more of the anthracite coal is sold in the East than in the West.

The rates to Chicago are still more excessive, and to Michigan and to Ohio and Indiana, but they are less felt there because the citizens there can use bituminous coal, whereas bituminous coal is practically prohibited in the eastern cities by virtue of the laws prohibiting excessive smoke.

I know other cases in which managers of competitive corporations simply cultivate a friendly feeling among themselves, and have gentlemen's agreements that they will maintain prices, knowing that if they were to put such an agreement in writing they would be subject to criminal prosecution. But they rely upon secrecy and absence of positive proof for their protection.

In respect to the anthracite coal roads, there is not the slightest doubt but what they have carefully avoided making such agreements in writing, but it is undeniable that during all these years they have maintained this high price, and the price has been uniform as well as being excessive. I would have Congress enact a law to prevent the making of such agreements for maintenance of such prices, and that the habitual maintenance of uniform prices shall be prima facie evi-

dence of combination. Unless you do that you will not stop the fixing of prices by "gentlemen's agreements."

Now, let me speak of the question as to whether or not that particular wrongdoing, combining to fix prices, rates, or terms for the purchase or sale of any commodity, is a violation of the Sherman law as it stands. One of the members of the Judiciary Committee of the Senate who framed that law was Senator Hoar, of Massachusetts. Now, I knew Senator Hoar and I knew Senator Sherman and Senator Edmunds. A year or two after the Sherman law was enacted the Washburn & Moen Co., of Worcester, Mass., employed Senator Hoar as an attorney to advise it whether a combination to fix prices would violate the terms of the Sherman law, and he wrote them an opinion to the effect that a combination to fix reasonable prices would not violate the first section of that law. I never knew that until Senator Hoar died, and I only saw the opinion in recent years. I got a copy of that opinion and sent it to Senator Edmunds and asked his views of it. He wrote me that he did not agree with it. Senator Hoar's argument was never convincing to me, although it was undoubtedly put forth in entire good faith. I do not think that, read over now, it would convince any lawyer accustomed to analyzing statutes, and particularly if that lawyer happened also to know what the construction of the courts upon that statute had been.

Mr. MORGAN. A gentleman this morning wanted Congress to permit two different firms to agree upon prices. You do not so understand it, do you?

Mr. WALKER. No, sir.

Mr. MORGAN. My understanding is that they simply say that one manufacturer has the right to fix his own price, and they contend that he has the right to confer with anybody else as to what anybody else should sell at.

Mr. WALKER. Oh, you misunderstood what the gentleman wished. What he wished was that not only shall the manufacturer fix the price at which he sells the goods to the retailer, but also that he shall fix the price at which other people may sell the goods.

Mr. MORGAN. They simply mean that if you are a manufacturer making salt, you have a right to say to the retailer how he shall retail his salt.

Mr. WALKER. They desire to have the manufacturer permitted to make a combination with the retailer to fix the price at which the retailer shall sell; that is a combination between the manufacturer and the retailer.

Mr. MORGAN. Not a combination, but simply an agreement, an arbitrary agreement.

Mr. WALKER. That is the very thing the Supreme Court said can not be done, and these gentlemen are displeased with the decision of the Supreme Court, and they want Congress to let them do it, notwithstanding the decision of the Supreme Court.

Mr. MORGAN. They do not want a combination between any two retailers or any two manufacturers.

Mr. WALKER. They claim that there should be an agreement between one manufacturer and all the retailers that sell his goods, and although two retailers might not agree between themselves, they do agree through the manufacturer. The manufacturer says to all the retailers, "Sell these goods at this price and no other,"

and as long as those retailers agree to that with the manufacturer they agree among themselves.

Mr. MORGAN. But those retailers are not in competition with each other.

Mr. WALKER. Oh, yes; they might be in the same town.

Mr. WEBB. They want the manufacturer to fix the price to the jobber, and the jobber to fix the price to the retailer, and the retailer to fix the price to the consumer.

Mr. WALKER. If Congress adopts the phraseology I have used in my bill, it will be seen that they can not do any such thing.

The CHAIRMAN. What they now complain of, Mr. Walker, is that as the law now stands, under the decision of the Supreme Court, they can not make that price-fixing agreement.

Mr. WALKER. Certainly, and they want Congress to give them that right, notwithstanding the Supreme Court.

Mr. WEBB. They want us to set aside the decision of the Supreme Court.

Mr. WALKER. Yes; I think that Congress should make the language so perfectly plain that everybody could see that it absolutely prohibits the fixing of prices under any circumstances.

Mr. NELSON. Would that work any harm upon any legitimate interest that you know of in the country?

Mr. WALKER. I do not know of any legitimate interest in this country that would be harmed.

Mr. NELSON. Have you thought of any interest in which it might work a hardship?

Mr. WALKER. No; I do not know of any; I have not thought of any. If this provision of mine would work a hardship to any legitimate interest, that is outside of my knowledge; but I do know that this very provision is necessary to protect the people of the United States against those great combinations of plunder that are enriching themselves at the public cost. This subject of gentlemen's agreements to fix prices is one which I have never known to be discussed before any committee, and it is a point upon which the first section of the Sherman law needs specific clarification for the public information.

Mr. MORGAN. Do you think there is any question that under the Sherman law two men can combine to fix prices without violating the Sherman law?

Mr. WALKER. How is that?

Mr. MORGAN. Is there any question about the Sherman law prohibiting the fixing of prices between two individuals?

Mr. WALKER. It clearly does prohibit it.

Mr. MORGAN. But is there any question about it?

Mr. WALKER. No; not to my mind, but there is question in other men's minds. And Congress should legislate not only to make particular a prohibition, but also should make the prohibition so plain that anybody can understand it.

Mr. NELSON. You have added a clause there that seems to get at the gentleman's agreement and shifts the burden of proof.

Mr. WALKER. Yes.

Mr. NELSON. It strengthens the law.

Mr. WALKER. Very much so; because now the burden of proof has been upon the Government to prove the gentleman's agreement,

and in some instances the Government has carried that burden without success, and has not secured a conviction; the Government seldom successfully sustains the burden of proof.

Mr. MORGAN. We had a gentleman here representing the independent oil interests, and he admitted that they sold at the same price as the Standard Oil Co., without any agreement or anything of that kind, but they had to follow the same price. Now, the very fact that these independents were selling at the same price as the Standard should be made by law sufficient evidence to convict them under the Sherman law.

Mr. WALKER. Prima facie only. They could prove at any time that there was no agreement between them and the Standard Oil Co. It merely throws upon them the burden of proof.

Mr. NELSON. And an affidavit or anything of that kind would remove the prima facie?

Mr. WALKER. No; not a mere affidavit, but when the party was tried for violation of the law he could disprove the prima facie case against him by affirmative proof to the contrary.

Mr. NELSON. In other words, it might necessitate perjury on the part of those who are parties to this gentleman's agreement?

Mr. WALKER. Yes, sir.

Mr. NELSON. To get away from the operation of the Sherman law?

Mr. WALKER. Yes.

Mr. MORGAN. Now, if such a law was enacted and had the effect you mention, would you put every independent dealer who happened to sell at the same price as the big concern in a position of being prosecuted?

Mr. WALKER. Not practically, because there are not half enough people prosecuted now. No district attorney or attorney general would think of bringing a prosecution against such an independent dealer merely because of conformity of prices; but if other things should satisfy him that there was a combination, then he would prosecute the independent dealer, and the independent dealer could meet that prosecution at any time by proof that there was not any combination. Horace Greeley was once asked to contribute to a fund to send missionaries to Asia and he said, "I will not give a damn cent, because not half enough people go to hell now." And in like manner the problem before Congress is not to shield innocent men from unjust prosecution, because no such thing has occurred in this country since the Sherman law was enacted. The problem before Congress is to stop rogues and put an end to the plunder of the people.

Mr. PETERSON. There is no hardship in asking a man to prove his innocence?

Mr. WALKER. No, sir; not in this case. This proposition that I have laid before the committee has never been laid before any congressional committee before, so far as I know.

Mr. NELSON. Have you written more than one book on the subject?

Mr. WALKER. No, sir; the "History of the Sherman Law" is the only book I have written relevant to restraint of trade.

(Thereupon, at 1.15 p. m., the committee took a recess.)

AFTER RECESS.

The committee reconvened.

Mr. WALKER. Before the recess I was speaking of the first of the seven propositions which I have formulated, to specify and precisely define classes of conduct which, if such a bill as mine were enacted, would be held and prescribed by Congress to constitute a restraint of interstate or international commerce. The first of the seven definitions related to fixing prices. I think that the committee will be convenienced if I suspend my exposition of those seven definitions while I say something more relative to the subject of price fixing.

Two years ago one of the largest of the industrial combinations of corporations of this country employed me to formulate some ideas that the manager of that combination entertained relevant to the regulation of its business. He employed me as a lawyer, and he employed me to develop and put into words his ideas and not mine, because for some reason he believed that I could express any particular thought in English better than he could. After making me fully acquainted with what he wanted, he got me to formulate a statute to be enacted by Congress on the subject of price fixing. I did formulate that statute with great care, but it was never introduced in Congress because, I suppose, he was either dissatisfied with my expression of his thought or because he thought the time was not opportune for introducing such a measure. But I venture to bring it here, and inasmuch as if it were enacted it would cover a good deal of ground that is covered in a somewhat different way by other bills before one or the other Houses of Congress, I will venture to read it to the committee.

This bill proposes to establish a commission called the Sherman law commission, and it is blocked out to the best of my ability to express things plainly, and would establish a system which I believe to be better than any other system which has ever been broached or suggested for the administrative regulation of industrial corporations. I am not saying that I favor any such bill, but if any such bill is to be enacted, then I should ask Congress to follow this bill that I have drafted. The bill reads as follows:

A BILL To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. A commission is hereby created and established and named the Sherman Law Commission, which shall be composed of nine commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall continue in office during good behavior, subject to removal by the President at any time at his discretion. None of the commissioners shall, while holding his office, have any pecuniary interest in any interstate or international trade or commerce, or in any trade or commerce being wholly or partly conducted in the District of Columbia, or in any territory of the United States; or shall engage in any work disconnected with his duty as commissioner.

The commission shall be provided with proper offices and other rooms, and with proper clerical and other agents to work in those rooms in the city of Washington; and each commissioner shall receive a salary of $12,000, payable in monthly installments of $1,000 each. Any five commissioners shall constitute a quorum for transacting any particular duty of the commission, and such a quorum shall be present for duty in the offices of the commission every day, except Sundays and legal holidays.

SEC. 2. No person, partnership, or corporation shall, at any time after the year nineteen hundred and twelve, transact any trade or commerce among the several States, or with foreign nations, or in the District of Columbia, or in any Territory of the

United States to a greater amount than $10,000, in any one day, without having received and possessing a license executed by the Sherman Law Commission, authorizing that person, partnership, or corporation to transact such trade or commerce; but neither the word trade or the word commerce, as used in this act, includes transportation of property without any change of ownership.

SEC. 3. No license shall be granted by the Sherman law commission to transact any such trade or commerce, except in pursuance of an application in writing, made in conformity to general rules to be established and published by the commission; and the commission shall either grant or refuse to grant a license in pursuance of every such application within one calendar month after it is framed in accordance with those rules and filed in the office of the commission.

SEC. 4. The commission shall not refuse to grant a license in pursuance of any such application, except for one or more of the following reasons, namely: First, the applicant's failure to convince the commission that its organization and its program do not involve any restraint of trade or commerce, or any attempt to monopolize any trade or commerce; second, the applicant's failure to convince the commission that its organization and its program are free from fraud and from deception.

SEC. 5. Every license granted by the commission shall be subject to the following conditions, namely: First, the licensee shall not, at any time after the date of the license, enter into any contract, combination, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or in the District of Columbia, or in any Territory of the United States, or make any attempt to monopolize any part of any such trade or commerce; second, the licensee shall not at any time after the date of the license adopt or execute any fraudulent or deceptive plan or scheme for conducting any such trade or commerce; third, the licensee shall, after the date of the license, faithfully perform whatever duties relevant to publishing facts relating to its business which may be prescribed by the commission prior to the granting of the license, or at that time or afterwards.

SEC. 6. Whenever the commission becomes convinced in pursuance of a regular investigation fairly conducted according to its rules that any licensee is guilty of having violated any condition upon which a license was granted to that licensee, that license shall be forfeited by means of an order made and recorded by the commission for that purpose; but no such forfeiture shall go into effect until one calendar month after its granting, and shall not go into effect then if during that calendar month the licensee shall have taken and completed an appeal from that order to the court of commerce, in accordance with rules to be prescribed by that court; and such order, if thus subjected to an appeal, shall never go into effect except in pursuance of and in accordance with a decree made by the court of commerce to effect its decision upon such appeal; and no appeal from such a decree shall ever be taken by any form of proceeding to any other tribunal.

SEC. 7. The commission shall have jurisdiction to prescribe prices of commodities to be thereafter purchased or sold by any licensee, whenever that licensee shall present a petition to the commission praying that such prices shall be prescribed, or whenever any other person, partnership, or corporation presents a petition to the commission, stating that and wherein the licensee has been engaged in artificially depressing prices, or artificially advancing prices, in derogation of justice to producers, consumers, or competitors; and this jurisdiction to prescribe prices may be exercised by fixing maximum prices, or by fixing minimum prices, or by fixing specific prices, as the case may be; and the prices so fixed shall continue in force until they are changed by the commission, in pursuance of a new petition, unless the order fixing them shall limit their prevalence to some particular lapse of time.

SEC. 8. Any licensee may by petition, apply to the commission at any time for advice on any question whether any proposed action of that licensee would, if taken, conform or not conform to this act, or to the act of July second, eighteen hundred and ninety, which like this is entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and is called the Sherman Act; and the commission shall give advice in writing to such licensee in pursuance to such petition; and any action thereafter taken by such licensee in pursuance of such advice shall be presumed in all courts and other places to be lawful; and that presumption shall prevail at all times, except as against some clear illegality, in which case it shall not prevail in any court.

Now, that paper is the result of the ideas of one of the most experienced men in the world in the matter of managing industrial corporations. This gentleman arrived at the conclusion about the year 1912 that the régime of laissez faire was coming to an end or was

about to come to an end, and that he would not be allowed to continue to run his business as he had before, and that he would have to submit the business of the great combination he represented either to administrative regulation or to judicial regulation in the courts.

Mr. NELSON. Mr. Gary is one of such gentlemen?

Mr. WALKER. Yes; he is one of them. This gentleman of whom I speak preferred to be regulated by an administrative board rather than by the courts. He gave me thorough possession of his ideas on the subject which, however, were somewhat crude and unorganized and not precisely expressed, and he employed me to put his ideas into what I might present to him as a workable scheme of legislation. This bill was the result of many days of careful study to carry out his ideas. Now, I expect that this bill when it was completed did not suit his ideas, because it was too severe. While it was a fair representation of the ideas that he expounded to me, when he came to see them face to face in print they did not look like what he thought they were going to be, and the result is that he has never used the draft so far as I know, and it never has been brought to the attention of any committee of Congress. But there is no reason why I should not furnish this copy of the bill to this committee for its use, and it is to be commended to the committee for such weight as they may see fit to give to it, though it is to some extent anonymous.

Now, on this subject of regulation of great combinations and businesses by administrative action or by judicial action, as the case may be, I have perfectly clear views. It may be known to some members of the committee—anyway it is a fact in which I take some satisfaction—that in the last presidential campaign I supported Col. Roosevelt and the Progressive Party. I did this notwithstanding the fact that I entirely differ with the colonel in respect of his views about regulation of big corporations. He holds that the ideal and proper way to regulate big corporations and big businesses is by administrative action, and I hold that the colonel is wrong on that point and that the true remedy for the evils under which we labor is to be reached through judicial action carried on under judiciary laws. I have had considerable correspondence with the colonel on this subject, and he has put me in possession of his ideas, and he had my ideas from reading my book. I feel that although he is the most powerful expounder of the theory of regulation by administrative action——

Mr. NELSON (interposing). Might I interrupt you there? Is his idea to permit the combinations to exist?

Mr. WALKER. It is.

Mr. NELSON. And to regulate them and possibly to fix prices?

Mr. WALKER. It is to regulate them. I think it goes as far as fixing prices. But anyhow the colonel feels that judicial regulation of big corporations has largely failed, and that if the object that all good men hope to see accomplished is to be accomplished, the colonel thinks it can be accomplished only through administrative action. Now, I disagree with him on that, and the great reason why I disagree with him on that is that it is not possible for any commission or any dozen commissions to wisely judge and determine the numerous questions that would have to be determined. It can not be done. The Interstate Commerce Commission has had a jurisdiction quite limited, as compared with the jurisdiction the bill I am now discussing would confer. The Interstate Commerce Commission has

relation to the railroad corporations and other common carriers only. Its jurisdiction relates to fixing rates, which rates are easy to fix as compared with the fixing of prices of commodities. The Interstate Commerce Commission has never exercised even its limited power fully and effectively. I told the chairman of that commission more than a year ago that although it had power to regulate rates it had never exercised that power in respect of the flagrant case of the anthracite coal extortion. The reason why they did not exercise their power in that case was not through any desire to help the wrongdoers extort money, but because it was enormously overburdened and overloaded with jurisdiction. It is not possible for any seven men in the world, supported by any 500 or 5,000 employees, to determine what prices should be charged and what prices should not be charged for the great variety of commodities that are needed by the American people. But Col. Roosevelt has never appreciated the inability of any board or commission to do that stupendous work.

Mr. NELSON. You believe that Col. Roosevelt still adheres to the policy outlined in his recommendation to Congress by special message some years ago, of having a commission pass upon trusts, good or bad, and I believe a bill was introduced and supported before this committee by Seth Low carrying out that idea?

Mr. WALKER. I have no reason to suppose that the Colonel has relinquished any such views held when he was President. In his correspondence with me, he has debated the fact that I was in favor of judicial action, and he was in favor of administrative action.

Mr. NELSON. The difference is this: That you are for prohibition against certain practices, and letting the judiciary enforce that prohibition, and he is for affirmative approval, and letting the commission decide when they become injurious?

Mr. WALKER. That is one way of stating it; but the Colonel and I want to reach the same result, namely, that prices shall not be excessive. But his idea is that that problem is so complicated that it is not capable of solution through the judiciary, but only by administrative action, and I claim the contrary.

Mr. NELSON. You are discussing the added teeth of the Sherman law. Have you any views as to the added machinery for the Sherman law?

Mr. WALKER. I will come to that shortly.

Mr. NELSON. Very well.

Mr. WALKER. I shall not leave anything out.

Now, returning to the bill, that I have proposed as a substitute for your bills number 1 and number 2, I explained to the members of the committee who were present this morning, that my purpose was to insert in the law seven distinct definitions of what should constitute restraint of trade; but not making those definitions exhaustive.

The second definition is this: "Combining to limit the production of any commodity with intent to consequently advance the price of any commodity." It may often happen that the limitation of the production of one commodity will result in advancing the price of some other commodity.

Mr. NELSON. How about a combination to maintain prices?

Mr. WALKER. That would not be covered by this particular definition, but will be covered by another.

Mr. NELSON. In other words, we had the testimony of a retailer of watches that the Waterbury Co. or the Elgin Co. limited the output of watches in order to maintain prices. This would reach that evil, would it not?

Mr. WALKER. That particular phrase would not reach it unless you put in the word "maintain" and make it read, "advance or maintain the price of any commodity." Now, I should have no objection to adding that word "maintain" although its purpose will be covered by a later paragraph.

The third definition is as follows, namely: "Combining to divide the business of furnishing purchasers with any commodity, on a territorial line or on any other line." Now, that is an abuse that has been overlooked. People divide up the United States among themselves and mutually agree that they will not invade each other's territory. It ought to be prohibited so thoroughly, that no business man could face another business man and say that it was right.

Fourth. The prohibition of the selling of any commodity, on condition that the purchaser shall refrain from buying from another seller. There is a great abuse in that regard. The Eastman Kodak Co. has undoubtedly been operating that restraint of trade for many years, and on a large scale, and also the Shoe Machinery Co.

Mr. NELSON. Did the Sanatogen case apply to that?

Mr. WALKER. No, sir; I do not think so.

Mr. NELSON. That is, giving exclusive privilege to sell in a certain territory?

Mr. WALKER. No; I do not think so. That case decides that contracts made between sellers and buyers that the buyer shall not resell below a particular price, shall not be enforceable against him.

Mr. NELSON. Well, do they also carry on the practice of requiring them to handle their goods exclusively?

Mr. WALKER. Yes, sir.

Mr. NELSON. Would that decision prohibit that practice?

Mr. WALKER. No; I do not think that decision would prohibit that practice, although it held that a contract, however definite, between the manufacturer and the retailer that the retailer would not sell——

Mr. WEBB (interposing). You refer to the Sanatogen case?

Mr. WALKER. Yes.

Mr. WEBB. I do not think in that case the contract was between O'Donnell and the defendant. He bought from the jobber and the printing on the bottle did not bind him.

Mr. WALKER. Well, those schemes are carried out in various ways, but they always amount to this: That the man who sells the article seeks to bind the man who buys it not to resell below a certain price.

Mr. NELSON. Well, that would prevent the exclusive contract, would it not?

Mr. WALKER. The Eastman Kodak Co., furnishing a greater variety of photographic material than anybody else, has crushed competition from people who could sell some of that material by refusing to sell any of its material to purchasers who would buy some material from other producers.

Mr. NELSON. That has been the practice of the Steel Trust?

Mr. WALKER. I do not know. I am not in a position to deny it; but whoever does it, does wrong, and it ought to be stopped.

Mr. VOLSTEAD. Will this be sufficient to reach the practice of the shoe-machinery company where they lease their material instead of selling it?

Mr. WALKER. The La Follette bill is broad enough to cover the word "lease." This committee would do well to follow that bill in respect of definitions of words. This bill which I have drawn has not been drawn with a view to absolute finality, but with a view to giving the committee thoroughly clear views. If the committee should agree to my model, it might be necessary to insert some modifications.

Now, the fifth prohibition is this:

Refusing to sell to any proposing purchaser without any legitimate reason and with intent to injure any business.

People who are engaged in furnishing commodities on a large scale have sought in many instances to confine the distribution of these goods to particular favorites, by refusing to sell to people whom they do not want to handle their goods, although they are responsible parties

Mr. WEBB. There again you have to insert the word "lease."

Mr. WALKER. Yes. Anybody has a right to decline to sell his goods to a particular purchaser when he considers him irresponsible. That is a legitimate reason. But this enactment would prohibit a man from refusing to sell goods to a purchaser without some legitimate reason.

Mr. NELSON. In other words, if any man offered cash, then he would have to sell; but if he offered credit, then he would have the right to pass upon that credit?

Mr. WALKER. That is quite right. The sixth prohibition is:

Discriminating between different purchasers or proposing purchasers, in respect of price or terms of sale or time or manner of delivery, with intent to injure any business.

I think that is very necessary and ought to be provided for. Nobody engaged in selling goods should discriminate between particular purchasers on account of personalities. Of course, a manufacturer sells lower to a wholesaler than to a retailer; but when there is no difference between two purchasers except in their personalities, if the seller arbitrarily sells to one at a different price from what he sells the same goods to another without a legitimate reason, it is in restraint of trade and should be prohibited.

Mr. NELSON. That does not prohibit the practice that is covered in one of the bills, where the Standard Oil Co. would sell very cheap in one locality and very high in the other.

Mr. WALKER. That is covered in this provision: "Selling any commodity at less than a fair price, with intent to injure the business of anybody, by means of such unfair competition." Now, that has been a principal trick worked by the Standard Oil people. For instance, it was proved in the Standard Oil case, that in northern Indiana there was a man advanced in life, with a very small capital, who owned a horse and wagon, and supported himself by peddling kerosene oil around the country in his wagon and selling it to whoever would buy it at a fair price. The great Standard Oil Co. deliberately set about to drive that man out of business, and its method of doing

it was to put in a young man, with a new wagon, going around the country selling oil at less than cost until that old man was driven out of business. That was no sporadic case, but that was characteristic of the general policy of the Standard Oil Co. to crush out competition locally by means of underselling whoever ventured to compete with them, and they make it up elsewhere or afterwards by increasing the price to the consumers.

Mr. NELSON. You seem to confine it to some particular place. As I understand it your language confines it to specific places.

Mr. WALKER. I think it is broad enough. It says, "With intent to injure the business of anybody." Whether the "anybody" lives in that town or some other town does not matter.

Mr. NELSON. It all depends on the intent?

Mr. WALKER. Yes.

Mr. NELSON. What is your criticism of one of these tentative bills that requires that while they sell at one place at one price they have got to have a uniform price throughout the country?

Mr. WALKER. I do not believe that is practicable.

Mr. NELSON. Why not?

Mr. WALKER. I believe under the different conditions of transportation that provision would be evaded.

Mr. NELSON. You mean it would offer loopholes for escape?

Mr. WALKER. Yes.

Mr. FLOYD. The language of the provision referred to by Mr. Nelson is "with intent to injure or destroy a competitor," and it has been very seriously contended by some people before the committee that it would prevent competition; that whenever a man undertook to compete with anybody he was injuring his competitor and that, therefore, he destroyed competition. Do you think there is anything in that contention?

Mr. WALKER. No; it does not impress me very strongly, because where a man sells goods for less than a fair price for the purpose of getting trade I think he is doing an ethical wrong. Where a man secures a fair price for his goods, but not extortionate, he is at liberty to undersell his competitor. But if he cuts below a fair price and with no ultimate aim except to injure his competitor, he does an ethical wrong.

Mr. VOLSTEAD. Would it not be an exceedingly difficult thing in a great many cases, to prove that it was an unfair price; that is, too low a price, and would it not be better to apply the test that is applied in this bill, that if he sells at one price in one place and another price in another place with the intention of destroying competition——

Mr. FLOYD (interposing.) To injure or destroy.

Mr. WALKER. Neither scheme will work out ideally, because human plans are fallible. But the burden of proof would be upon whoever brought the suit, to prove the nonethical intent, and that nonethical intent would not be proved except in any case where it would exist, and prosecutions would not be brought in debatable cases, but would only be brought in flagrant cases, where it was only a question of bringing the culprit to the bar.

Mr. NELSON. In other words, you think the case you cite where the man was peddling kerosene would apply in this way: That if this statute was in force he could have an action and in an action of that

kind it would be disclosed what the prices were in other parts of the country, necessarily, would it not?

Mr. WALKER. Yes, sir; and those characteristics of the conduct of the Standard Oil Co. were disclosed in the Standard Oil case and were held to violate the first section of the Sherman law by the Supreme Court of the United States. My object in making this definition is not to make the Sherman law cover more than it covers now, but to make it so plain that everybody can know what it means and nobody can be heard to say, "I do not know what the Sherman law means."

I have been told in this room to-day that the Sherman law is so vague and uncertain that we do not understand it. I said to this gentleman, "It is the plainest statute on the statute book. There never were but three words in it that should give anybody any trouble to understand, and those are the words 'restraint,' 'commerce,' and 'monopolize.'" The definition of commerce was made by the Supreme Court many years ago and there is not much trouble in making out what "restraint" and "monopolize" mean. That claim is of ambiguity, usually put forward in bad faith, and it has the color of convincingness only because the language of the Sherman law is general. I am asking that that language should be supplemented by explanatory language which shall not limit, but only illustrate, the words of the Sherman law.

The CHAIRMAN. One of the arguments that has been urged against proposed legislation is that by this proposed legislation we introduce an element of uncertainty into the Sherman law; and the gentlemen who argue that contend that the Sherman law was well understood. It has taken the courts 20 years to make that plain, and therefore they say we should not have any more legislation on the subject. We hear all sorts of arguments against proposed legislation, and that is one of them.

Mr. WALKER. That argument is well based upon the tentative bills before this committee, in my judgment; because those tentative bills are couched in such general terms as to raise a crop of questions that will not be settled for 20 years more, and if I had the alternative between doing nothing and passing your tentative bills, I, as a strong advocate of the Sherman law to punish restraint of trade, would do nothing. In your tentative bills, in defining what is meant by "restraint of trade" you have used language far more ambiguous than the language defined. It was with consciousness of that fact that I drew my bill; and I am confident that no two men can differ as to the meaning of any of the language I have used therein.

Mr. NELSON. The Chairman anticipated my question and I will follow it up with another case. I want to know whether we ought to put teeth in the Sherman law or leave as it is. Now, we do not want to open up avenues of doubt in litigation. Are you sure that the courts would not construe your language to weaken the sweep of the Sherman law?

Mr. WALKER. Absolutely sure, because I save that point.

Mr. NELSON. You save that point at the beginning of the bill?

Mr. WALKER. Yes.

Mr. NELSON. Then you only want to specify the prohibition of the law as to certain practices?

Mr. WALKER. The Sherman law prohibits restraint of trade. I define with precision all kinds of restraint of trade in general use, and leave the language of the Sherman law to cover all the others.

Mr. NELSON. You have defined the language of the bill, and then you seek to prohibit in specific language, some specific forms of evil, and leave the application thereof to the courts of the country?

Mr. WALKER. Yes, sir; that is right. The courts will have no difficulty in applying my definitions to concrete cases.

Mr. NELSON. At least, in such cases they will not be more lenient than the Sherman law is now?

Mr. WALKER. Oh, certainly not, because this reenacts the Sherman law in the first clause.

Mr. NELSON. Then you see no danger at all in the fact that you may have omitted one practice, and that would thereby validate some evil practice?

Mr. WALKER. No, sir; I have guarded against that most thoroughly. That is a matter which was discussed among the members of the Senate committee two years ago and with myself, and several Senators questioned me on that point. I was perfectly conscious of it when I drew this bill, and I guarded against that danger with the utmost care, but I am very sure that in the tentative bills that has not been done. If this committee desires, I shall make a statement about the tentative bills. But first I will finish my own bill.

Section 2 of my bill provides that "Every person who shall do or participate in doing any of the acts specified in section 1 of this statute will be guilty of a misdemeanor, and, on conviction therof, shall be punished by a fine not less than $1,000 nor more than $1,000,000, or be imprisoned in some penitentiary not less than one month nor more than one year, or by both such punishments, at the discretion of the court, and no such punishment shall be omitted, by suspension of sentence or other subterfuge."

There is the difficulty which seems to me should be guarded against by congressional action. Federal judges assume to suspend sentence in many cases, where it should not be done. A couple of gentlemen pleaded guilty in my State recently to the charge of smuggling $15,000 worth of property. One of those gentlemen voted in favor of the statute that he violated. He was a Member of the Congress which enacted that statute. They were both wealthy men and pleaded guilty, and they were sentenced to be imprisoned and then, in the next breath, the judge suspended sentence and let them go. The late Judge Archbald came to our town a couple years ago, and heard the pleas of more than 80 men connected with the Wire Trust, and they pleaded nolo contendere, they having been indicted for violating the Sherman law. Thereupon the judge sat upon that bench and said, "Oh, that is only a violation of a trade statute." The district attorney asked him to imprison those men, particularly the leaders who were flagrantly guilty, but no, that was not done.

Mr. WEBB. Who was the district attorney, Mr. Wise?

Mr. WALKER. Yes.

The CHAIRMAN. Mr. Wise came down here in the Archbald case. That was in the wire pool?

Mr. WALKER. Yes. The judge let those men off upon consideration of them turning over to the United States less than 5 per cent of their plunder.

Mr. NELSON. I did not follow your bill closely. Do you make guilt personal?

Mr. WALKER. Yes, sir; very personal.

Mr. PETERSON. You do not provide for any civil remedy for those who are injured?

Mr. WALKER. Yes; I do.

The CHAIRMAN. It has been suggested that where the employee or officer or agent of the company does it by direction of the board of directors or by direction of the management, you do not hold those higher up responsible. You simply punish the man who did the act.

Mr. WALKER. Oh, no. My bill says: "Every person who shall do or participate in doing any of the acts" and so forth.

The CHAIRMAN. You think that is a participation?

Mr. WALKER. Yes. In section 3 of my bill, I have developed some new remedies which are very important. Section 3 reads: "The district courts of the United States are hereby given jurisdiction in equity, to prevent and restrain violations of this statute by means of writs of injunction, and otherwise in accordance with the course and principles of courts of equity, and that jurisdiction may be exercised in pursuance of bills in equity filed by any district attorney of the United States, on behalf of the United States, or filed by any person or corporation, which may have been injured, or may be in danger of injury, as a result of some committed or threatened violation of this statute."

Now, section 4 of the Sherman Law confines the power to institute such proceedings to the district attorneys of the United States acting under the jurisdiction of the Attorney General. So that there is only one man in the world who has power to institute an action in equity to restrain a violation of the Sherman law, and that is the Attorney General of the United States.

Mr. WEBB. Could you not sue them at common law and get damages?

Mr. WALKER. Yes; but not to get an injunction. Now, there have been several Sherman law cases, notably one of the cases decided by Judge Taft when he was on the bench. In that case a private party brought a suit in equity to restrain a violation of the Sherman law and Judge Taft told the party that he could not do it; that he had no power to proceed in that way.

Mr. MCCOY. Why could they not do it on the ground of saving a multiplicity of suits for damages?

Mr. WALKER. No; I do not think so. There has been no case in the 24 years, in which the law has been on the books in which that scheme has worked out. I think Judge Taft recognized at that time that there was an opportunity for adding a provision to the Sherman law that would make it more effective, but it has never been added and Judge Taft decided, and two or three other judges have decided in the same way, that an action in equity to restrain a violation of the Sherman law will not lie at the instance of any individual person or corporation, but only at the instigation of the Attorney General. I am in favor of giving to an injured party the same right of institution of suits, that the Sherman law now gives to the Attorney General.

Mr. NELSON. Would you let private persons or corporations carry that practice to the extent of dissolution of these corporations without the intervention of the Attorney General?

Mr. WALKER. No; I would not go as far as that.

Mr. NELSON. Why do you confine it to district courts? Why not give that power to any court of competent jurisdiction?

Mr. WALKER. You have abolished the circuit courts, and the question of whether State courts have power to administer Federal laws discussed more than 100 years ago by Alexander Hamilton in "The Federalist."

The CHAIRMAN. Did not the State courts come to the conclusion that they could do that under the employers' liability act?

Mr. WALKER. No; I do not think so.

The CHAIRMAN. I know they undertook to do it under the employers' liability act, and the State courts are doing that very thing now.

Mr. WALKER. I think that Congress is not prevented by any Constitutional limitation from conferring power to administer Federal laws on State courts.

Mr. NELSON. That is the point. Would it not be well, if you open the door to courts outside of the Federal courts to let the injured parties go in for relief to the State courts?

Mr. WALKER. I would not say that it should not be done.

Mr. NELSON. What harm would there be?

Mr. WALKER. Well, most of the States have antitrust laws of their own, and it is possible that if you confer upon State courts the jurisdiction to administer the Sherman law, that some confusion might arise.

Mr. NELSON. Would not the Federal statute be paramount in that case?

Mr. WALKER. I do not think it would. I fear it would not. You know that the State of Louisiana passed a statute modifying the Sherman law——

Mr. NELSON. It was held unconstitutional, was it not?

Mr. WALKER. How?

Mr. NELSON. It undertook to exempt farmers' organizations.

Mr. WALKER. I do not think so.

Mr. NELSON. Which would be more effectual in working for the destruction or dissolution of monopolies and trusts that are now existing in this country, your additions to the restraint or prohibition of the Sherman law by way of those seven specific teeth that you are putting in or by the machinery being increased so that everybody can come to court for relief instead of waiting for the Attorney General to institute action?

Mr. WALKER. I am in favor of doing both.

Mr. NELSON. But which is more important?

Mr. WALKER. It is more important to do the latter.

Mr. NELSON. I agree with you there.

Mr. WALKER. Yes, sir.

Mr. NELSON. And the other has not developed yet?

Mr. WALKER. No, sir.

Mr. NELSON. We see clearly that the Attorney General can not cope with the situation, even though he is ever so willing to undertake it.

Mr. WALKER. That is perfectly plain. Therefore I would confer upon the district attorneys the same authority that is now conferred upon the Attorney General.

Mr. NELSON. But when the Department of Justice sues for dissolution of a corporation it should originate with the Attorney General?

Mr. WALKER. Yes, sir. I think my bill would be strengthened by providing that the suits under it might be not only brought in the district courts but also in the Supreme Court of the State of New York, for instance, or any State court of general jurisdiction.

Section 3 of my bill, as it stands, agrees with section 4 of the Sherman law as it stands plus the authority to individuals to bring actions in equity in Federal courts. I should be glad to have another addition made giving them authority to bring action in any State court. Section 4 of my bill provides:

"The district courts of the United States are hereby given jurisdiction of actions at law to ascertain and award damages to any person, partnership, or corporation which may have incurred any injury from any violation of this statute; and any such action may be brought in any district in which the defendant conducts any business, without regard to the amount of damages claimed; and in any such case, wherein a verdict is found for the plaintiff, a judgment shall be entered for three times that amount plus the plaintiff's proper costs and an attorney's fee."

That strengthens slightly the sixth section of the Sherman law. The difference between that section and the sixth section of the Sherman law is not very great, but I use phraseology which somewhat strengthens that portion of the Sherman law.

Now I come to a very important matter which is not claimed to be in the Sherman law, and I favor it strongly. Section 5 of my bill provides: "Any decree in equity or judgment at law which shall be found to adjudicate the violation of this statute by any defendant in respect of any particular combination or act shall be pleadable as res adjudicata against that defendant in any other case, with the same effect as if all the parties were the same in both cases."

Mr. NELSON. How does your language differ from the language of this bill?

Mr. WALKER. I think it is more technically correct. The language in some of the tentative bills would be almost unintelligible to a layman. I think my language is preferable, because it is perfectly clear and easy to understand. The objects are the same.

Mr. NELSON. Do you think that the language in the tentative bill accomplishes the same purpose?

Mr. WALKER. I am not sure that it would, because it is so involved.

Now, I am going to speak frankly to the committee. The income-tax law is so involved that it took me six weeks of hard work, day and night, before I understood it, and even now there are about 100 words that absolutely defy analysis.

Mr. NELSON. I have had a bill pending before Congress for two years, which has been reported out in part, to give Congress expert aid in bill writing. Do you not think that would cure some of these evils?

Mr. WALKER. I do. It is very important. Some time ago I sat in the gallery of the Senate, and Senator Owen's bill, something like that, was brought up in the morning hour, and his argument was that Members of Congress have such an enormous amount of work to do for their constituents that there ought to be an organization

of men appointed by the President and confirmed by the Senate to give Members of Congress expert assistance in drawing bills. Senator Root arose and supported that argument, and said it was the most important matter before the Senate. Thereupon Senator Bacon, now of honored memory, arose and opposed it upon the ground that he did not think it was necessary. He said, "I do not need any schoolmaster; I do not think any one of us does, and if we did we ought to resign and let somebody else take up the work." That argument is pleasing to some of us, but Senator Bacon was not able to work 24 hours a day without sleeping. It is not possible for any committee of Congress, or Congress as a whole, to successfully wrestle with these great topics without expert advice as long as those Members of Congress are diverted from such studies by other labors for their constituents. Although my heart is set on a considerable number of reforms, I am inclined to agree with Senator Root that there should be a body of experts, having no diversions and no digressions, appointed, not for the purpose of making laws, but for the purpose of giving the highest degree of assistance to lawmakers in drawing up bills.

Now, I mentioned the income-tax law as an example. This Congress passed the income-tax law. Doubtless it was drawn in good faith. But with the best ability I could give to it, after 40 years of experience in such matters, it took me 6 weeks to understand it, and I believe I am the only man now who claims to understand it.

The CHAIRMAN. I believe that is correct.

Mr. WEBB. Mr. Walker does not claim to know it all, I understand.

Mr. WALKER. No; there is one passage that defies understanding. After Mr. Moon's committee reported the new judicial code, with 300 sections, and it passed the House, and went to the Senate, it was referred to the Judiciary Committee of the Senate, which committee referred it to Senator Heyburn and Senator Sutherland. They looked it all over and said it was all right, and it passed the Senate and went to the President, and he signed it. I did not get hold of a copy of the bill for some time, but when I looked at it, in less than 15 minutes I found that that bill deprived all the 20 circuit judges of the United States of power to hold their own courts, and left them with nothing to do but draw their salaries. I wrote to Senator Dillingham and told him of my discovery. He said that Senator Sutherland and Senator Heyburn knew more about the bill than he did, and he would put it up to them. He showed it to them, and Senator Sutherland said "Walker is right about that." He wrote to me and asked me to draft a bill correcting the error. I did and so, he introduced it, and it was passed by the Senate, and was finally referred to this committee of the House. This committee reported it favorably, and it was passed by the House and sent to the President.

No harm resulted from the error, for this reason: The judicial bill on its face provided that it should not go into effect until the 1st day of January, 1912. I discovered the error in May, 1911. The bill correcting the error passed the Senate in July, 1911, but it did not pass the House prior to the end of that year. But it did pass the House and was signed by President Taft, very soon after January 1, 1912, and before any harm had resulted from the error in the Moon bill.

Mr. NELSON. Two years ago there were hearings along this line. There were a great many men present, including Ambassador James Bryce, and he told us of the wonderful help that the Parliament of England was receiving from parliamentary counsel along this line. That report is full of arguments in favor of the position you are taking.

Mr. WALKER. Yes; gentlemen, I have been connected with congressional hearings for 37 years, and I have watched out for slips and errors that are made in legislation, and I am pretty sure that Mr. Bryce had the right idea.

The CHAIRMAN. We all know that the time of the average Member of Congress is so much engrossed with the multitude of duties that he has not time to sit down and study any particular case and criticize the wording of the bill.

Mr. WALKER. Certainly; it is beyond human power.

Mr. NELSON. In all these cases it is not only the pending bill which he must look out for, but he must be careful how the legislation will affect future legislation and legislation now on the statute books.

Mr. WALKER. Certainly. It is one of the most difficult employments of the human intellect to frame statutes so that they will match in with existing law and not contain errors.

Mr. NELSON. For instance, this Judiciary Committee has before it now not only the trust problem, but two impeachment cases and cases pending with reference to Members of Congress being either censured or expelled, and all sorts of amendments proposed by the American Bar Association. If we had parliamentary counsel or experts who would look up the effect of this legislation it would be a great service to us. Do you not think so?

Mr. WALKER. Oh, yes; it is vastly important, and what is more, the Government is going to break down unless you secure such assistance. Senator Edmunds wrote me that one of the greatest burdens imposed upon him in the latter years of his service in the Senate was drawing up bills for Members of Congress. I think that Senator Edmunds was one of the most competent draftsmen of bills in Congress. Away back in 1878 Senators and Representatives were often going to Senator Edmunds to get him to draw up their bills or put them into shape. The burden became very great, and after 35 years of hard work he resigned. Now that the country is growing so rapidly, and the multiplicity of affairs to be decided in Congress is so great, and the burden upon the lawmakers is so excessive that I do not see how it can be carried. I am perfectly sure that statute drafting can not be done with the highest degree of accuracy much longer without official expert help, except by skilled gentlemen who have nothing else to do. Their functions would be purely advisory. Their positions would be highly honorable. Their labors would be extremely beneficial. I have no doubt that millions of dollars would be saved to the country annually through the assistance of such a board of gentlemen, which would not cost over $25,000 a year.

Mr. NELSON. I want to thank you for that statement, because we have had the benefit of a reference bureau for several years in my State, and the effect has been remarkable, both on the State and on the laws.

Mr. WALKER. You have encouraged me. I feel that I must ask you to forgive me for speaking so plainly.

Mr. NELSON. Now, with reference to the machinery. In the La Follette bill there is a provision as to contracts of trusts not being enforceable in courts of justice. What do you think of that provision as a punishment?

Mr. WALKER. I am in favor of going into that. I had a case in the United States court about a month ago, in which I represented the defendant, and I asked the court to refrain from enforcing the contract that was involved in the litigation, because it was in violation of the Sherman law. But I was not able to point to any authority in the statutes that supported that contention, and the judge rendered an opinion in which he said that he thought the contract to be illegal but that he had no authority to affirm my contention.

Mr. NELSON. Now, would it be fair to prohibit the enforcement of the contract if the contract itself was all right, just because the plaintiff was a trust?

Mr. WALKER. Are you conversant with the two Supreme Court cases decided by Justice Harlan?

Mr. NELSON. No, sir.

Mr. WALKER. I will expound them to you. The case that came from Chicago, and in that case—I do not remember the name of the case——

Mr. WEBB. Was it not the sewer pipe case?

Mr. MCCOY. Was it the Wall Paper Trust?

Mr. WALKER. No.

Mr. WEBB. Do you remember what report it is in?

Mr. WALKER. It is cited in my book, The History of the Sherman Law. Perhaps you have it here. If you have it, I can cite it. In that case the defendant was an entirely innocent party, but he had given a note to pay money to one of the parties of a combination violating the Sherman law; and that party sought to collect that note, and the defendant contended that the contract was vitiated by the corrupt conduct of the plaintiffs, and therefore he was not bound to pay.

The CHAIRMAN. You can insert that case when you revise your remarks.

Mr. WALKER. I presume I shall never get to that. I am such a busy man.

However, I find the case in my book here. It is the Connolly case; Connolly against Union Sewer Pipe Co. It was decided in 1902, in 184 U. S., 540. The National Wall Paper case was one in which the opinion was delivered by Justice Harlan. In that case the suit was brought against a party to the combination, the wall-paper combination, which was a combination violating the Sherman law in fixing prices and limiting the output, and so forth. The contract was made between a manufacturer of wall paper and a dealer in wall paper in Cincinnati, and this dealer belonged to the combination.

After a while, according to the books of the dealer, he found that he owed a large sum of money for wall paper, and he reached the conclusion that it was wrong for him to be connected with such an institution any longer, and he decided that he ought not to pay the money. Thereupon he was sued for it, and he contended that he was a party to the wrongdoing, and they were all rascals in the same boat, and the Supreme Court took that view of it. The Supreme Court said, "Shall we issue writs to enable wrongdoers to carry out

their schemes, or shall we refuse writs, and allow one of the parties to the wrongdoing to escape?" The court decided to refuse to help the combination reap the returns of its wrongdoing.

Mr. NELSON. You do not hold that that is the law now? That the court will not enforce the contract although it is made with a trust?

Mr. WALKER. Where both parties are in the wrong, the contract can not be enforced.

Mr. NELSON. My thought was this: Supposing we wished to inaugurate a self-regulating statute or self-enforcing statute, which will prevent restraint of trade and monopolies, and so forth, could we enact anything more effective—unless possibly the suggestion as to opening up the State and other courts to injunctive relief—than to make contracts nonenforcible when it is proved that the other party comes into court with unclean hands?

Mr. WALKER. I am thoroughly in favor of it. I think it would be most effective. I lost my case a month or so ago because I did not have the proper statute to back me up.

Mr. MCCOY. Would it not be rather a dangerous practice to permit a man to defend on the ground that he was a party to an illegality?

Mr. WALKER. Yes; but the Connolly case was not based on any constitutional evasion. It is perfectly competent for Congress to enact a law——

Mr. MCCOY (interposing). Would there not be another question of public policy involved in a matter of that kind, namely, the suggestion that so many people would unfairly endeavor to avoid payment of their debts?

Mr. WALKER. That is a strong argument, and that argument convinced Justice Holmes. He dissented strongly in the Continental Wall Paper case. He said that between two evils it was better to enforce contracts between wrongdoers than to permit one of them to escape payment of a debt to the other one.

Mr. MCCOY. I do not mean to enforce a contract between parties if the contract were illegal, but to allow a third party to interpose that defense to a debt which he had created and which is supported by some consideration that has passed between them, to allow him to come in and say that, "The man or the corporation that sold those goods to me is violating a law like the Sherman law," and allow him to escape successfully on that ground.

Mr. WALKER. I would not allow a defendant to defend simply because the plaintiff had violated the Sherman law; I would confine it to a case where the wrongdoing was involved in the contract sought to be enforced.

Mr. VOLSTEAD. Suppose this case: Through some restraint of trade the prices have been unduly enhanced, and a person buys goods and refuses to pay. Would you allow him to defend on the ground that in increasing unduly the price they violated the law?

Mr. WALKER. Yes; I should like to see Congress pass such a statute.

Mr. MCCOY. Would you allow him to escape the payment of the whole debt or only the excess charge?

Mr. WALKER. The whole debt.

Mr. NELSON. You would make a combination in monopoly come into court with clean hands?

Mr. WALKER. Yes. I would say that anybody who invokes a court of equity or a court of law, if he is a law breaker, shall not successfully invoke the aid of the court to reap the fruits of his wrongdoing.

Mr. NELSON. But when will you determine whether that business interest is an outlaw?

Mr. WALKER. It should be open to the defendant to prove it in every case where it has not already been proved, and if it has already been proved, then the defendant should be allowed to plead res judicata.

Mr. NELSON. Then why not adopt that procedure in just such cases?

Mr. WALKER. That is an excellent idea. I drew my bill not because I thought I was putting in all the provisions that I would put in it, if I were a benevolent despot making laws for a nation, but with a view to go so far as Congress can be expected to go at this time.

Mr. NELSON. Do you see any hardship that would be worked against any business interest that was not a combination in the form of a trust?

Mr. WALKER. Oh, no.

Mr. NELSON. But would it not be a powerful deterrent for a business interest to say, "If we go into this contract, we may not be able to enforce it"?

Mr. WALKER. Certainly.

Mr. WEBB. Can the States enforce such contracts now?

Mr. WALKER. They can.

Mr. WEBB. It seems to me that the State court could not close its doors to cases involving the violation of an antitrust statute.

Mr. WALKER. I do not think so.

The CHAIRMAN. In the Connolly case they held that the exemption provided in the statute was a denial of the equal protection of the laws, and that therefore the Illinois act of 1893 is repugnant to the Constitution of the United States.

Mr. WEBB. That was because the Illinois antitrust statute undertook to exempt cattle raisers from the general scope of the laws.

Mr. WALKER. I think the gentleman from North Carolina is right in his intimation that the Illinois statute was bound to be ineffective for that particular reason.

Mr. VOLSTEAD. It could be very properly applied to all sorts of contracts, where the contract is in restraint of trade.

Mr. WALKER. I would refuse action in the courts to enforce an alleged right which resulted from a violation of the law. But if it resulted from some innocent act I would not keep it out of court, even if the plaintiff had violated the law in other matters.

Mr. NELSON. For instance, take the case that was suggested by the gentleman the other day. The Standard Oil Co. might rent a building to somebody in Washington and it would be perfectly legal for them to collect the rent?

Mr. WALKER. Quite correct. Now, then, there is a suggestion about these tentative bills which I want to make. There is a provision on page 2 of the second tentative bill that I would not like to see enacted into law. The second tentative bill provides that certain classes of conduct shall be prohibited. Among these it specifies agreements "To prevent competition in manufacturing, making,

transporting, selling, or purchasing of merchandise, produce, or any commodity."

Now, whoever drew this bill, must have drawn it upon the assumption that restraint of competition, always involves restraint of trade; and that whenever you pass a law to prohibit restraint of trade you ought to pass a law to prohibit restraint of competition. Now, the Sherman law never prohibited restraint of competition. It never did, and never was intended to. Restraint of competition does not always result in restraint of trade; but it sometimes results in restraint of trade. Suppose there is a town located on two sides of a State line, like Kansas City, Mo., and Kansas City, Kans., on each side of the State line. A couple of men are engaged in the business of running an express wagon carrying trunks from hotels to the depot, and the State line runs between the hotel and the depot. Each man owns a horse and wagon and harness, and his business is simply transporting trunks. The two go into partnership, and the firm is Brown & Jones instead of Brown and Jones separately.

Now, it may happen that Brown's horse will get sick or Jones may be sick, and the other man would have to run the business temporarily. But if you prohibit restraint of competition, you prohibit the formation of partnerships between those two men engaged in interstate commerce. Whenever two men enter into a partnership in interstate commerce they restrain competition in that commerce. But they do not restrain interstate commerce itself, unless they afterwards do something wrong as partners in that business. The real union of the two men into a partnership does not constitute restraint of trade. It is entirely an ethical transaction.

Mr. NELSON. But these fellows have so little capital. Suppose you took two business interests that had $5,000,000 apiece and combined them. Would not they have the ability to prevent any third man from coming in, and would not that be restraint of trade?

Mr. WALKER. I hold that the combination of two big corporations with a million dollars capital each does not necessarily constitute a combination in restraint of trade. It constitutes a status which may be so used as to conduct a restraint of trade, but the mere constitution of that status is not a restraint of trade.

Mr. NELSON. Then, under your definition, the Steel Trust would not be in restraint of trade?

Mr. WALKER. Not unless the Steel Trust does restrain trade by its conduct.

Mr. NELSON. But it has potency?

Mr. WALKER. No; potency is too strong a word. It implies an obnoxious result.

Mr. MCCOY. One of the famous seven sisters of the State of New Jersey recognizes your argument exactly, because it permits one corporation to buy another out. That is expressly provided for.

Mr. WALKER. Yes. But those seven sisters have a number of provisions in them which I could not indorse.

Mr. NELSON. That very definition, if kept in mind, would have absolutely made unnecessary, if it is unnecessary, any construction as to the statute including or not including the word "unreasonable."

Mr. WALKER. Certainly. At the hearing before the Interstate Commerce Committee of the Senate two years ago I was asked to address the committee. I did so for an hour or two, and then the

Senators took turns in conducting a dialogue with me which lasted all day. Senator Cummins, of Iowa, conducted his dialogue for a while. "Mr. Walker, do you not agree with me on this point: That what Chief Justice White said with respect to reasonable or unreasonable restraints of trade was misplaced as to the subject to which that adjective was applied? If he said that restraint of competition is wrong only when it is unreasonable, he would have been right, would he not? Is not this true, that restraint of competition is reasonable or unreasonable according as it results in restraint of trade, and if Chief Justice White had said that no combination violates the Sherman law by restraint of competition unless that restraint is unreasonable, he would have been right, would he not?" I said, "Certainly." Indeed, I am sure that if Chief Justice White had had in his mind a clear apprehension of the difference between restraint of competition and restraint of trade, he would have said that restraint of trade is always wrong and that restraint of competition is wrong only when it is unreasonable. Thus the whole subject would have been cleared up.

Mr. McCoy. Mr. Walker, take a case where there are two corporations in a similar business and they have been indulging in cut-throat competition, so that neither of them is making any money, and they are just simply slashing each other. Now, they come together, and thereby restrain competition, and as a further result they do not produce as many goods as they produced before, but what they do produce they sell at a reasonable price. Now, is that vicious under the Sherman law?

Mr. Walker. It is not vicious if they do it spontaneously and in good faith.

Mr. McCoy. I mean, assuming that they come together for the express purpose of quitting this cut-throat competition, but nevertheless there is a curtailment of output that is sold only at a living profit.

Mr. Walker. I hold that that would be a violation of the Sherman law. You might say that it would be regrettable to hold that to be a violation of the Sherman law, but it would be more regrettable not to so hold. A man does not have to agree with his neighbor not to kill him in order not to kill him.

Mr. Nelson. In other words, they might start to cut each other's throats in order to get together.

Mr. Walker. Yes, sir.

Mr. Nelson. Here is a concern which is manufacturing a certain article, and another concern or individual says that he is going to build a mill in which that article is going to be manufactured. He is engaged in other business which is cognate to it, and the first concern then steps in and buys him out, because they fear his competition with the new mill which is going to be built. Does that constitute a combination in restraint of trade?

Mr. Walker. That is one of the most difficult concrete cases that has ever been put up to me, and I would not wish to answer that categorically without particular opportunity for thought. That is what Mr. Carnegie did.

Mr. Nelson. That is the case I have in mind.

Mr. Walker. The remedy for that is plain. He proposed to establish a mill up on Lake Erie, and he used that as a threat to

induce Mr. Morgan to pay him $400,000,000 for property he bought for $200,000,000 a few years before. The purchase by Mr. Morgan of Mr. Carnegie's entire plant was based wholly or partly upon his desire to prevent Mr. Carnegie from building that mill. That might not be held to be a combination in restraint of commerce because Mr. Carnegie had not yet built his mill. Nearly all of these concrete cases that have been put up to me are very easy of solution if you desire to analyze the matter scientifically. It is the business of the attorneys for combinations to detect weaknesses in the cases against them. I heard all of the arguments in the tobacco case and in the Standard Oil case, and I heard the arguments that were used to confuse the court. Those men went there for the purpose of winning their cases, and in the tobacco and oil cases they did their utmost. They were paid great fees to simply throw dust through the court room; and it is no wonder that Chief Justice White was somewhat blinded by that dust. But on this point on which I am now speaking I am very sure that if Congress were to adopt that language, "in restraint of competition," you would be doing a great deal more to impede the administration of justice than you could help it by anything else you could enact. Always a committee of Congress should bear in mind that the evil to be prohibited is restraint of trade, and when you aim at restraint of competition you aim at conduct that sometimes results in restraint of trade and sometimes does not. When you aim at restraint of trade you do all that public policy requires and that justice permits.

Mr. McCOY. Mr. Walker, is it not true that the suppression of competition by the formation of partnerships which do engage in interstate commerce is a very ordinary transaction?

Mr. WALKER. Oh, very.

Mr. McCOY. And it may be that in a great number of cases a great wrong would be done by leaving that provision in there.

Mr. WALKER. Oh, appalling. I am not sure but what it might precipitate a revolution; because when you enact a statute that in its application to the majority of the people, will violate their ethical sense, they will snap their fingers at the whole statute. Law is nominally something on the statute books; but effectively it rests in the hearts of the people. When a new law is enacted, it takes time to carry that law into the public consciousness, and it took 20 years to carry the Sherman law into the public consciousness. When it was enacted every Member of the House voted for it on a roll call; and on a roll call in the Senate only one gentleman voted against it, and that was a Senator from the State from which comes the gentleman on my left, Senator Blodgett, of New Jersey. It had the approval of nearly all of the great men of the time. It was debated for weeks and months by intellectual giants in both Houses, and no law has come out of Congress in half a century with such a stamp of approval as the Sherman law. It was never very effective, however, until Roosevelt's administration. During the last year of McKinley's administration, not one finger was lifted by the Attorney General, to enforce that law against anybody.

Mr. NELSON. In the McKinley administration as in the Cleveland administration, was this failure on the part of the Department of Justice to enforce the law due to lack of funds or lack of public

sentiment, or to the fact that some Attorney General, like Olney, had themselves been attorneys of the trust in previous cases?

Mr. WALKER. Olney was bitterly opposed to the Sherman law.

Mr. NELSON. He had been the attorney for the Whisky Trust?

Mr. WALKER. Yes, sir. And he got them off, when they were undeniably guilty. When Olney assumed the office of Attorney General he advised President Cleveland to refrain from taking any steps against any one under that law, and he refrained from invoking that law, until he enforced it against the labor organization in New Orleans, although he had previously declared that it did not apply to labor organizations.

Mr. NELSON. Did he not also enforce it against Debs?

Mr. WALKER. Yes, sir.

Mr. McCOY. That case turned on the question of interference with the mails.

Mr. WALKER. The Attorney General invoked the Sherman law in that case, and Judge Woods decided that case on the ground of the Sherman law, and also on the ground of interference with the mails.

Mr. McCOY. What was the opinion in the Knight case?

Mr. WALKER. Oh, that is a wicked story. The Knight case was brought to be lost. The district attorney who brought the Knight case never expected to win it, and never wanted to win it, and he brought it to lose it. He steered extremely clear of proving any act violative of the Sherman law, although he never let anybody else——

Mr. NELSON (interposing). He made it appear that it was intrastate traffic.

Mr. WALKER. Certainly; and when he had the witnesses on the stand he steered very clear of asking them questions which he did not want them to answer, for fear of proving his case. That man afterwards lived at the expense of the State of Pennsylvania in the State penitentiary. And John Johnson, the famous lawyer, who steered that Knight case, always invoked it afterwards as a justifying restraint of interstate commerce case. Oh, my pen would burn the paper if I wrote the damning facts about how the job was put up on the Supreme Court in the Knight case. In Harrison's administration, before the second Cleveland administration, the trouble there was the feebleness of the Government administration.

Mr. NELSON. There was a willingness in the Harrison administration?

Mr. WALKER. Oh, willing, yes; willing like this: "Johnnie, are you willing to stay home and shovel snow instead of going out to skate?" "Oh, yes; I am willing, but not very willing."

Mr. McCOY. The result was the same?

Mr. WALKER. Yes.

Mr. NELSON. He developed a spirit of trying to enforce the law.

Mr. WALKER. The Attorney General under President Harrison was not the most earnest man I have ever seen. I have read his reports and they were rather perfunctory.

Now, in McKinley's administration there was an almost total neglect of these matters. For 15 months there was only one case pending under the Sherman law, and nothing whatever was done about it.

Mr. NELSON. Was Mr. Griggs the Attorney General then?

Mr. WALKER. I think he was not at the time. Justice McKenna was the first Attorney General under McKinley's administration, but he only occupied that position for less than a year. Mr. Griggs followed him, and held the office for two or three years, and was followed by Mr. Knox.

Mr. NELSON. Was not that due to the failure of the Knight case?

Mr. WALKER. It should not have been; but very likely it was, because the Knight case never was properly prosecuted under the Sherman law.

Now, in the present administration we have an Attorney General whom I have known for years. I exerted myself to the utmost to induce Mr. McReynolds to prosecute the coal combination, and he finally concluded it was possible, and so brought suit against the Reading Co. last September, six months after the beginning of his incumbency. He engaged some high-priced lawyers to conduct it, and in a leisurely sort of way they have carried it forward. It has been the same way in the prosecution of the Steel Trust; they have been going through the motions of a prosecution, taking testimony, for nearly three years.

Mr. NELSON. The question has often occurred to me, Mr. Walker, as to how we could help the Attorney General's office. This committee is supposedly busy solving this problem for all time, but we do not seem to be accomplishing very much. Has the department, as you have observed it, sufficient power to engage attorneys and to work this thing up to a quick solution? I would like to know what you think about that.

Mr. WALKER. They have power enough, but not money enough.

Mr. NELSON. Not money enough?

Mr. WALKER. No, sir; the Department of Justice has never received sufficient appropriations to enable the Attorney General to enforce the Sherman law.

Mr. BEALL. How can you say that, Mr. Walker, where there was an unexpended balance of several hundred thousand dollars? I remember in 1902, when there was a special appropriation made to enforce the Sherman law—$500,000, I believe, but not more than a hundred thousand dollars was spent and the next Congress had to reappropriate that money for that purpose. So, how can you say it was due to the fact that there were not sufficient funds at the disposal of the Attorney General?

Mr. WALKER. Easy enough. The Attorney General didn't use the money you gave him, and it was his fault that he did not.

Mr. BEALL. I understood you to say to Mr. Nelson that the Department of Justice had never been properly supplied with funds.

Mr. WALKER. I didn't use that language. I said the Department of Justice never had money enough to enable the Attorney General to enforce the Sherman law.

Mr. NELSON. Well, what is the difference?

Mr. WALKER. The difference is due to the Attorney General and not to Congress.

Mr. NELSON. You still don't answer my question. When Congress is called upon to give him more money to enforce the Sherman law, must we say to the Attorney General just how he shall expend the money? Is that it?

Mr. WALKER. What I would advise Congress to do is to pass a law providing for the appointment of additional assistants to the Attorney General, and conferring upon those assistants the special duty of enforcing the Sherman law, and I would appropriate a million dollars to carry on the work, and require him to use it.

Mr. NELSON. What do you say to this practice of hiring specialists, like Kellogg and Dickinson, to handle these cases?

Mr. WALKER. Great abuse, great abuse; because those men are paid a great deal more than they deserve. Those positions are largely sinecures. There is not the slightest necessity of the Department of Justice engaging Mr. Dickinson or Mr. Kellogg, and paying them thirty or forty thousand dollars a year for prosecuting one of these cases. They don't do the work; the work is largely done by subordinates. And work quite as efficient as theirs could be obtained from men regularly appointed as Assistant Attorneys General, confirmed by the Senate, and paid salaries, and having this special duty imposed upon them.

The CHAIRMAN. Mr. Roosevelt employed special counsel in his administration, and paid them large fees, did he not?

Mr. WALKER. No doubt he did; yes, sir.

Mr. McCOY. What salary would you suggest, Mr. Walker, for an Assistant Attorney General, appointed and confirmed as you say, and specially charged with this work?

Mr. WALKER. Ten thousand dollars a year, if the right man was appointed; and there are plenty of the right kind of men that could be selected, from whom the Government would secure, devoted, enthusiastic, and efficient work.

Mr. NELSON. And what did you say these specialists received?

Mr. WALKER. From thirty to fifty thousand dollars.

Mr. NELSON. So we could hire five men almost as competent who would put in their entire time for a year for the price that we now have to pay for one of these?

Mr. WALKER. Yes, sir; you could hire five men who are more competent.

Mr. NELSON. You think they would be just as efficient?

Mr. WALKER. Oh, yes; and each one of them would do more work than Dickinson or Kellogg, and do it better. I know those men and they are not Alexander Hamiltons. They are men of good ability, but not of extraordinary ability, and, besides, they are very slow.

Mr. NELSON. There is another question I would like to ask you: Have you noticed, for instance, in these cases handled by some one expert, whether the department has had the same control over him as it would have over an assistant attorney general if he were carrying on the case?

Mr. WALKER. Nominally so, but practically not.

Mr. NELSON. So you think too much discretion is left to the expert, who is not strictly responsible to the people?

Mr. WALKER. That is quite true. The history of the supposed attempts that have been made to suppress the anthracite coal combination is replete with inefficiency, with dereliction on the part of those taking the Government's money, with paucity of result.

Mr. NELSON. I would like to ask your opinion about this, too, because you have made a special investigation of this thing, and you

are entirely impartial in the matter. What would be the effect as to speeding the case to trial if it was left to some regularly appointed assistant attorney general rather than to an expert, who, presumably, is paid a lump sum for his work?

Mr. WALKER. No; he renders his bills to suit himself, and the Attorney General O. K.'s them.

Mr. NELSON. Yes; but on the question of speeding the case to trial, hastening the prosecution in every way possible so as to come to a solution of the problem, would that be helped or not by doing away with these experts?

Mr. WALKER. It would be helped; unless exceptionally inferior men were selected to fill those offices.

Mr. NELSON. But assuming that you would get a $10,000 man.

Mr. WALKER. There is a difference between some $10,000 men. Some men who work for $10,000 work with all their hearts, with a view of advancing the causes they are supporting. There are other men who work for the same amount, with a view of pay day and nothing else, and the first class have more efficiency than the last. But there are plenty of good lawyers, men of learning, ability, force, energy, and devotion, who would throw themselves with their utmost energy into the prosecution of those cases on a $10,000 salary, and not work 10 or 11 months in the year, but 12 months.

Mr. MCCOY. How are you going to discover those men, Mr. Walker?

Mr. WALKER. Easy enough. Ask me, and I will give you a list of their names and post-office addresses; as many of them as you want.

Mr. NELSON. If these Assistant Attorneys General were appointed as you suggest, and as we have discussed them, for the purpose of prosecuting these cases, would there be necessity for a much larger force in the Attorney General's office?

Mr. WALKER. Not nearly so large as you might otherwise need, because as soon as the people who are violating the law now found out that the Government was in earnest and was backing up these statutes with vigorous action, they would obey the law.

Mr. NELSON. Another question. Have you followed closely these agreements or understandings the Attorney General has had with some of these combinations whereby settlements were effected?

Mr. WALKER. None of those papers have been submitted to me, and I do not know what agreements the Attorney General has made; but I know that if I were Attorney-General, there would be no agreements of any kind made.

Mr. NELSON. By what authority are those agreements made?

Mr. WALKER. Only the same authority that any district attorney has to let up on a criminal offender, if he feels that it is right to do so.

Mr. NELSON. But hasn't the Attorney General been going too far in that direction?

Mr. WALKER. Of course he has. Here is the Sherman law; let me read it to you. [Reading:]

The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General * * *

To do what? To compromise and trade? No.

to institute proceedings in equity to prevent and restrain such violations.

Mr. NELSON. Supposing, Mr. Walker, that we should not have such a patriotic and efficient Attorney General as we have now, but some one of the Olney, Harmon, or Griggs type, might it not be extremely dangerous for the department to compromise cases both as to future penalties or future suits to dissolve?

Mr. WALKER. Extremely so. I believe that the Attorney General is assuming more jurisdiction than he has under the statute. If you allow him to assume more than the statute confers upon him, you will make him one of the most powerful men that ever lived under a republican form of government, a power unchecked by consultation with anybody else, except consultation between him and the parties involved.

Mr. MCCOY. What is the remedy for that situation?

Mr. WALKER. The remedy for that situation would be to define the duties of the Attorney General with great precision, and then impeach him if he does not perform those duties.

Mr. MCCOY. You would favor a statute that would require the Attorney General to push through and bring to trial and get a decree on every suit which he had instituted?

Mr. WALKER. No; I would not take away all his discretion, but I would frame the statute in such terms that when he was presented with such a flagrant case as the New Haven plunder he would be bound by the law of Congress to enforce the law against those people instead of dallying with them.

Mr. MCCOY. We have to frame a statute which would do what you say. What sort of language could be used that would accomplish a result of that kind?

Mr. WALKER. I can not construct that language or give you such a provision in proper terms extemporaneously; but there would be no difficulty about it, in my judgment. I think I could draw up such a section in half an hour in the proper form.

Mr. VOLSTEAD. Would it not be a good idea to compel a report to Congress of all such compromises of that kind, so there would be some publicity about it?

Mr. WALKER. It would be an excellent idea.

Now, the discretion of the Attorney General, the power which he has exercised outside the statute, has in general been exercised wisely, but in cases like the New Haven matter, in Roosevelt's term, Attorney General Bonaparte brought a suit to dissolve that combination. That suit was perfectly well founded, and was being prosecuted quite as rapidly as those suits generally are; but immediately after Taft's administration took charge, Attorney General Wickersham assumed the power to withdraw that suit and dismissed it altogether.

Mr. MCCOY. How about the failure to sue in that sugar situation up in Philadelphia, when Mr. Earl requested Mr Bonaparte to prosecute and he refused to do so?

Mr. WALKER. Bonaparte didn't have the power to prosecute there. Earl went ahead with his civil suit, however, and got more than two million dollars in money.

Mr. MCCOY. But that was on the basis that something had been done in violation of the statute, and that something existed at the time Mr. Earl asked Mr. Bonaparte to prosecute.

Mr. WALKER. I don't know, of course, how fully Mr. Earl represented the facts to Mr. Bonaparte.

Mr. McCoy. According to his own statement, made publicly, he almost went on his knees beseeching Bonaparte to prosecute, and laid before him the facts which subsequently he proved in the suit for damages and which enabled him to recover over two million dollars.

Mr. WALKER. Mr. Earl has a glowing imagination, and while I believe he intends to do right, he sometimes presents his case in stronger terms than seems justified.

Mr. McCoy. But "the proof of the pudding is in the eating," and Mr. Earl's account was so glowing that he forced a settlement for $2,500,000; and I presume that the same persuasive statement was made to Mr. Bonaparte at the time he asked him to prosecute, only it didn't persuade. Mr. Earl says he stated the thing fully to Mr. Bonaparte.

Mr. WALKER. What happened was this: Mr. Earl stated his case to Bonaparte; he knew Bonaparte could get busy if he wanted to; but Bonaparte was not convinced that it was the duty of the Government to move as Mr. Earl desired him to move.

Mr. McCoy. Now, Mr. Walker, you tell us, then, what you would put into a statute that would convince a man who was in the frame of mind Mr. Bonaparte was in that he had better move or somebody would move him?

Mr. WALKER. I could not do that, because I do not know just what Mr. Earl laid before Mr. Bonaparte; it may not have appeared a conclusive case to Mr. Bonaparte. Mr. Earl later on employed some very able lawyers, including Gov. Black, to present his case to a jury in court in New York; I was present when that trial began. The attorneys for the sugar people expected at first that they were going to stave Black off, but he was so powerful and brought out his evidence in so cogent a way that there could not be but one outcome. And shortly after that District Attorney Wise, in New York, brought suit against the Sugar Trust, in 1910, now nearly four years ago. That suit which Wise brought against the Sugar Trust in 1910 was far more comprehensive than any complaint Earl had made. The point that Earl complained of was the wrongdoing of the sugar people in the city of Philadelphia, and not elsewhere; whereas the suit brought by Wise was based not only upon those wrongdoings, but upon the entire illegal conduct of the Sugar Trust. Now, that suit was brought in 1910, but what has happened to it? Has anybody heard anything argued? Not yet. The testimony is not even closed yet.

Mr. WEBB. Do you remember that the Tennessee Coal & Iron Co. was taken over by the United States Steel Corporation? Do you think that was all right under the Sherman law?

Mr. WALKER. The purchase of the stock of the Tennessee Coal & Iron Co. by the United States Steel Corporation did not, in my judgment, violate the Sherman law.

Mr. WEBB. You think President Roosevelt did right to give his O. K. to it?

Mr. WALKER. He didn't give his O. K. to it. He said "I have not the power to stop it." And he did not have, in my opinion.

Now, there is not a more enthusiastic advocate of prohibition of the restraint of trade than I am, but I will say to the gentleman from North Carolina that the purchase of the stock of the Tennessee Coal & Iron Co. by the Steel Corporation did not, in my judgment, violate

the Sherman law, but that the use of the stock since that time may have violated it.

Mr. WEBB. Why not? It was an attempt to monopolize trade, was it not?

Mr. WALKER. It is exactly in line with what I have said before, that the suppression of competition generally results in the restraint of trade, but not always. It would have been proper for the United States Steel Corporation to use that stock to promote trade, but not to restrain it.

Mr. WEBB. It seems to me that action resulted in monopoly.

Mr. WALKER. No. In my judgment that was no violation of the second section of the act.

Mr. NELSON. But it has a tendency to promote monopoly?

The CHAIRMAN. Was there not a tendency to monopolize in that; when they acquired the Tennessee Coal & Iron Co. they also acquired the coal and iron lands belonging to that corporation? Can you tell me how much, with the additional coal and iron land that the Steel Corporation got from the Tennessee Coal & Iron Co., of those lands the Steel Corporation were then able to control?

Mr. WALKER. I think they controlled more than half of it before that.

The CHAIRMAN. But how much did they control after they got hold of the land that belonged to the Tennessee Coal & Iron Co.?

Mr. WALKER. From 60 to 75 per cent, I would say.

The CHAIRMAN. Was not that an effort to monopolize?

Mr. WALKER. Not necessarily, Mr. Chairman; and on that point I wish to say what I have not said before to-day, and that is, I wish to make a few observations on the meaning of the word "monopolize."

Mr. NELSON. Before you leave that, Mr. Walker, in order to complete that line of thought, I would like to ask you another question. When we complained of the power of the Attorney General to compromise cases, your answer was that you would have to leave him some discretion, and if they violate that discretion, they should be impeached. I want to ask you if you think it is practicable to impeach any official for failure to exercise discretionary power wisely?

Mr. WALKER. I think that Attorney General Olney was subject to impeachment at any time, because his failure to try and enforce the Sherman law was willful and intentional.

Mr. NELSON. How can you prove it?

Mr. WALKER. Where that discretionary power is always exercised in favor of the wrongdoer, I think would be proof that it was not exercised wisely.

Mr. NELSON. You take this New Haven case, where one Attorney General deliberately overruled a former Attorney General; but how could we impeach Wickersham for that successfully?

Mr. WALKER. I don't think you could, simply on a sporadic case like that.

Mr. NELSON. You think that the possibility of impeachment justifies us in giving the Attorney General this tremendous discretionary power?

Mr. WALKER. Certainly not; he must be guided and confined in his use of discretionary power, and the matter of impeachment should be only a last resort.

Mr. VOLSTEAD. One of your suggestions might help out—the one about allowing the district attorneys to act independently of the Attorney General. You might get some relief with that provision.

Mr. WALKER. That is a point I cover in my bill.

Mr. NELSON. That is on the assumption that he would act without consulting the Attorney General?

Mr. WALKER. Yes, sir; if Congress should pass the law in that way, every district attorney would interpret that as giving him that authority.

The CHAIRMAN. And when the district attorney went contrary to the views of the Attorney General and contrary to the views of the President he would be removed from office.

Mr. WALKER. Yes, sir; and the President might be removed from his office at the next election also. I don't think any district attorney who was competent to conduct the business of his office would be deterred from doing a plain duty on the general theory that the Attorney General or the President might not want him to do it.

Mr. NELSON. I believe we are to find the solution of this problem along the line of widening the duties and powers of the Attorney General. Why should we not let sovereign States come in to protect themselves and to secure the dissolution of trusts? If they can bring this action the Attorney General should have every power to do so.

Mr. WALKER. I should be glad to see that done. There is no constitutional objection to it. I think it would be a very effective measure.

Mr. VOLSTEAD. I would like to have you pursue the question of monopoly a minute.

Mr. WALKER. I think I ought to be heard on that subject, for it is a subject I have given a great deal of study.

I will begin by saying that when the Sherman law was being considered in the Senate, having been reported by Senator Edmunds from the Judiciary Committee in the form in which it was enacted, at the time it was first read Senator Konna rose to inquire of Senator Edmunds the meaning of the word "monopolize." Senator Edmunds replied—I am not attempting to quote his language, but the substance only—that the word "monopolize" had a meaning in law which was narrower than its dictionary meaning; that the word "monopolize," according to the dictionary, means complete acquirement; when you completely acquire a thing you monopolize it, as when a man monopolizes the affections of his wife. But it sometimes happens in the useful arts that a man monopolizes a particular business without any unethical conduct whatever.

As an illustration of this, it may be said that Alvah Clark, of Cambridge, Mass., had a process of grinding glasses for telescopes, and this work was so well done that nobody in this country could compete with him. He accomplishes that result intentionally, but as the result of exercising extra care, extra industry, and extra personal ability. It was a complete monopolization of that business, acquired by purely ethical means. Warner & Swayze, of Cleveland, Ohio, at a later time, by similar means, monopolized the business of mounting telescope lenses. So those two firms monopolized the business of making telescopes in this country. They had no competitors who could compete with them, yet they had no patents by which they

acquired their monopoly. It was only the result of the application to their delicate business of extra skill and extra natural gifts and enthusiastic devotion to the sciences of optics and astronomy. Thus it is evident that a man may monopolize a particular business, in purely ethical ways, by reason of superiority of natural gifts and enthusiastic devotion to difficult work.

Senator Kenna wanted to know from the Senator from Vermont, if the proposed Sherman law would prohibit that sort of monopoly. Senator Edmunds said no, and that the word monopolize has a much narrower meaning than that; he stated that it means a man is monopolizing a trade or industry or particular business within the eye of the law when he throws impediments in the way of his competitors, and not when he accomplishes that result only through his own superior mentality or business superiority.

And when this law was passed by Congress it was passed with this understanding—and Senator Hoar backed up this definition of Senator Edmunds—that the meaning of the word "monopolize" is confined to a case where the monopolizer threw impediments in the way of his competitors in the race for success.

Now, when a man is engaged in business, or, as in the case of the Steel Co., controls more than half of the best iron mines, and such a corporation should buy the stock of another corporation controlling 10 or 15 per cent more of those mines, if that acquirement is the result of an intention on the part of the corporation to benefit mankind by making the production of iron and steel cheaper, then it is not an effort to monopolize, within the meaning of the Sherman law. But if, after that acquirement is achieved, the added power is used to impede some competitor by unfair practices, a violation of the Sherman law occurs. That violation of law when it occurs is based upon conduct and not upon status.

Mr. McCOY. Well, how is it if a concern is able to monopolize the raw material from which an absolutely necessary article is made, like iron and steel, and from which only it can be made, what difference does it make what his intention was?

Mr. WALKER. A case easy to understand is the effort of certain railroads to exploit the anthracite coal fields, because the limits of those deposits are better known, and the job of acquiring all the anthracite coal is a more practicable scheme than the job of acquiring all the iron mines. Now, all the anthracite coal is owned by a comparatively few corporations in Pennsylvania, and the Reading Iron & Coal Co., one of the three Reading combinations, own more than half of all the anthracite coal under the ground in the State of Pennsylvania, and its friends own the rest. Now, I hold that the mere ownership of all that coal does not constitute a violation of the Sherman law——

Mr. WEBB. You think that a firm that owns one-half of it and then buys another 25 per cent does not violate the law?

Mr. WALKER. Not by merely buying it; but it is almost certain to violate it once it has possession of it.

Mr. VOLSTEAD. Should not there be some limitation placed on him in view of that possibility?

Mr. WALKER. There should be, ethically; but I fear that if Congress simply legislates with a view to limiting the acquirement of property it would trench upon constitutional limitations. What I

am in favor of is a rigid inheritance law, which should result in checking the accumulation or enormous fortunes.

Mr. VOLSTEAD. Do you think there would be any great difficulty, from a constitutional point of view, in limiting a corporation so that it would not, from its very size, be practically a monopoly?

Mr. WALKER. That can be done by the State in which the corporation is organized.

Mr. VOLSTEAD. Could not the National Government do that?

Mr. WALKER. I don't know by what power.

Mr. VOLSTEAD. Suppose we say to them, "You can not do an interstate business if you get too big." Of course, you have to make some sort of general rule.

Mr. WALKER. The corporation would have to be subject to Federal visitation.

Mr. VOLSTEAD. Have we a right to say to a State corporation, "You can not do business in interstate commerce," just as a State would have to say to a foreign corporation, "You can not do business inside this State"?

Mr. WALKER. I don't think you have quite as much right as a State has in that respect. But you could pass a statute which would force the corporation to take a Federal charter. Then you could regulate it.

Mr. VOLSTEAD. You have not said anything along the line of holding companies, and I would like very much to have your views on that subject.

Mr. WALKER. I shall be very glad to give them. In the first place, I am in favor of breaking up holding companies. I have studied the subject pretty thoroughly and it is my opinion that it is very important for Congress to so legislate as to check if not entirely abolish the whole holding-company scheme; because as long as it is permitted to exist in practical operation it will be difficult to keep the holding company within ethical bounds.

Mr. VOLSTEAD. And isn't it true that they practically do away with the necessity of companies making any agreement among themselves?

Mr. WALKER. They themselves constitute an agreement.

Mr. VOLSTEAD. And don't they restrain trade, as a result of such agreements?

Mr. WALKER. Most of them, like the Amalgamated Copper Co., and the American Smelting & Refining Co., are undoubtedly violating the Sherman law.

Mr. MCCOY. Have you ever seen a good definition of a holding company, one that was sufficiently comprehensive but not too comprehensive?

Mr. WALKER. I don't remember that I have; but, undoubtedly, I could write one.

Mr. MCCOY. I think that is one of the things that is bothering the committee.

Mr. FLOYD. Now you take a great company, like some of the big insurance companies; they invest their money in the bonds and securities of other corporations, as I understand it, and get interest on those bonds; they derive their profits in that way. Would you favor a provision that would prevent one corporation from holding the securities of another corporation?

Mr. WALKER. Oh, no.

Mr. FLOYD. We are told—I think it has been developed in these hearings—that there are many companies that are organized for the purpose of holding the bonds of mining companies as an investment, and in order to lessen the risk and hazard, instead of investing in the bonds of some one company, which might fail, they will invest in the bonds and stock of a great many mining companies, some of which will likely be successful and some of them will fail; but on the whole they reduce their risk by handling the securities of a great number of companies, as their purpose is to invest the money of others in safe securities. Now, would you prohibit that?

Mr. WALKER. Certainly not.

Mr. FLOYD. It is an exceedingly difficult thing to do, in drafting a provision to cover this, to draft an inhibition against that particular form of holding company which takes the stocks and bonds of rival corporations engaged in a single industry for the purpose of uniform control and the acquirement of a monopoly.

Mr. WALKER. I would not prohibit the purchase of bonds, but only the holding of stock.

Mr. MCCOY. I know of a case of a man who died and left a large estate, in which there was stock, bonds, and other securities; all this property was bequeathed to the several children, and the beneficiaries, each of them, turned over his holdings to a company organized to buy the stocks and bonds and took in exchange the stock of the holding company. The purpose was solely to provide for an equal distribution of possible loss, and not let it fall on one particular beneficiary if he handled his own interests at a loss.

Mr. WALKER. That could be done in a better way by simply putting the entire estate in the hands of trustees.

Mr. MCCOY. But the corporate form is more convenient.

Mr. WALKER. And there is larger danger of abuse.

Mr. FLOYD. In answering my question, you said you would not prohibit the purchase of bonds, but only the holding of stock?

Mr. WALKER. That is what I said.

Mr. FLOYD. You think that would prevent the evil of the holding company?

Mr. WALKER. I think so, because the bonds can not be used to control the action of the corporation.

Mr. VOLSTEAD. Are there not some cases where the holder of bonds has a vote? I was told there was one case where he did.

Mr. WALKER. I do not know of any corporation law in any State that permits that; I never knew of it occurring. I think it must be so rare as to be negligible. But even where the bondholder would vote, that doesn't mean he would have control.

But the holding-company evil is illustrated in these great combinations—the United States Steel Corporation and the Amalgamated Copper Co., and the Sugar Co. These are some of them, but I have a list at my office——

Mr. FLOYD. I recognize the evil you refer to, but let me give you a specific case: An independent oil company in the State of Texas was operating independently of and were competitors of the Standard Oil Co. Under the laws of the State of Texas they were required to incorporate for a specific purpose, and that was producing oil, taking it from the well. After operating in that way for a while, it became

necessary for them to acquire additional territory, and they had to go over into Louisiana to do it, and there there was a tax of so much on a foreign corporation. It was a considerable tax, more than they could afford, so some of the company, the stockholders, organized under the laws of the State of Louisiana, in order to avoid the tax that would have been imposed on a Texas company in the production of oil. Then, in order to get all the oil they wanted, they had to invest in some Oklahoma fields, and that required a second incorporation; and the same corporation, the same identical stockholders, then wanted to get a pipe line from the Oklahoma fields to the Louisiana fields, and it became necessary for them to organize under the laws of the State of Oklahoma, because the laws of Oklahoma provide that a foreigner should not have the right of eminent domain, and in order to get that right for the pipe line they had to take out an Oklahoma corporation, and by the time they had taken out these three corporations it was necessary for them to get some money to finance the scheme, so the same parties went to New Jersey and formed a holding company that took the stock of the three corporations. Would you prohibit that?

Mr. WALKER. Yes, sir; I would. The Louisiana corporation was organized simply to evade the taxes levied by the State of Louisiana. Now, that taxation was levied on the theory of discriminating against foreigners and in favor of citizens of Louisiana, and it was a plain evasion in that instance of the legislative will to organize the Louisiana corporation. That does not commend itself to me. The Oklahoma corporation was more ethical, because they needed the pipe line and could not get it except under the guise of an Oklahoma corporation. But when they sought to unite those three corporations into one holding company for the purpose of floating their bonds in New York City they did an illegitimate thing.

Mr. FLOYD. Let me ask you another question. In the State of Pennsylvania, and probably in other States, the law forbids ownership of real estate by a foreign corporation. Now, suppose the Texas corporation desired to do business in Pennsylvania; it would become necessary to acquire real estate for the purpose of carrying on its business in Pennsylvania. Would you prohibit a holding company, organized for the purpose of holding title to real estate in a State where a foreign corporation was prohibited by State laws from holding real estate?

Mr. WALKER. I would prohibit it; yes, sir.

Mr. MCCOY. Now, then, because you incorporate in Pennsylvania you do just what the law says; it has accomplished all its purposes, for it simply says that no foreign corporation shall own real estate in Pennsylvania, and these people say, "Very well, we will incorporate in your State."

Mr. VOLSTEAD. An outside corporation comes in and takes possession and runs the business, but the State laws control your directors and stockholders.

Mr. MCCOY. I am not speaking in favor of a holding company, but Mr. Walker has spoken of the ethics of the situation, and I presume it is ethical to organize in that way in Pennsylvania. The only unethical thing involved, as I understand it, is the indirect violation of the Pennsylvania law, but in such a case you really do just what the law says you shall do.

Mr. WALKER. But you evade what the law really intended, which was that no foreigner should own real estate in Pennsylvania.

Mr. McCOY. No; that foreigners should not.

Mr. WALKER. That is the intention; the intention was broader than just to get jurisdiction of the corporation.

Mr. McCOY. They did not intend to keep foreigners out, but they said nobody coming under the guise of a corporation shall own real estate in Pennsylvania unless they incorporate in Pennsylvania.

Mr. WALKER. I understood you to say that you can not own land in Pennsylvania unless you can incorporate there.

Mr. McCOY. As I understand it, they say no foreigner shall own land there.

Mr. WALKER. The foreigner might be a good one, or he might be a bad one; but my idea of it is that the State didn't want their public domain divided up among people not citizens of the State of Pennsylvania, and in order to prevent it they would be going too far if they denied an individual citizen of the United States to buy land in Pennsylvania. But the State of Pennsylvania didn't think it was going too far to say that citizens of Oklahoma should not club together and form a corporation for holding real estate in Pennsylvania.

Mr. McCOY. It is not what they said, but the motive back of it, and as I understand it those corporation laws are simply for the purpose of saying, "We want to keep jurisdiction of any foreign individual who comes into our State and acquires real estate."

Mr. WALKER. I think the issue between you and myself depends entirely upon whether that was the motive back of their legislation. I think it was not, because the State could have kept jurisdiction without requiring any such local organization. Any State has the power to prescribe terms under which any foreign corporation shall do business. It could get control without insisting upon reorganization there. I think the policy back of their legislation was to discourage ownership of the soil of Pennsylvania by people living elsewhere.

Mr. PETERSON. I would like to make a suggestion of one addition that appeals to me. Some time ago the United States Steel Corporation, in order to compete for western trade, found it necessary to build a city in a western State. They were made a corporation under the laws of the State and proceeded to build this city. They had to acquire land, so they organized a land company, which, of course, was subsidiary to the United States Steel Corporation; they had to build a plant, and they formed another corporation under the laws of the State to take over the stock of these corporations. They then had to build a railroad to operate their plant, and it had to take over the stock of the railroad. Now, that was all ethical and legitimate, in order to enable it to compete with the western competitors of the United States Steel Corporation. Now, would you object to that corporation holding the stock of these subsidiary companies?

Mr. WALKER. I would not object to that corporation holding the stock of the other corporations in Gary, to owning the railroad or anything else that was necessary and incident to the conduct of its business, but I would object to the holding company organizing and operating another company for the purpose of making steel and iron there. I draw that distinction.

Mr. PETERSON. They went there to Gary for this purpose, to engage in legitimate competition for the western trade.

Mr. WALKER. Could not they have conducted their business in Gary in its own name?

Mr. PETERSON. No; they had to have these separate corporations, under the law, to operate at all—in order to come into the State, to acquire land there for the purpose of building their plant, to build the railroad, etc.

Mr. WALKER. After the corporation was organized and purchased the land and and had gotten established, then there was no practical necessity for separate corporations to run the mill. The United States Steel Corporation, after having gotten control of the physical property, the land and the buildings and the railroad, could have gone ahead and conducted the manufacturing business.

Mr. PETERSON. No; it had to hold the stock of these separate corporations.

Mr. WALKER. Oh, hold the stock. And you ask me whether I object to that?

Mr. PETERSON. Yes.

Mr. WALKER. I would not.

Mr. PETERSON. Well, in order to control the operations the directors of these other corporations were put under the control of the United States Steel Corporation, and some of those directors are directors in the United States Steel Corporation.

Mr. WALKER. I do not object to holding companies holding the stock of companies engaged in some branch of business connected with the general scheme; but I do object to a holding company holding stocks of corporations which are engaged in making and selling commodities in the same line of business, for the whole business of fixing prices on those commodities is then subject to but one will. That is what I think is obnoxious to the Sherman law.

Mr. NELSON. You hold, I suppose, that the holding company scheme, as well as the interlocking directorates, is a violation of the Sherman law?

Mr. WALKER. I have not yet expressed myself about the interlocking directorates.

Mr. NELSON. But you believe that the holding company is a violation of the Sherman law?

Mr. WALKER. Simply the organization of a holding company is not a violation of the Sherman law, before they do anything. I am not in favor of enacting a statute that would prohibit the formation of holding companies, because a holding company might be formed and might be managed in a perfectly ethical way, promotive of the public welfare. What I am in favor of is restraining any sort of conduct that will hamper people from embarking in business, who may have the necessary ability and resources to carry it through.

Mr. NELSON. So you think it is better to leave the general sweep of the Sherman law to take care of preventing restraint of trade and monopolies?

Mr. WALKER. Yes, sir.

Mr. NELSON. I would like to have you give us, now, your views with reference to interlocking directorates.

Mr. WALKER. I shall be glad to. I do not favor this third tentative bill having in view the prevention of interlocking directorates.

Mr. NELSON. Isn't it through that means that they are able to monopolize not only one business, but all kinds of businesses?

Mr. WALKER. No; I think the general opinion is that if you were to prohibit interlocking directorates you would largely diminish the efficiency, ability, and power of the people of the United States. The men of high intellect in our country to-day are not too many. There are but few in my profession, in my judgment, of very great ability. In any kind of business at all, the men of great ability who are capable of handling really great affairs, are very few. Nature has not been so lavish in bestowing her gifts as to furnish enough to go around. Now, it so happens that a particular man may be especially gifted in corporate management; he may be an honest, earnest man devoted to the interests of the public welfare; and if you enact a statute which will prevent him from serving on more than one board of directors you restrict that man's usefulness, intellect, and efficiency. If you were to say to a particular man in New York City, or elsewhere, "You must confine the exercise of your ability and intellect to one particular corporation," and if you exercise it there, you shall not exercise it anywhere else, it seems to me you are simply diminishing the power of the particularly gifted men to properly exercise their powers. And when you do that, you do something that is not necessary to be done. Conceivably the interlocking directors are exercising their powers with the highest motives, and do no wrong whatever; so when you prohibit interlocking directorates, you are doing more than taking away the right or power to do wrong; you are destroying the power of these men to do some necessary right.

Mr. NELSON. I see; you don't like legislation aimed at the form, but at the evil. What is the evil we could legislate against, that results in interlocking directorates?

The CHAIRMAN. Or, rather, results from interlocking directorates?

Mr. WALKER. You legislate against restraint of trade. The most effective interlocking director this country has ever seen was John Pierpont Morgan, now deceased. He exercised dominant control and power as a director in a very considerable number of corporations. He also exercised dominant power over a considerable number of corporations of which he was not a director. He exercised this power because he had it. He had acquired it in a great variety of ways, partly on account of his personality, which in itself was a very dominant power, and partly on account of fortunate combinations of circumstances.

I will refer briefly to a case in history: In 1902 there was a great anthracite coal strike in Pennsylvania, and President Roosevelt was laid up in the temporary White House with an injury to his leg which he had suffered shortly before. He was much concerned about this strike, but he knew that he had no constitutional power to interfere between the coal men and the miners. However, he was a public-spirited man, and he wanted to exercise whatever influence he could to induce a compromise of that strike between the coal miners and the coal companies, which coal companies were the coal railroad companies under other names. Therefore, he invited the presidents of these railroad companies to call upon him here in Washington, and he also invited John Mitchell, who was at that time the head of the coal miners' organization, for the purpose of bringing about, if pos-

sible, a settlement of their disputes. Mr. Roosevelt proposed to them that they agree upon the appointment of a board of arbitrators, and Mitchell said, "That is a good idea; I agree to that at once." But the railroad men turned the proposition down, saying they had nothing to arbitrate and that there was "nothing doing." So the President said, "Well, gentlemen, if that is your decision I do not see how I can say anything more." And the railroad men went away.

About a week after this conference President Roosevelt sent Secretary of War Root to New York one Saturday night, and Mr. Root hunted up John Pierpont Morgan, who was on his yacht the *Corsair*, and had an interview with him. The following Monday morning John Pierpont Morgan sent word to these railroad presidents to come down off their "high horses," and they immediately sent word to the President that they would arbitrate the coal strike controversy. As a result of that agreement, Mr. Roosevelt appointed the arbitrators, and that great conflict was settled.

Now, John Pierpont Morgan was the only human being who could have moved those railroad presidents and make them take the back track and eat their own words, and he did that, not because he was a director in those railroads, because he was director in only a part of them, but because his connections with those men were such that they dared not resist his will. And in the panic of 1907 John Pierpont Morgan, in less than an hour, raised $25,000,000 out of the New York banks by simply sending word to one bank, "You loan $250,000 to this man," and to another bank, "You loan $250,000 to this man," and so on, here and there, and they dared not refuse. Now, our idea of the evil influence of the interlocking directorates has arisen largely from the fear of domination of one personality, but we can see from this historical case that it may not be always evil. John Pierpont Morgan is no more, and his son has not inherited the qualities of his father. There is no man between the two oceans to-day that has half the power and influence that was exercised by Mr. Morgan, and I do not believe any of us will ever see another such character. But if you enact a statute that will absolutely prohibit the good, efficient men who are eligible to be directors from serving in more than one corporation, I think you will be making a sad and injurious mistake.

Mr. NELSON. Even in competitive corporations?

Mr. WALKER. Yes, sir; even in competitive corporations, because they may be so managed as to be ethically not violators of the Sherman law, though some of them will be. If I was a director in two competitive corporations, so far as I had any influence, there would not be any agreements between them in restriant of trade; and it is presumable that there are many gentlemen in this country as honorable as I am, at least; and if they are given such positions of power as I have mentioned, I believe they would exercise that power for honorable ends and not evil ends.

I hold that the American business man can be intrusted with the power to do wrong, if you have a statute to restrain him from doing wrong. I would aim legislation not at status, but at conduct. Two years ago I think I impressed many of the Senators on the Interstate Commerce Committee of the Senate with the soundness of my views on this subject. I said to them, "Gentlemen, you must draw a distinction between status and conduct. Do not punish status, but provide for the enforcement of ethical conduct."

Mr. FLOYD. So you oppose the whole scheme of legislating against these interlocking directorates?

Mr. WALKER. Yes, sir; I am opposed to the whole scheme.

A BILL To prohibit, prevent, and punish certain forms of restraint of interstate and international commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That every act in restraint of interstate or international commerce is hereby prohibited; and this prohibition, without being limited thereto, includes the following conduct:

1. Combining to fix prices, rates, or terms of purchase, sale, or transportation of any commodity; and evidence which proves habitual conformity in such prices, rates, or terms among two or more persons, partnerships or corporations, engaged in buying, selling, or transporting such commodities, shall be received in all places as prima facie proof of such a combining.

2. Combining to limit the production of any commodity, with intent to consequently advance the price of any commodity.

3. Combining to divide the business of furnishing purchasers with any commodity, on a territorial line or on any other line.

4. Selling any commodity, on condition that the purchaser shall refrain from buying from another seller.

5. Refusing to sell to any proposing purchaser, without any legitimate reason, and with intent to injure any business.

6. Discriminating between different purchasers or proposing purchasers, in respect of price or terms of sale, or time or manner of delivery, with intent to injure any business.

7. Selling any commodity at less than a fair price, with intent to injure the business of anybody, by means of such unfair competition.

SEC. 2. Every person who shall do or participate in doing any of the acts specified in section 1 of this statute will be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not less than $1,000 nor more than $1,000,000, or be imprisoned in some penitentiary not less than one month nor more than one year, or by both said punishments, at the discretion of the court, and no such punishment shall be omitted by suspension of sentence or other subterfuge.

SEC. 3. The district courts of the United States are hereby given jurisdiction in equity, to prevent and restrain violations of this statute, by means of writs of injunction, and otherwise in accordance with the course and principles of courts of equity; and that jurisdiction may be exercised in pursuance of bills in equity filed by any district attorney of the United States, on behalf of the United States, or filed by any person or corporation which may have been injured, or may be in danger of injury, as a result of some committed or threatened violation of this statute.

SEC. 4. The district courts of the United States are hereby given jurisdiction of actions at law to ascertain and award damages to any person, partnership, or corporation which may have incurred any injury from any violation of this statute; and any such action may be brought in any district in which the defendant conducts any business without regard to the amount of damages claimed; and in any such case, wherein a verdict is found for the plaintiff, a judgment shall be entered for three times that amount, plus the plaintiff's proper costs and an attorney's fee.

SEC. 5. Any decree in equity or judgment at law which shall be found to adjudicate the violation of this statute by any defendant, in respect of any particular combination or act, shall be pleadable as res judicata against that defendant, in any other case, with the same effect as if all the parties were the same in both cases.

(Thereupon, at 5.50 p. m., the committee adjourned.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman*.

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
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DANIEL J. McGILLICUDY, Maine.
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JOHN D. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY C. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPERRY, *Clerk*.

TRUST LEGISLATION.

SERIAL 7, PART 29.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, March 12, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. We will be pleased to hear first from Mr. William J. Shroder.

STATEMENT OF MR. WILLIAM J. SHRODER, LAWYER, CINCINNATI, OHIO.

Mr. SHRODER. My name is William J. Shroder. I am a practicing lawyer, of Cincinnati, Ohio. My address is 1320 Union Trust Building.

I was special assistant United States attorney in the years 1906 and 1907 for the special purpose of prosecuting the Drug Trust. I was solicitor and of counsel for John D. Park & Sons Co. in the cases of Hartman *v.* John D. Park & Sons Co. (163 Fed. Rep., 24) and Dr. Miles Medical Co. *v.* John D. Park & Sons Co. (220 U. S., 373). The latter is the case in which the Supreme Court decided that resale price maintenance of trade-marked articles (not patented) is unlawful.

During the past 10 years I have had occasion to advise clients of monopolistic as well as those of independent proclivities, so that my study of the Sherman law has not been from one point of view.

I am here as the representative of John D. Park & Sons Co., but the views I am about to advance, with their permission, are those which represent my personal convictions, which possibly are not, in all instances, concurred in by my clients.

I shall speak this morning in favor of the part of the administration bills contained in lines 14 to 22 on page 2 of No. 2 committee print tentative bill, in sections 3 and 4 of said bill. However this bill may be modified, I feel that these sections should be retained.

I am here to speak in favor of the retention of these sections regardless of what is done in the redrafting of these bills in other respects. I favor the retention of these sections because they prohibit resale price maintenance.

Mr. VOLSTEAD. Referring to some of the language at the top of page 2 of Tentative Bill No. 2, which you are discussing, instead of the expression, "Between any State and Territory and the District of Columbia, or between the District of Columbia and any Territory, or between any State, Territory or the District of Columbia." Would not this expression serve the same purpose, "Trade subject to regulations by the Congress"?

Mr. SHRODER. Yes; I think it would.

Mr. VOLSTEAD. I think, instead of using that descriptive language it would serve the same purpose if we said, "Trade subject to regulations by Congress."

Mr. SHRODER. These provisions prevent resale price maintenance and are therefore contrary to the Stevens Bill H. R. 13305, page 385 of the volume of Bills and Resolutions Relating to Trusts, prepared for this committee, and the Metz Bill H. R. 13860, introduced February 25, 1914. More indirectly they are contrary to the exception in Senate Bill 1138, page 480 of this committee's volume, which exception is found in lines 16 and 17 at page 491 of said volume

In availing myself of the opportunity to state my views, so courteously extended by you, I wish first to outline my position and then in detail to support the general propositions which I assert.

(1) Undue cost of distribution is one of the causes of the high cost of living. Resale price maintenance will, if not increase, at least prevent a reduction in the cost of distribution. My opinion is that it will increase the cost of distribution.

(2) Resale price maintenance is destructive of individuality and is therefore socialistic—it reduces all merchants to a common plane—the plane of automatons.

(3) The legalization of resale price maintenance is not the restoration of an old but the creation of a new right. The burden of establishing its benefits to the public is upon its proponents.

(4) The creation of such right will reverse the public policies of centuries: First, that restraints upon the alienation of personal property are illegal; second, that to alienate personal property with restrictions preventing competition is contrary to the public interest.

(5) The creation of such right is to legalize indirectly what the law forbids and what no one will claim directly—a combination of dealers to prevent competition in the sale of articles of commerce.

(6) Resale price maintenance, as a trade policy, was originated by dealers in unlawful conspiracy. Dealers remain its principal protagonists. A few manufacturers have adopted it because of its indirect but material benefits to their individual interests. In all

sincerity and good faith their economic convictions follow their material interests.

(7) The proprietor of trade-marked articles bases his claim for the economic need of resale price maintenance partially upon his alleged rights and partially upon his alleged wrongs. His rights have no recognized existence—the cure for such wrongs as exist is in legislation other than that legalizing resale price maintenance.

(8) The consumer pays the bills for special privileges. Resale price maintenance is a special privilege. It enables the manufacturer to force upon the consumer, at the consumer's expense, what he may not desire but what he must accept, and at the same time prevents him from obtaining the benefit of lower prices resulting from honest competition.

Before sustaining these propositions in detail, it is but fair to the committee to state that there are no trustworthy figures or established general facts from which general deductions can be drawn. I am advised that Secretary Redfield, through the Bureau of Corporations, is now engaged in investigating the question of resale price maintenance and collecting data essential to the proper consideration of so radical a change in merchandising. Until his data and deductions therefrom are published we must rely upon the special facts within our knowledge. Such figures as I use are gleaned from the published statements of supporters of resale price maintenance and therefore should go unchallenged by them.

It might be well to define our terms at the outset. If I were to adopt the tactics of the opposition, I should use the term "price fixing," but I yield to their desire and call their plan "resale price maintenance." In exchange I shall use the term "competitive selling" for honest merchandising and confine the term "cutting" to such unethical merchandising as, unfortunately, may exist. If all competitive merchandising appears unethical to the opposition, I fear there is no basis of discussion between us.

The term "proprietary articles" will apply only to trade-secret articles—whether the secret be of ingredients or of process of manufacture. The term "trade-marked articles" will include trade-named articles, since for the purpose of the proposed legislation there is no distinction between them. "Proprietor" will mean the owner of the trade-mark, not necessarily the producer or the original owner of the goods.

In approaching our subject we must note the general and sweeping character of the Stevens bill. It applies to all merchandise under trade-mark or special brand. No distinction is made between patented articles, proprietary articles, articles of luxury, or articles of necessity. The person imposing the restrictions need not be the producer—it is sufficient if he owns the name and attaches it to the article. His sole investment may be printer's ink; his sole service to the public may be the advertising for which the public pays.

Not only is the public to pay a uniform price, but the quantity discount to dealers is forbidden. This deprives the dealer of any reward for efficiency in distribution and enhances the retained profit of the owner of the trade-mark. The proprietor's sole justification for such legislation would be Socialism—unless the proprietor will admit it to be greed. He can make no claim of injury to his good will or business if the consumer's price is maintained and the dealer is

rewarded for efficiency. Maybe the proprietor is neither socialistic nor greedy. Perhaps this is the trade association's provision.

The committee will recall that Senator Lodge, in reporting the results of the investigations of his committee on the causes of the high cost of living, included among the contributing causes the increased cost of distribution.

We are told, comparing present conditions with 25 years ago that the increase in population has been approximately 100 per cent, while the increase in the number of manufacturers and distributors has been 200 per cent. We are told that the increase in the number of manufacturers had resulted in oversolicitation of jobbers and wholesale merchants, and that they in turn, with an increase in geometrical progression, oversolicit the retail dealers; that the ability to receive shipments by express and parcel post has decreased the size of the orders, and that the general increase in the cost of living has increased the expense of the distributors through increase in salaries and in all expenses of traveling and solicitation.

Mr. William H. Ingersoll tells us that there are one and a quarter million retail merchants and that, including their employees and those dependent upon them, approximately 10,000,000 people live upon the profits of the retail merchant. Assuming that there is one earner supporting three nonearners, it follows that there are approximately 16,000,000 earners among that part of the population not supported by the profits of the retail trade, or that each two earners in any gathering is supporting more than one person, in exchange for the privilege of receiving the supplies they may need. This is an evident explanation of the increased cost of distribution as a contributing cause to the high cost of living, and despite this you are urged to overthrow the common law and to make a radical change in commercial usage by maintaining the inefficient merchant at the expense of the public in an occupation whence his inefficiency should bar him at the same time depriving the public of the benefits it should receive from the competitive merchandizing of the efficient.

There are forces now at work whose natural effect will be to reduce the cost of distribution. While cooperative purchasing by the consumer, except as practiced in the larger universities, has not been successfully developed in America, progressive distributors have developed commercial machinery to reduce the cost of distribution.

John D. Park & Sons Co. are wholesale druggists at Cincinnati. For 40 years they have conducted their business upon the basis of cooperation between the retail dealer and the wholesale dealer. Their proposition has been this: It costs the wholesale dealer from 6 to 8 per cent to keep traveling salesmen on the road. If the retail dealer will mail his orders, this expense can be saved. If the retailer will accomplish this saving it belongs to him and can be used by him for the benefit of the consumer. The John D. Park & Sons Co. have continuously (save only when they were unable to obtain the merchandise) sold all merchandise—advertised and unadvertised, proprietary, trade-marked, and anonymous—at 6 per cent less than list prices. Resale price maintenance would prevent this method of doing business.

The Kroger Grocery Co. is a chain-store unit of 200 groceries. Thirty years ago B. H. Kroger began business with a capital of $372. His policy with his first store was the same as is his policy with 200.

The cost of extending credit, of calling for orders, and of frequent deliveries increase the expenses of merchandising almost 100 per cent. Let those consumers who do not demand this service receive the benefit of the saving. His stores are cash stores—every customer receives the benefit of this saving regardless of neighborhood. Those neighborhoods demanding delivery service pay more than those carrying their purchases with them. The Kroger stores sell all merchandise, every day of the year, advertised and unadvertised, proprietary, trade-marked, and anonymous, at less than regular prices. Resale price maintenance would stop this.

The Dow stores are a chain of 10 drug stores in Cincinnati. Miss Dow, their proprietor, began with one store, 25 or more years ago, with a capital of $500. She believes in giving the consumer the advantage of her quantity purchases. Her competitive prices prevail every day in the year and on all merchandise in her establishments. Resale price maintenance would stop this.

The Economy Drug Co. and the Bruns Bros. Grocery Co. are companies whose stock is owned by the independent retail dealers in Cincinnati and its surrounding territory. Their cost of doing business is 5 per cent. They buy at wholesale in quantities and sell to their stockholders at 5 per cent over cost. The retail dealer saves approximately 10 per cent on his purchases, part of which is given to the consumer. The Economy Drug Co. advertises cooperatively for all of its customers. The retail stores sell at less than list prices. Resale price maintenance would stop this.

The American Druggists' Syndicate is a national organization whose stock is owned by retail dealers. It manufactures and is a wholesale dealer. Its savings are passed to its stockholders and the public receives part of the saving. Resale price maintenance would stop its wholesale dealing, but would potentially make of it a powerful extortionist in goods of its own manufacture, since under the resale price maintenance system the slight check of the dealers upon the independent proprietor would be eliminated.

The establishment of resale price maintenance would check cooperative merchandising, of which the foregoing are examples. To this extent it would increase the cost of distribution. It would crystallize the present uneconomic system of distributing and thereby prevent a reduction in the cost of distribution.

Instead of keeping the farm boy on the farm, thus maintaining the rural communities, it would attract him to the merchandising field with the assurance of living profits regardless of his merchandising efficiency.

The effort toward resale price maintenance at present is, because illegal, confined to few proprietors. It requires no imagination to foresee the result of its legalization. The material advantages to the proprietor are too obvious. Anyone selling goods in more than one State can secure a trade-mark at the expense of $25. Immediately he is within the law. We already have trade-marked oil, meat, bread, fruits, food products, medicine, and clothing. Soon, under resale price-maintaining legislation, all necessaries and all luxuries of modern existence would be trade-marked. What opportunity would the merchant have for individualism? Mr. Ingersoll, the high priest of the cult of resale price maintenance, and others, justify their claim to resale price maintenance on the ground that

the merchants, wholesale and retail, are merely conduits for the passage of goods from the proprietor to the consumer—that the transaction is between these two. In the same argument he says that concentration of selling, in the absence of resale price maintenance, will drive independent merchants into the employ of a distributing monopoly. While not conceding this is a consequence of competitive merchandising, is it not a fair question—which is more encouraging to individualism, being a conduit, fixed, changeless, except for disintegration, or an employee of a distributing monopoly, with chances of promotion and even participation, if individually fit?

Resale price maintenance sets the merchandising opportunity at the level of the least efficient and will drive from the field all those not contented with being mere automatons.

Despite the apparent impression to the contrary, I submit that to enact the Stevens or Metz bills is to overthrow the common law. This committee has heard from so many witnesses that the rights of merchants were changed by the recent decisions of the Supreme Court and that that court's interpretation of the Sherman law deprived them of rights which they would have enjoyed in the absence of such interpretation, that it is worth while to call to the attention of the committee that the Supreme Court decisions were based upon the common law. The Sherman law being deemed to be wider in its application than the common law, and therefore necessarily including it, it was as a matter of course violated in the violation of the common law.

In the Miles Medical Co. case, wherein the article sought to be protected by resale price maintaining contracts, was a trade-marked article manufactured under a trade secret, not patented, the Supreme Court in its decision, which would have been unanimous save for the dissent of Mr. Justice Holmes, held that resale price maintenance contracts were contrary to public policy and invalid both at common law and under the statute.

In Bauer *v.* O'Donnell (229 U. S., 1), the Sanatogen case, the Supreme Court decided that save for the monopolistic rights granted by the patent, the rule in regard to the marketing of patented articles is the same as that regarding any article of general commerce, such as the trade-marked article; that the patent statute did not give the right to restrict the sale beyond the initial sale, and that therefore a patented article after the initial sale was governed by the same rules as announced by the court in the Dr. Miles Medical Co. case. While this was a decision by a divided court, three of the justices there dissenting concurred in the decision in the Miles case. It is apparent that as to them, at any rate, the dissent was based upon the interpretation of the patent statute and not upon the interpretation of the common law as applied to resale price maintaining contracts or notices.

If in the wisdom of Congress it sees fit to increase the reward to inventors by extending their monopolistic rights to the resale of patented articles, it will be dealing with an entirely different question of public policy than that involved in permitting or forbidding resale price maintenance as a general commercial rule.

In view of the real ownership of profitable patented inventions and the small part which the inventor receives from their exploitations,

I am in great doubt as to whether or not the patentees' rights should be extended to include resale price maintenance. The strongest argument in favor of such extension is as an inducement to disclosure for the ultimate public benefit. Such inducement would be of no value if the right of resale price maintenance should be extended to proprietary and trade-marked articles. A trade secret would be of infinitely greater value than a patent, and only real philanthropists would patent their inventions and discoveries.

I need not remind this committee that the establishment of this new right will reverse the accepted policies of centuries, those forbidding restraints on alienation of personal property of every description and the policies embraced in the common law and all statutes forbidding restraints of trade and commerce.

It being clear that Congress is not being asked to restore a divested right, but to create a new one, the burden is upon the proponents of the change to establish that economic conditions have so changed that public policy must change with them.

Who are the proponents of the measure? To a moderate extent, the proprietors of trade-marked articles; more generally, various trade associations throughout the United States. That I am speaking advisedly upon this point is borne out by the experiences of the Department of Justice in its investigations of trade associations.

Mr. Felix Levy has told you that the trade associations which he recently represented are not for the purpose of holding up prices, but for the purpose of confining merchandise to the regular channels of trade. This is but an indirect method of accomplishing the same end. The effort to prevent the manufacturer from selling to the retailer is an effort to maintain the jobbers' profit from the retailer. The effort to prevent sales direct to the consumer is a similar effort. The effort to prevent purchases by syndicates composed of retail merchants and by buying clubs in various forms is an effort to maintain the jobbers' profit from the retailer. So, too, the numerous requests made to this committee that trade associations be permitted to publish lists of manufacturers and wholesalers who did not confine their trade to the regular channels and to publish lists made up of those who are recognized as legitimate dealers at wholesale or retail, as the case might be, look to the maintenance of prices as between the branches of the trade and to the publication of blacklists and whitelists, the matter being merely the former euphonized.

John A. Green, secretary of the National Association of Retail Grocers, in an interview with the Journal of Commerce, published January 12, 1914, who also appeared before this committee, said that the retailer has appealed to the manufacturer for an assured profit.

Henry B. Joy, of the Packard Motor Car Co., in the price maintenance discussion of the National Advertising Managers' Association, at the Hotel Astor, May 14, 1913, said that the trade associations should be permitted to ameliorate price-cutting conditions.

Frank W. Whitcher, of the National Leather & Shoe Finders' Association, before this committee (pp. 343, 344) said that prior to the Supreme Court decision the dealer would say to the manufacturer that he must insure the dealer a fair margin of profit, and that the manufacturer and the dealer would then agree upon what a fair margin of profit was.

The Hon. Herman A. Metz, Member of Congress from New York, stated to this committee that the competitive prices did not hurt the manufacturers, but hurt the retailers. (P. 360.)

Charles F. Miller and Charles L. Miller, president and counsel, respectively, of the Hamilton Watch Co., stated that the 23,000 retail jewelers of the United States supported the resale price maintenance policy (p. 786); that the policy is for the protection of the small dealer (p. 791).

Mr. Kirstein told the committee that the inefficient small dealer must be compelled to get the price by resale price maintenance.

The committee can not but have noted that the pressure behind this legislation is largely from the dealers' associations.

In the case of the United States *v.* National Association of Retail Druggists (unreported) the petition alleged, and the decree (by consent) found that the adoption of resale price maintenance contracts in the drug trade was the result of the direct efforts of the National Wholesale Druggists' Association and of the National Association of Retail Druggists. The methods adopted by these associations to the sole end that prices in the trade-marked articles dealt in by their principals should be fixed from the manufacturer to the consumer, and that prices of all other articles should be fixed by the dealers themselves, would have been instructive to the "predatory trusts," against whom alone the trade associations now say the Sherman Act should be enforced. It is enough to say that blacklisting of manufacturers, wholesale dealers, and retail dealers, and boycotting not only those blacklisted but those who dealt with those blacklisted, was the mildest of their methods. The adoption of resale price maintaining contracts was the final means urged by them upon the manufacturers in the hope that if the other schemes which were designed to attain the same object were declared illegal because the result of a combination, this objection would be removed because the resale price maintaining contract is apparently the plan of the noncombining manufacturer. As was stated by the National Association of Retail Druggists in its bulletin No. 11, issued March 25, 1902:

> The resale price maintaining plan depends for its practicability on whether or not the law will enforce it directly, while the (former) plan of the association depends not upon the courts, but upon the loyalty of its subscribers and their mutuality of interests, the courts being a possible, remote, contingency to be reckoned with instead of an instrument to be used.

The trade associations, having failed in their efforts to use the courts in carrying out their unlawful plans through contracts similar to those set up in the Miles case, they now by indirection appeal for the legalization of the plan, and going further, ask, in several of the bills introduced at this session of Congress to be exempted from the provisions of the Sherman law.

I was one of the attorneys in this case against the National Association of Retail Druggists. The investigation developed that the resale-price-maintenance movement began with the efforts of the Western Association of Wholesale Druggists as far back as 1876.

In 1881 these druggists, in order to stop competition between themselves, urged upon the members of the Proprietary Association of America, who were manufacturers selling trade-marked goods in the drug trade, the adoption of a rebate plan by the terms of which

a wholesaler was sold at list—that is, the same price at which he was supposed to sell to the retail dealer—and received his profit upon signing a contract or certificate to the effect that he sold to the retail dealer at a certain price which was determined by the association. This simple plan of resale-price maintenance, with modifications, remained in effect until 1898, when the National Association of Retail Druggists came into being. Instantly, in the language of one of the witnesses before this committee, the "let-us-get-ours" talk commenced. The result was a conference between committees of the Proprietary Association of America and the National Wholesale Druggists' Association and the National Association of Retail Druggists, which developed what was known to the trade as the "tripartite plan." This was a three-sided agreement in which the manufacturer agreed to sell his goods to the wholesaler and to confine his sales to such wholesalers only as appeared upon the recognized jobbers' list; the recognized jobbers' list was prepared by a committee of the National Wholesale Druggists' Association and contained only the names of those who had agreed to and who did maintain a certain price to the retail trade. The wholesale dealer also agreed that in his sales to the retail trade he would not sell any retail dealer whose name appeared upon the black list prepared at first directly by the National Association of Retail Druggists and ultimately by a publisher employed by the National Association of Retail Druggists. This black list contained the names of the dealers, and the suppliers of the dealers, who sold goods at competitive prices.

This plan, to a certain extent, depended upon the good will and good faith of the parties to it. When a dealer acted in bad faith and was not caught by the detectives and spies of the associations, there was no way of determining whom he was supplying or whence the prohibited dealer's supplies came.

In order to meet these conditions, the associations urged upon the proprietors the adoption of a resale price-maintaining contract, with serial numbers identifying the articles, requiring the wholesale dealer to report to the manufacturer by serial number to what retail dealer he had sold the particular item of his sale.

The Dr. Miles Medical Co. adopted a direct-contract serial-numbering arrangement for marketing its product, at the direct request of the retail association. Because the wholesale association had not been consulted the Dr. Miles Medical Co. was compelled to withdraw this contract from the market, and after consultation with and the approval of a committee from the National Association of Retail Druggists and the National Wholesale Druggists' Association adopted a contract. This is, in substance and effect, the same which it is urged should be legalized; that is, contracts between the manufacturer, the jobber, and retail dealer, a resale price-maintenance plan for the purpose of choking off competition from the hands of the producer to the hands of the consumer.

In carrying out these plans and in forcing these things upon the proprietors and upon dealers who were unwilling to tie their hands by such arrangement, illegal acts of every character, the employment of detectives for spying upon competitors' business, the breaking open of parcels to detect the source of supply, black lists and white lists,

and every method known to trust organizations was used by these dealers' associations.

At this point the United States intervened. The court enjoined and ordered the cancellation of every contract, every black list, every "tripartite plan," and every white list, and in this manner broke up an illegal combination which the trade associations had struggled through a number of years to perfect and which they had succeeded in perfecting.

Now, gentlemen of the committee, these associations having failed in their direct effort, and an injunction having issued, certain individual manufacturers, currying the favor of the trade, subsequent to the injunctions adopted resale price-maintaining plans. Among them was the Dr. Miles Medical Co. The suit testing the right of an individual to maintain resale prices was carried to the Supreme Court of the United States, which determined that the manufacturer's benefit in such plan was indirect, while that of the dealer was direct, and that the manufacturer could not accomplish for the dealer by indirection what the trade associations and the members thereof were forbidden to accomplish directly. I would commend to your attention the opinion of Mr. Justice Hughes on that point.

There have been several bills introduced at this session of Congress, which are not before this committee, in which it is directly provided that voluntary trade associations not for profit shall be exempted from the operation of the Sherman law. I submit it would be a grave mistake to pass such bills, because, in my opinion, there are no trusts quite as complete in monopoly and quite as cruel and uncompromising in action as the trusts formed by the trade associations.

Assuming for the moment that the proprietor of the trade-mark is alone in seeking resale price maintenance, he bases his right to such legislation—

First. Because his name and reputation are embraced in his trade-mark.

Second. Because he guarantees the quality to the consumer.

Third. Because in some instances he assures service to the consumer.

Fourth. Because he sometimes advertises; and

Fifth. Because the sale is between him and the consumer, the distributors being mere conduits.

Taking up these claims in order: Trade-marks have been used for ages under a competitive system. There is no change in economic conditions requiring a change in commercial rights based on their ownership. The primary protection of a trade-mark by law is against deception of the public by selling goods of one origin as goods of another. Secondarily, the owner of the trade-mark must be injured by the deception. Otherwise he has no standing in court. Jurisdiction can not be invoked on behalf of the public by one who has not been injured by the deception. The ownership of a trade-mark gives no monopolistic rights to the goods bearing it which are not possessed by the owner of unmarked personality. If it should involve monopolistic rights, this would be an additional reason against extending them by the proposed legislation. In the Miles case, counsel for complainant sought to sustain its right to resale price maintenance on the ground of monopoly through the trade secret used in complainant's product. It was admitted that no such

right existed for the usual trade-marked article. Why create this right? Does not every author, musician, artist, lawyer, artisan, dealer, and producer sell his name and reputation as part of the product of his art, science, brain, brawn, or machine? Special legislation based on the ownership of trade-mark articles is legislation creating a special privilege at the expense of the general public.

What rights can be claimed because of the proprietors' guaranty of quality to the consumer? Can he force upon the consumer a monopolistic system because of this? Has the consumer yielded his rights in exchange for this mess of pottage? Perhaps the consumer prefers the dealers' guaranty. It is more direct, more accessible, more easily enforced, and without doubt the proprietor has been paid for his guaranty in the price he receives from his original purchaser. It is included in the proprietor's profits. Shall the consumer pay for it three times over?

Has there ever been any service rendered the consumer for which he has not paid? Again, has the consumer consented to monopoly in exchange for service? "Service" usually means supplying repair parts. If you have ever availed yourself of this service, a computation will convince you that the sum of the cost of all parts is equal to several times the cost of the original article. If service means credit, delivery, numerous salesmen, and other costly merchandising methods, by what right does the manufacturer impose this expense upon that part of the public which would save by performing its own service?

The proprietor says that his advertising should entitle him to resale price maintenance. The proposed legislation is not limited to the advertised article. To so limit it would be to deny it consideration. What is the effect of advertising? Its primary effect is to create the impression that the advertised article is worth the advertised price. This is the fundamental basis of the advertiser's claim to special legislation, but is it worth the price? It may or may not be. Such figures as are available indicate a spread of 200 to 500 per cent between the cost of production and the advertised price. In some instances this difference is greater, in a few instances somewhat less. Mr. Dey, of Dey Bros. Co., Syracuse, in his talk to the United States Chamber of Commerce in Washington two weeks ago, said that goods in the open market gave both dealer and consumer the best value for their money. It stands to reason that this is so. The consumer pays for the advertising.

The next effect of good advertising is to withdraw the article advertised from the influences of the laws of supply and demand. "Under the spell of advertising this law does not function." To the extent that this is so, the advertiser is unrestrained by the competition of kindred merchandise. He enjoys a partial monopoly. He should not be permitted to complete this monopoly by resale price maintenance. The control of prices is the essence of monopoly.

The third effect of price advertising is to raise the price of kindred advertised and unadvertised articles. This is so well recognized that advertising proprietors have been known to market two articles of equal quality under different names—one price advertised, the other not. The same dealer carries both and is able to satisfy the wants of the economical buyer, receiving a higher price for the unadvertised article than would have been possible had not the advertised article

set the price. The evidence before the committee shows that price advertising leads to standardization of price. Charles F. Miller, president of the Hamilton Watch Co., said that the prices on Hamilton, Elgin, and Waltham movements are about the same, although there is no agreement between the manufacturers.

Harry F. Kierstein stated that the dealers used the advertised prices as a standard and that all dealers in the same business would have about the same standard price on similar articles.

The Scientific American in its issue of June 21, 1913, page 566, contains the statement that there is no wide variation of price in competing wares of equal quality.

Each of the foregoing effects of successful advertising necessitates the subjection of price-advertised articles to competitive conditions. All testimony before the committee leads to the conclusion that the proprietor will set the highest price the traffic will bear. The fact that he may create a market by his enterprise does not entitle him to monopolistic control of that market when created. The public pays for the advertising—not the proprietor. He receives full compensation for whatever risk he runs in the sales to dealers. That this compensation is ample would appear from the fortunes accumulated by advertisers who have permitted competition to regulate resale prices and by those who have not. To quote the Supreme Court, "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The last claim of the proprietor, which would reduce the dealer to a vending machine, is untrue in fact and in law. The dealer buys the merchandise and assumes the risk of being able to resell it. His experience, his investment, his personal qualifications enter into its resale. His personal guaranty is frequently demanded. He is the owner for all purposes.

Should the bulk of his stock be purchased on the resale price maintained plan, his credit with the bank might be imperiled. The dealer could not reduce his stock by seasonal sales to meet his banking obligations. He would be at the mercy of the proprietor of the trade-mark.

The proprietor could reduce the price to the subvendee and maintain or increase the price to the vendee. The demand having been created, the dealer might be compelled to carry the article for fear of losing other trade of disappointed customers. This would be true of either wholesale or retail merchants. No system more merciless to the many for the benefit of the few, so destructive of initiative, so unfair to the consuming public could be devised as one based upon the conduit theory of merchandise distribution.

The proprietor claims necessity for resale price maintenance legislation because of alleged wrongs perpetrated under the present system. He claims to be wronged: First, by the advertising of his products at competitive prices for the purpose of attracting trade to other goods; second, by other dealers preferring to sell other goods at better profits rather than meet competition in the advertised goods; third, by the necessity thus forced upon the manufacturer of reducing his price to dealers or of losing part of his trade.

If the foregoing results are brought about through fair merchandising, the proprietor has no cause for complaint. If other goods

yield larger profits, the dealers will invariably prefer to sell them. If price advertising renders the proprietor unusually susceptible to competitive selling, his advertising is of his own choosing. If its advantages do not counterbalance its disadvantages, he may stop price advertising and begin quality advertising. Many successful proprietors have done so. It can scarcely be claimed that because a proprietor chooses a particular method of marketing his products, his choice of method entitles him to special consideration if its disadvantages are not to his liking.

The proprietor then charges that the results complained of are produced by false advertising—false either as to the quality of the goods sold, as to the quantity, or as to comparative values. If the complaint is well founded, and it is regrettable that in many cases it is, the remedy should not be sought in resale price maintenance—a remedy containing more of harm than the original disease—but in stringent laws against false advertising. I am informed that 16 States have such laws. A strengthening of the postal laws, with the accompanying "fraud order" denying the use of the mails, is all that would be necessary to protect interstate commerce from trade pirates. But honest competitive merchandising is not trade piracy. It is charged that where advertised articles are cut, an overcharge is necessary to compensate. This statement is founded on the premise that every sale must bear the same percentage of overhead and should yield the same percentage of net profit. The premise is false and the conclusion necessarily falls. The general business must bear the general overhead.

But seasonal goods, perishable goods, those subject to the change of fashion, those in which style as well as manufacturing costs are paid for, yield and should yield much larger profits than goods salable throughout the year and from year to year. These goods should carry overhead in proportion to their profit and not in proportion to their cost; hence the overhead on the staple articles is materially reduced. An unadvertised article of equal quality will cost the dealer less than the advertised article. Must the dealer charge the consumer less for the one than for the other? If quality be equal is it not just that the consumer pay equally for both? Justice would in this case demand as inequality in overhead, an inequality in profit, and an approach to parity in price. No merchant can long continue whose bargains are not real. When you find a competitive merchant whose business has grown continuously throughout a period of years, you may safely conclude that his merchandising is honest. The history of such concerns, their growth, their success, is conclusive proof that they are performing properly their economic functions. It is also proof of the untenantability of the premise upon which the proprietors case is built.

There is nothing in the claims of the owner of trade-marks, even accepting his view of the facts, the law, and the necessities of the situation, which should in any way apply to the wholesale dealer. His advertisements are not to the consumer; if he advertises at all, it is to the trade. He is willing to sell any and all dealers at the same competitive prices. He does not touch the proprietor's reputation, guaranty, service, advertisement, or consumers' price. Why is he included in resale price maintenance legislation? Is this the pro-

trusion of the cloven hoof betraying the wholesale dealers' associations' connection with resale price maintenance?

In conclusion, let us look at the proposed legislation from the viewpoint of a member of the consuming public. He is denied the freedom of purchase. He must pay a price to include advertising, which he does not invite—he must accept service, when he would save himself its cost—he must buy at the height of demand, although willing to be out of date at less expense—he must support a neighborhood merchant, although willing to inconvenience himself by shopping at a distance—all this he must do because of the special privilege claimed for a twenty-five dollar trademark.

I thank you, gentlemen, for my opportunity and your attention.

Mr. DYER. In connection with your statement, which has been very interesting, let me call your attention to the tentative bill No. 1. You did not discuss that.

Mr. SHRODER. No; I confined my discussion to the two sections of tentative bill No. 2, which I referred to at the beginning.

Mr. DYER. Let me call your attention to section 0 of tentative bill No. 1, and let me ask you if you have considered that, and will give the committee your judgment as to the section. That section reads:

That it shall be deemed an attempt to monopolize trade or commerce among the several States, or within the foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodities sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of a mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

Mr. SHRODER. I have given some consideration to that question My principal criticism would be to the inclusion of the word "injure" in line 5, where it says, "with the purpose or intent to thereby injure or destroy a competitor."

Mr. DYER. Is not that the meat of the section, to prevent the injuring or destroying of the business of a competitor by discrimination in prices?

Mr. SHRODER. One should not be permitted to destroy the business of a competitor by discrimination in prices. It is impossible to conduct a modern merchandizing business without an intent to injure a competitor. The object of doing business is to secure trade, and every bit of trade you take away from a competitor injures him.

Mr. DYER. What would you say as to a corporation making a special discount or a special price to a dealer in one community as against another dealer in the same community or in the same territory?

Mr. SHRODER. It depends entirely upon the object with which it is done. It is sometimes necessary, in order to make a particular sale in a given territory in the course of competition and everyday trade, to give one dealer or one consumer a different price from another dealer or another consumer. To my mind the difficulty with trying to define an act which shall be a conclusive violation of the law is that

you are going to include in your definition many things which are absolutely necessary, customary, and harmless in the ordinary transaction of business. In the majority of cases it is the intent—and in using that word I mean intent in the legal sense—which determines the character of the act. I think if your legislation were aimed at the result and confined to the result——

Mr. VOLSTEAD. Suppose you amended it in this fashion, so that you substitute for the word "competitor" the word "competition," so that it would read "with intent to destroy competition." How would that suit you then?

Mr. SHRODER. "To injure and destroy competition." I would make it "destroy competition." I think that would meet the particular criticism which I made. Still at the same time I do not think it aids the Sherman law, because I think the Sherman law as now interpreted would attain exactly the same object.

Mr. NELSON. What company do you represent?

Mr. SHRODER. I represent the John D. Park & Sons Co., of Cincinnati.

Mr. NELSON. Does this company have any branded goods on the market?

Mr. SHRODER. Of their own production?

Mr. NELSON. Yes.

Mr. SHRODER. They have produced and traded in some family heirloom recipes where the demand was sufficient to make it worth their while to manufacture them.

Mr. NELSON. Was sarsaparilla one of them?

Mr. SHRODER. There may be a moderate demand for some form of it. They are not really producers.

Mr. NELSON. They do not produce?

Mr. SHRODER. Such producing as they do is incidental. It is an inherited remnant of an old family business.

Mr. NELSON. What is their business?

Mr. SHRODER. Wholesale dealers.

Mr. NELSON. Do they attempt to fix the price to the retailers on their goods?

Mr. SHRODER. You mean the goods of their own manufacture, those minor articles?

Mr. NELSON. Yes.

Mr. SHRODER. No.

Mr. NELSON. Other goods?

Mr. SHRODER. You mean prices at which they should be resold?

Mr. NELSON. Yes.

Mr. SHRODER. No; they fix their own prices, of course, and they are requesting that they be permitted to continue to fix their own prices to their customers, instead of having the price fixed for them by the manufacturer.

Mr. NELSON. Do they give liberal discounts to their customers?

Mr. SHRODER. They sell absolutely everything they sell at 6 per cent less than list, whether advertised or unadvertised. Their established business has been built up on the theory that to keep traveling salesmen off the road is to save 6 per cent in the cost of doing business, and they turn that saving to their retail customers.

Mr. NELSON. Is their practice strictly in accordance with your argument?

Mr. SHRODER. I have been acquainted with their practice for 10 years, and I have not known of any variations from it.

Mr. DYER. You referred in your statement to the committee, Mr. Shroder, to trade associations as being inimical to the consumer, if I have a correct interpretation of your statement. Will you not elaborate there just a little bit and give us your idea more in detail? You did not explain why you thought they had been detrimental to the consumer.

Mr. SHRODER. If a trade association would confine its activities to cleaning up its own stables—in other words, taking care of its own evils which exist in the trade, and which do not affect the consumer—there would be no objection to a trade association. They could be of general benefit.

I understand there are a very great many reputable trade associations organized for that purpose and confining their activities to that purpose.

But the history of the trade association contains glaring examples of associations which, while having that for their apparent cause, have used all their energies and all the machinery at their command in establishing noncompetitive prices for the consumer. In other words, they insure the profits of the various dealers along the line; they make the jobbers noncompetitive; they confine each jobber to his own particular territory; they have all retail dealers sell at one price. I think that to exempt them from the operation of the Sherman law because they are a voluntary trade association, would be a grave mistake.

This is a matter of no great importance, but it illustrates what I mean. There are a number of poor people, who, when they receive prescriptions from a doctor, shop with a prescription. They take it from one druggist to another druggist, in most cases driven by necessity, because they are trying to get it put up at a cheaper price.

I suppose the condition still exists which existed in 1903, when the retail drug associations in various localities, ultimately indorsed by the National Association of Retail Druggists, adopted a plan for preventing the shopping of prescriptions. The word "pharmacist" is made up of ten letters, no two of which are alike, and therefore can be used as a price mark on prescriptions, each letter corresponding to one of the numerals. The associations recommended that when a shopping customer came into a store, the first clerk who received the prescription should take the prescription behind the counter, size up the ability of the customer to pay, size up the cost of the ingredients and the amount of time necessary to make up the prescription, allow a liberal profit on each item, and then price this prescription between the first and second lines of the prescription, in ink or pencil, according as the prescription itself was written, so that if the shopper should go to the next drug store and that druggist was an association man, he could see the price his competitor had asked for the prescription, and therefore would not cut on the price marked on that prescription. I do not know that this was ever generally adopted, but it was adopted by some associations and it was indorsed by the national association, and while in itself it is a trifling incident, it shows the condition which prevails in trade associations, whenever they direct their activities to controlling prices.

Mr. NELSON. You advocate the sections I referred to, do you?

Mr. SHRODER. I advocate them because they prevent resale-price maintenance.

Mr. NELSON. Are they necessary? Under the present status of the law, as interpreted by the Supreme Court of the United States, does that not take care of that practice.

Mr. SHRODER. There is still a field of doubt; or rather, there has been no final interpretation of the law upon particular points by the Supreme Court. If Congress feels that all points should be cleared up, and that there should not be such field of doubt, then I favor legislation forbidding the effort to accomplish an illegal thing by legal means.

Mr. NELSON. Will you illustrate that in the case of drugs?

Mr. SHRODER. Take a case which is quite common. I happen to have here a catalogue and price list that came into my office last week. This concern does not attempt to maintain its prices, but it has a suggestive price list for the retail trade. Here, for instance, are jeweled cuff buttons and pins, and small things of that sort, without any particular individuality. The suggestive price list would have the retailer sell all articles on a certain page in the catalogue as indicated by number at a certain price, say $9 a dozen. This is an article which is sold to the jobber at $3 a dozen, less 6 per cent off for cash. That is an illustration of the tremendous difference between the manufacturer's cost and the proposed cost to the consumer. I have no doubt but that the sending of this suggestive price list with a catalogue and circular is likely to serve the purpose for which it was sent.

Mr. NELSON. But if there were others sending the same thing out, where the prices were practically the same, would not that indicate that a combination or agreement had been formed?

Mr. SCHRODER. It might or it might not. There is a natural tendency, as I tried to explain before, when once a price is fixed on an article, and the price proves to be a profitable price at which the goods will move, for most dealers to put the same price or practically the same price on a similar article, regardless of competition. That is what they call their educational work. It is not a contract or a combination or an agreement; it is not a monopoly, and still the result is just the same as if it were.

Mr. NELSON. What is the language in the proposed bill that would prevent one firm from sending out a proposed or suggested price to be charged to consumers?

Mr. SCHRODER. The third section prevents an agreement between corporations to prevent competition in selling, and the fourth section prevents the making of any agreement, "entering into any arrangement," that is not necessarily——

Mr. NELSON. The last clause would cover that?

Mr. SCHRODER. "Directly or indirectly"; that is the clause which I think would accomplish the purpose. That is the fourth section.

There is too much indirect violation of the law. You have had witnesses before you and they have told you about these agreements and this educational work, and the net result is that they destroy competition and escape the law simply because it is not by contract. There are other plans that are even worse.

There are the plans of the preferential rebate. I do not know whether the committee has had that matter explained to them.

That is a system whereby all or a material part of the dealer's profit is given to him in the form of a rebate at the conclusion of a certain period, upon his signed statement that he has resold his goods at the suggested price, and if he has not sold it in that way he does not get his rebate.

Mr. NELSON. Is that a verbal or a written agreement?

Mr. SHRODER. The agreement is not one to sell at a certain price. The agreement is simply that if of your own accord you will handle my goods, and during the time you are handling my goods you will sell at certain prices, I will at the end of that period give you a special discount.

Mr. NELSON. Is that verbal or in writing?

Mr. SHRODER. I suppose it is both ways. It is not an agreement whereby one party binds himself to sell at a certain price; it is not an agreement to control the price, but it accomplishes the same thing indirectly. They say to you, "If you do sell at the desired price we will give you this preferential discount." There is an instance of price maintenance, showing how the resale price can be controlled without in form and letter violating the law.

Mr. VOLSTEAD. Would not it be necessary, under this fourth subdivision of the first section, to have an agreement, would not the court have to find some agreement, under this fourth subdivision of section D, where it says, "to enter into an understanding and undertake to prevent free and unrestricted competition"; would not the word "undertake" require some sort of an understanding or agreement, some obligation?

Mr. SHRODER. As I understand you, that is to enter into any agreement by which they undertake to prevent free and unrestricted competition? I would say that using in the same paragraph the word "agreement," the legislators having before them the plain meaning of the certain word in the section, would not be interpreted to use the word "undertake" as if they meant by that "agreed." Undertaking is not necessarily by agreement; undertaking may be by action.

Mr. VOLSTEAD. The first part of the section says it must be a combination or agreement to undertake to prevent free and unrestricted competition. Could that exist without some sort of an agreement?

Mr. SHRODER. I consider that the words of the introductory portion of the bill, whereby all of the subsequent clauses are made dependent upon the introductory clause, is somewhat confusing in that respect. That is why clause 4 is apparently independent and may stand by itself, aside from the recital of jurisdictional facts of the introduction.

Mr. VOLSTEAD. They would have to be read together, as it is written.

Mr. SHRODER. There is that danger, I think, that the introductory section would be carried into clause 4 in such a way as to say that it applies only to combination and express agreement; if it does that, it does not go any further than does the Sherman law, and it is absolutely unnecessary.

Mr. VOLSTEAD. Must not this qualification be considered, too, that this combination or agreement must be between different personalities? Suppose one corporation fixes the resale price; will that be considered such a combination simply because it fixes the price, and

turns it over to the wholesaler, and the wholesaler turns it over to the retailer—would not an arrangement between those persons be what is contemplated?

Mr. SCHRODER. There is necessarily a combination when three different persons can enter into a mutual contract which would be necessary in order to maintain the price from the producer to the consumer.

That is a vice of the system of resale price maintenance, that it is an indirect agreement between three branches of the trade, resulting in a complete monopoly.

I favor these sections first, because they make it clear that the United States does not propose to protect that kind of an arrangement, and second, because it gives us a chance to get at these indirect methods which might not come under a plain wording of the law.

The CHAIRMAN. We are very much obliged to you, Mr. Schroder, for having given us your views on this subject.

We will now hear from Mr. Twyman O. Abbott.

STATEMENT OF MR. TWYMAN O. ABBOTT, OF NEW YORK, N. Y.

Mr. ABBOTT. Mr. Chairman, I will try not take over 15 minutes of your time in making the statement which I have to make.

I want to direct the committee's attention to section 12 of the committee's tentative bill No. 1. The reason I want to direct your attention to that is because it relates to what is known as the seventh section of the Sherman Act, and I have had some experience in trying to enforce some of the provisions of that section, and I have found that it has been very difficult to accomplish any results, for reasons which I will state to you.

In the first place, practically every man who has been injured by the unlawful acts of combinations or conspiracies has been so completely injured that he has no recuperative power. That is to say, he has been so completely put out of business that he is not able to enforce his rights—he has neither friends nor money with which to carry on his fight.

I think that in order to make that section of the Sherman Act effective, there must be something done to extend the rights and, you might say, the advantages which a person who has been injured has, in order to accomplish some relief or secure some remedy.

So far as this section goes, it is very good, but I think it ought to go a little bit further. In the first place, if you will permit me to read from it, I will call your attention to the third line of the section, where it is stated that when a final judgment or decree shall have been rendered, it shall be permissible to receive it in evidence in other courts. I would insert, after the word "final," "or interlocutory." There are sometimes interlocutory decrees which are in effect final. Take the case of the Powder Trust, with which I have had some experience; that is to say, I recently was representing a party who brought an action against the Powder Trust under the seventh section of the Sherman Act, and that is really what brings me here, because of

the difficulties we encountered in that proceeding; and I might state to you that we were 5 months trying the case, and we were 14 weeks in proving the conspiracy, and at the end of 14 weeks they came in and admitted the conspiracy, when, if we had had the permission contemplated by this section, or if this section of the act which you are proposing to adopt here had been adopted, we could have simply offered a decree of the circuit court, which was to the effect that they were a conspiracy and were engaged in those unlawful acts, and that would have been enough, and we could have tried our case in 3 weeks at the outside; but all the rest of the time was taken up with complications which resulted from our efforts to prove a conspiracy, which they finally admitted.

I will go further than that, gentlemen, and say that it has developed since that certain members of the jury, who were influential, believed, notwithstanding the evidence we had submitted and the fact that the court practically instructed them that under the law this was an unlawful combination, that they might not have been an unlawful combination, as I have been informed by some of the members of the jury since. In other words, the conspiracy in that case was one which was really a conspiracy which the court alone could pass upon. It involved such a technical question as the legal effect of a contract system or price making in a certain way, and other things upon which really the jury could not pass. That is one of the suggestions I am going to make here, that you extend the privileges of this section to so cover a case of that kind.

In order to hurry along, because I want to keep my promise, I would suggest this amendment at the top of page 4 of the same bill, after the words "Provisions of this act":

That in any action or proceeding, where the violation of the first or second sections of said act shall be a question in issue, such question shall always be one for the court.

I think there is no more reason why the court, when an action is being tried under the seventh section of the Sherman Act, should not determine the unlawfulness of the combination than why the court should determine that question in an action in equity by the Government—none whatever. This, of course, applies to a case where the Government has not already proceeded against the combination and found it to be illegal, but it is to the same effect and purport as the other provision of the act, which is, that where the Government, in an action which it has prosecuted against a trust, has found that it was unlawful, that judgment may be accepted as final in other courts where the question in issue may come up. If the court can do it in one case, the court can do it in another case, and I think it is properly a question always for the court.

Mr. VOLSTEAD. Do you think it could be done in an action at law?

Mr. ABBOTT. I think it can be if the statute so provides. We had this question up in this case. We considered whether we would offer the decree in the circuit court in the equity case, as res adjudicata, and we looked up the authorities and came to the conclusion that it could really be done, but we felt that we could prove the conspiracy and we did not care to rely upon it. We were afraid it might possibly be error, so we went ahead and proved the conspiracy to our satisfaction and rested upon that point, and then we offered the decree, and the court stated if we had offered the decree earlier, he would

have been inclined—in fact, he indicated his views that he would have accepted it. But offering it after we had really proved the conspiracy, he did not care to raise the question, so he rejected it.

I want to say that I have the authority of Judge Rellstab who tried that case—I told him I was coming over here—to say to you he favored this section you are proposing to adopt, section 12, to that extent at least. In other words, he thinks the decree of one court should be conclusive and final upon the point, if I do not misunderstand him. I do not wish to quote his language exactly, but that is the understanding I had while discussing the matter with him the other day, and he said I might say so to you gentlemen.

At the end of the same section I would add this:

"When in any such action it shall have been found that the defendant has violated any of the provisions of the first or second sections of said act, some damage shall be presumed to have resulted therefrom."

I think that should follow as a matter of public policy; that if there is anything in the provisions of the Sherman Act—and I think there is—which is for the benefit of the public, then I think the burden should be upon the persons committing the unlawful act to show they have not committed any damage or any injury. In other words, it ought to be just as in an action for libel or slander—that where you have proved the slander or libel, then some injury is presumed to follow. I think there is more reason in a case of this kind, and on the other hand, I think that public policy requires that the burden should at least be shifted to the other side; if not, that presumption should be made complete. That would be of great benefit to the man who is suing under the seventh section of the Sherman Act, because it gives him some heart, some hope, because when he goes into an action of this kind he is usually a man without means and he must rely upon his friends; in nearly every case he must rely upon his friends and his own innate spirit.

By the way, in that very connection, I want to say that when this Sherman Act was being considered, Senator Sherman, in answering some of the criticisms that had been made of that particular section to the effect that it would bring up a great amount of litigation which would involve the courts, said that only men of spirit would bring these actions, and that the greater portion of the community, who had suffered injury of this kind would simply let it go by without paying any attention to it. I think, since the Sherman Act has been in effect, that statement has been borne out in a great many different ways.

Mr. VOLSTEAD. Would such a general presumption as that be of any particular value to any individual bringing the suit?

Mr. ABBOTT. I think it would be; yes. I think it would be of great value, because, in the first place, it saves costs.

Mr. VOLSTEAD. I realize that was one of the main reasons for it; but how would he avail himself of that presumption? He would have to connect himself just the same with the injury.

Mr. ABBOTT. Certainly. No man would be permitted to bring an action and, because of the fact he had brought that action and shown there was an unlawful combination, thereby to say, "I must have a judgment for nominal damages." He must show, in the first

place, he has some cause of action against the party he is suing, and when he has shown that, just as in the case of libel, if he has shown he has been libeled, then some damages must follow.

Mr. VOLSTEAD. In the form you submitted it would be a legal conclusion that could not be disputed.

Mr. ABBOTT. It may be the form is not quite complete, but it is the substance I am endeavoring to get at, and I wrote this rather hurriedly. I see the force of your suggestion. Nevertheless, I think that would follow as a rule of law, that no man would be permitted to recover in an action of this kind unless he had first shown he had a right to maintain that action. He must show in some way that he has been injured, and that the attack had been made in a certain way so he had received some injury.

Mr. VOLSTEAD. I presume you might put the burden of proof on the offending party, but could you go beyond that? If you establish that he was in fact liable, that a corporation or concern was in fact liable for damages unless there was an opportunity to dispute the fact?

Mr. ABBOTT. Of course, burden of proof would help, but the burden of proof would still leave the question open, and I think it would not be very much more, in a case of that kind, than a good strong instruction from the court; but at the same time it would help. My belief is, however, that the rule that some injury must be presumed in a case of that character would be a very wholesome rule, and one which would produce not only a great deal of good to the injured parties but would also be a sort of checkmate upon those who were so anxious to drive them out of business or do these unlawful acts.

Mr. VOLSTEAD. Might it not raise a question of constitutionality with reference to your section by putting it in?

Mr. ABBOTT. These matters of constitutionality are always coming up. I think, though, in a matter of this sort it would not involve any serious question. I can not see where the case would be different from the one which I have indicated. It is a rule of public policy that allows that rule to apply in cases of libel and slander, because it is a very difficult matter, gentlemen, to put your finger upon a direct injury that may have resulted from some general act which affects the unlawfulness of the combination in itself. Yet the policy of the Sherman law must be that to unlawfully combine for the purpose of doing any of these things is wrong *per se*.

Mr. VOLSTEAD. In libel and slander, of course, the injury is direct to the person bringing the suit. In this instance, where a first party sues, it might even be contended that instead of the injured, he, as a member of a general public, might not have been injured at all, and if you raise a presumption in favor of every litigant who invokes this law that he has been injured it seems to be it would raise a very serious question whether it would be constitutional. I concede that you could put the burden of proof on the parties violating the Sherman antitrust act. It seems to me that might readily be done, because that could be disputed. You could say, as an actual fact, that there was no injury.

Mr. ABBOTT. Of course, burden of proof is better than nothing at all, but I believe that this provision can be so framed as to meet all constitutional objections. Upon that same point I did not read all

the amendment which I would propose there. It goes to this same point:

Any person who shall have been compelled to sell his products at less than a fair price by reason of such violation shall be entitled to receive not only the losses actually sustained thereby, but shall also recover the profits which he was prevented from making thereby.

Any person who shall have been injured to the extent that he shall have been driven from business entirely shall also recover such reasonable profits as he would have made for a period of three years thereafter had his business not been totally suspended or interrupted.

Mr. WEBB. Are not you getting into the realm of speculative damages there?

Mr. ABBOTT. Yes; the point is that there is only one way in which anything like complete recompense can be obtained by any person who undertakes to bring an action under the seventh section of the Sherman Act, and that is to recover for the damages on his loss of profits—not only what he may have lost by reason of some particular sale that he made or because of the fact that he was forced to sell property at a discount or something of that sort—those things are conceded; but when you go beyond that, a man who has actually been driven out of his business by these unlawful acts has been driven out because he lost his profits or has lost his right to do business in a natural and normal way, and the result is that gradually he goes down, down, down, until he has no business or he has no profits, and he is compelled to retire from business. When he has retired from business, you see that he is done with, and he can not come in and make any further claim. There is no rule of law that I know of that will permit him to come in and claim after that. Nevertheless, it seems to me the man who has been put out of business must have some further right to recover damages because of the fact that if he had not been interfered with he would have continued to live and do business. It must be part of his actual loss that he has been put out of business. When I say for a period of three years, that means, of course, something like a reasonable time, and the three-year rule for loss of profits has been followed by a number of courts; but that is only an arbitrary phrase that I use there as fixing some time. It might be said "For a reasonable time" and leave that to the court and jury to determine.

I have found, in my connection with litigation under this section of the Sherman Act—and I have had several cases and have been consulted in a great many others—that that is the one thing we lawyers come up against. We can prove that we are put out of business and that we sold our property, and that it cost us so much to begin with and we got so much for it, and that there is a distinct loss right there, which they usually admit; and then we can prove that in some particular cases, in a number of instances, we had to meet certain competition, and in order to meet that competition we cut our price to meet theirs, and there is a loss there. But when it comes to proving loss of profits, and when it comes to proving loss of future profits, we have the greatest difficulty on earth.

Mr. NELSON How in the world would you have a court estimate future profits?

Mr. ABBOTT. All future profits and all losses on profits must be estimated upon some basis of what a man has done, and that is the only way in which you can get a rule. You have to show a man was,

in the first place, engaged in business; that for a time he did make some profits; and that by reason of certain acts, which began at a certain time, his profits fell off; and if you can connect the two together, then you are permitted to recover profits.

I do not want to overstep my time and I am at the committee's service, but the suggestions which I have made do not cover all I desired to present. I could make others and would like to make others, but I feel as though I ought not to take up the time of the committee. It is a matter which I think of very vital importance, because if the seventh section of the Sherman Act is to be of any avail at all—and I think it could be made a very effective weapon for enforcing the Sherman law—something ought to be done to extend the advantages and privileges of the man who has been injured, because all of the powers and all of the influence in every way are against the man out of business and with the trust who has put him out of business. I do not think I need to enlarge very much upon that, because it is the sinking ship as against the ship which is afloat, and it is very often difficult to get witnesses to testify in cases of that kind. The difficulties are enormous, and I believe there is only one way in which that section can be effective, and that is in some such way as I have indicated—not only making it easier for the man who has been injured to prove his case but also giving him some advantages in the way of showing what his losses have been.

Mr. NELSON. You justify that wholly upon the fact that the competitor that brought about the injury was an unlawful thing?

Mr. ABBOTT. Yes; I do. I think that is the basis of the whole thing. If it were an ordinary case, as between two men where they had entered into a contract, and injury had resulted to one of those men and he was suing for his loss of profits, I would not attempt in any way to extend that rule; but here is a wrongful act, a criminal act which has been committed, and then the criminal not only comes in and takes advantage of all the benefits of it by continuing in business after he has put the other man out of business and taken his business away from him but he also goes scot free from paying any penalties or any damages.

Mr. NELSON. If such a provision were enacted, it would almost make the Attorney General's office unnecessary, would it not, as a deterrent?

Mr. ABBOTT. I do not think it would, but I think it would help a great deal. I believe it would be a great advantage in enforcing the Sherman act. I do not believe it would work any unjust effect on the unlawful combination in any way. I think it would simply work for the justice of the person who has been injured.

Mr. BEALL. If the Government instituted the proceedings against some person or corporation on the ground that they are engaged in restraint of trade or in an effort to establish a monopoly, and secured a decree to that effect, you would have that decree admissible in evidence and conclusive for the purpose of establishing that fact in litigation between a party claiming to be injured and the person or corporation convicted of restraining trade or establishing monopoly. Suppose, on the other hand, the decree were the other way, and the Government failed in its suit, failed to secure a decree that the party against whom the charge was lodged had restrained trade or had been a monopoly, would you have that decree admissible in

evidence between parties claiming to be injured and the alleged monopoly or alleged concern engaged in restraint of trade, and conclusively establishing between those parties the fact that it was not in restraint of trade and not a monopoly?

Mr. ABBOTT. That question has not been considered, but I can not see any impropriety in it. It seems to me that a decree obtained in one way ought to be just as binding as in another. In other words, if you have a decree as to the title of a piece of property, that decree is admissible in evidence everywhere as res adjudicata, at least so far as any party in interest is concerned; and I do not see any reason why the same rule should not apply in a case of this kind.

Mr. BEALL. You would not limit as it is limited in this tentative bill?

Mr. ABBOTT. I would not say I would not limit it. You are putting the question to me as a matter of policy, and of course I have not looked at it from that side. I think it is susceptible of argument. At the same time I think it might be just.

Mr. FLOYD. Is it not a matter of fact, if the Government should fail to establish that one of these combinations was an unlawful thing, there would not be much opportunity of an individual establishing it?

Mr. ABBOTT. That is what I think myself, and that is why I answered the question the way I did. I believe it would reduce the tendency to litigate on those matters, because I am sure I would not go in and undertake to establish unlawfulness or conspiracy if the Government had proceeded and failed. Of course, where the Government has not acted, then we use our own best judgment and do proceed very often.

Mr. BEALL. Is it not a fact these proceedings often are going on at the same time?

Mr. ABBOTT. Yes; it is sometimes the case.

Mr. VOLSTEAD. Let me call your attention to this fact: It has been suggested that unless this decree would estop third parties, in case it was against the Government, as well as estop those third parties in case it is for the Government, it would be unconstitutional. Have you given any consideration to that thought?

Mr. ABBOTT. No; I did not consider that feature of it. I think the question of the constitutionality of this section is one which is apt to come up. I believe there is some ground there for questioning the constitutionality of that provision upon the theory that every man is entitled to have his day in court. But I do believe, nevertheless, that the policy of the Sherman Act is one which is purely a public policy; and when I say "purely," perhaps that is not exactly the word, but certainly the Sherman Act is a public-policy act, and I believe the courts will be inclined to sustain any rule which will bring about the enforcement of that act in all of its parts and provisions.

Mr. BEALL. In a case like this, where the Government instituted such a proceeding and the litigation proceeded for a while, and finally the parties came in and effected a kind of compromise with the Government under which a certain character of judgment might be entered in consideration of so-and-so, would you have that sort of decree admissible in evidence and conclusively establishing the facts recited in it in litigation between third parties?

Mr. ABBOTT. No. I think a compromise decree of that sort could not go any further than the decree itself provided, whatever that might be. If there was any provision in that decree to the effect that the combination was an unlawful one, then I think that ought to be admitted just the same in any court as where the parties had fought the issue out and had it determined in some way.

Mr. BEALL. Would not that have the effect or tendency to prevent any compromise being made between the Government and these concerns involved in litigation?

Mr. ABBOTT. I do not know. It might have, but for my part I believe it would be for the best interests of the country that the compromise method of settling the Sherman Act should be just as little indulged in as possible. I do not believe you can ever settle questions finally by compromised methods. You can settle issues as between parties, but you can not settle great questions of law in that way; and while I might be in favor of the methods which are being carried on now by the department of bringing about these adjustments in this way, still I think that more good will ultimately be established by the laying down of definite rules by our high courts than these compromised methods. These compromise methods are such as are subject to the whim and caprice of individuals who happen to be in power. This administration may want one thing and the next administration want another; and while they may be good for the community and an effective means of bringing about the dissolution of these combinations, still I do not believe they will result in the best good so far as the enforcement of the Sherman Act is concerned, and the ultimate breaking up of unlawful combinations.

Mr. VOLSTEAD. Suppose we would put a provision of this kind in the act, would not the compromised decrees quite often perhaps, be so drawn as to practically find nothing, but just simply determine what dispostions shall be made in the future?

Mr. ABBOTT. They might do that. Take these great compromise decrees that have been worked out, such as the Tobacco Trust and the Standard Oil and the Powder Trust, and I think that in every case the attorneys who have represented the combinations have been able to get in some provision which has enabled them in effect to continue their practices, and I say that advisedly with reference to one of the combinations about which I know something.

Mr. NELSON. That is the Powder Trust?

Mr. ABBOTT. Yes; that is the Powder Trust. Of course their methods of going on and carrying on that combination are absolutely the same, practically—I do not say they are the same in effect as they were before. They do not themselves believe there has been any dissolution there; at least that is my opinion from some things I have heard.

I am satisfied in an issue of that kind there must always be some advantage gained by the stronger influence. They will fight until they get what they want, or they will continue to carry the matter on until it is litigated to the end. However, I am speaking now as a novice in the art of the administration of government. I am not considering that matter so much as I am this question of whether we shall make this provision in the seventh section of the Sherman Act effective, and I do not believe it can be accomplished if allowed to remain in its present state.

Mr. NELSON. You mean if this tentative bill is allowed to remain as it is?

Mr. ABBOTT. The tentative bill is a very great step, and if we can get no better than that, I am content, of course; but I think it would be very much helped by these suggestions which I have made—very much indeed.

Mr. BEALL. Is it your opinion that the first and second sections of the Sherman Act would be more effective or more easily enforceable if Congress would attempt to define certain acts as being in restraint of trade or being a monopoly?

Mr. ABBOTT. Yes, I do; and I will say I have come to that conclusion after originally having the other opinion. I have done it upon considerable reflection and experience. Generally speaking, I think it is almost impossible to define or lay down a rule which covers acts which, you might say, are fraudulent acts—and of course the basis of the Sherman Act is a fraud. Yet I have practiced and lived in code States, and I find that we are able to take the general rules of law, as they have been adopted from time to time, and codify them and get them down to a definite expression which is very helpful indeed toward determining the questions which arise in litigation. While of course you can not lay down any rule to which we will not find an exception, and you can not lay down any rule as to which there will not be times when it may appear to be unjust, still I believe that great benefits can be secured by defining acts which are considered unlawful in a great many ways—I was going to say "As nearly as could be done," but I think the bill, as has been prepared here, goes a long ways in the right direction. If it were not for taking up too much of your time, I would make some suggestions on that point, but I do not care to step over that line.

Mr. FLOYD. You will have the privilege of extending your remarks when the stenographer's notes are sent to you. You may then extend them if you desire.

Mr. ABBOTT. That will be very agreeable, and I shall be glad to do so.

Mr. BEALL. I will be obliged if you will incorporate in your remarks any criticism you may have to make in regard to the definition contained in tentative bill No. 2.

Mr. ABBOTT. I will do so.

The CHAIRMAN. I wish you would put in writing and make a part of your remarks the amendment or amendments which you think ought to be made to these bills.

Mr. ABBOTT. I will do so, Mr. Chairman, with pleasure.

Mr. FITZHENRY. Have you examined Senator Owen's bill, known as Senate bill No. 1036, which was approved by Attorney Generals' Association of the United States, granting to the State courts and the law officers of the several States the right to prosecute violations in the State courts?

Mr. ABBOTT. No; I have not examined that; except to run over it hastily. I do not claim to be an expert in every matter in connection with antitrust litigation. I do think I know something about the Sherman Act and something about the difficulties of enforcing the seventh section of the Sherman Act. I have given a great deal of thought and study to the rules laid down by the courts in the country. But on this other matter of the general rules applicable to

antitrust legislation, I do not know whether I am competent to speak.

Mr. FITZHENRY. This bill I refer to is a bill that simply grants to the attorney generals of the several States the right to prosecute under the Sherman law in the State courts. I would like to have your views on that subject.

Mr. ABBOTT. Very well; I will be glad to give you my views.

My recollection is that along at the time when the Sherman Act was under consideration in the Senate, there was a discussion between Senator Edmunds and Senator George and Senator Reagan upon that very point, and think there was an amendment offered at that time for the purpose of extending the right, under the seventh section of the Sherman Act, to sue in the various State courts, and it was considered not to be an advisable thing to do at that time. It would seem to have some bearing, I take it, upon this thought you are now suggesting, and inasmuch as you ask me to give my views on that, I would be very glad to do so.

Mr. NELSON. You think the danger would be that such as New Jersey some years ago might bring suit against a trust and be very inefficient in prosecuting it, and find that the combination was not a trust?

Mr. ABBOTT. Yes.

Mr. NELSON. Giving it an indorsement of a judicial decree?

Mr. ABBOTT. Yes. It seems to me, just offhand, without really having considered the question, that it would be to the best interests of the whole country, if the enforcement of the Sherman law were left in the hands of the Federal Government and its officials.

Mr. NELSON. You are in favor of enlarging the machinery for third parties to come and get injunctive relief?

Mr. ABBOTT. Oh, most assuredly. I am in favor of enlarging that.

Mr. NELSON. Would you also be in favor of making it difficult for them to enforce the contract where they come in with unclean hands?

Mr. ABBOTT. Indeed, I am in favor of that, too. That is one of the provisions which I wanted to call to your attention to-day, and would if my time were not so limited.

Mr. NELSON. I am very much interested in that feature of legislation, and I wish you would add something with reference to that.

Mr. ABBOTT. I will do so. I think this contract system or contract method, or method by which trade is tied up, and by which consumers and purchasers of various products agree to purchase exclusively of a certain person or a certain company, is perhaps the most effective means that is used by these combinations.

Mr. NELSON. Mr. Chairman, I would like to have the gentleman give us five minutes to develop that point. I am very much interested in that.

The CHAIRMAN. Without objection he may proceed.

Mr. ABBOTT. I will say that in this Powder Trust case we had this situation to face: Away back in 1897 the old Powder Trust association started in with a system of making contracts with each consumer as to black blasting powder that was engaged in the using of black blasting powder throughout the country. It was an elaborate contract, and provided for rebates under certain conditions, and the rebates

were made larger, of course, as the amounts of powder was larger. That system was so extended and so worked out that before they got through they had under contract nearly every consumer that took as much as 1,200 kegs of powder per year within certain districts where competition prevailed, and in that way they would take them out of the open market, so they were not subject to competition. The trade which was underneath the 1,200 kegs per annum was subject to a certain amount of contest, but they had then another system which was put into effect so far as that man was concerned. That was to give him a special price. They would go to him and say, "If you will buy your product of us you may take advantage of such and such a price." Of course, I am speaking now in general terms. I can make it more specific at the proper time. The purchaser would be inclined to buy of them; and finally, if he did take advantage of that price, he felt bound up to them just the same as if he had a written contract with them. That was the evidence, without question.

In that way they got the bulk of the trade tied up. The worst feature of it was this, that they did not make those contracts where they did not have the competition. All through the Eastern States and some of the other States there were large districts where they were not in fear of competition at all, and they did not make these contracts; but in these districts where they did have competition they invariably made them when they could get the consumer to agree, and if it were in some district where they had a special competitor whom they desired to put out of business they would then go into that district and make an extraordinary effort, by cutting the price down to the very lowest possible rate, until the consumer found it was to his interest to buy their powder under any arrangement they might see fit to make. For instance, it was in evidence that it cost to produce black blasting powder and sell it in the open market about 95 cents. I mean by that the overhead charges and all. The original cost of powder was less than that, of course, but when you add to it freight and delivery charges and all that, it must be sold for at least 95 cents.

Mr. FLOYD. Per what?

Mr. ABBOTT. Per keg. Whenever they got to the point that they felt that they could clinch the trade in a certain district they would put their price down to 95 cents, and of course nobody could compete with them very long. While competitors did come down even below them a while, they did it only at a loss, and it was invariably the case that the man who competed against that kind of an arrangement ultimately would either have to go out of business or have to combine with them. That was the plan which they worked over and over again.

I did not come here for the purpose of making any charge against the Powder Trust. I am only speaking of that as something which happens to be so recent in my experience that it is very fresh in my mind. I think it is a very desirable thing to understand that the contract system or method of tying up the consumers by making a contract with them is something which ought to be declared unlawful, if not actually prohibited.

Mr. FLOYD. You are familiar enough with other concerns and know the methods of the Powder Trust are not unusual in that regard?

Mr. ABBOTT. That is my judgment in the matter. I do not know

of any other concern that has followed the line of contracts they have followed, as during the examination which we had in this case they contended that their methods were only those of others, but when we asked for instances none of their own witnesses were able to give us instances where the contracts were similar or where they carried out the rebate system in the same way or in similar ways, or where they undertook to tie up whole and special districts in the same way.

Mr. FLOYD. I presume their contracts were different, but the ultimate aim accomplished by the method is the same in all cases?

Mr. ABBOTT. Yes; to tie up the trade and take the consumer out of the open market.

Gentlemen, I am certainly obliged to you for your consideration.

The CHAIRMAN. The committee will take a recess until 2.30 this afternoon.

(At 12.55 p. m. the committee took a recess until 2.30 p. m.)

AFTER RECESS.

The committee reassembled at 2.30 o'clock p. m.

The CHAIRMAN. The committee will be in order. We have a delegation of gentlemen here from Ohio, Illinois, and Missouri, and perhaps from some other States, who desire to be heard. Have you arranged the order in which you will have them appear, gentlemen?

Mr. GREEN. Yes, sir. The first on the list as submitted to the clerk this morning is Mr. W. H. Cook, of Springfield, Ohio.

The CHAIRMAN. We will be very glad to hear you, Mr. Cook.

STATEMENT OF W. H. COOK, OF SPRINGFIELD, OHIO.

Mr. COOK. Mr. Chairman and gentlemen of the committee, as a representative of the retail grocery trade of Springfield and as secretary of the Ohio Retail Grocers and Meat Dealers' Association, we desire to present for your consideration the question of the standard resale price. It must not be thought that the situation will be that of the fixing of the price of a trust or monopolized product, but rather that of the standardization of prices or the establishment of one-price-to-all principle under legitimate competition. If the manufacturer were permitted to maintain the standard price of his product, he would not set an exhorbitant price because of the competition he would meet from manufacturers of like products. Every business man should have an opportunity to play fair if he wants to. No manufacturer can long maintain a price unduly high. All progressive manufacturers are looking for a way to reduce the price of their goods, as such reductions usually bring increased sales, and every competent manufacturer knows that to fix a resale price below that which will yield a satisfactory profit to everyone necessary to the manufacture and sale of the goods will bring disaster. Competition would serve to regulate the standard price of merchandise.

A manufacturer of a standardized or trade-marked brand endeavors to produce his particular brand or brands and place upon the market under the requirements of Federal and State laws and guarantees and backs up his products with his reputation. He spends his money to put this product upon the market and to secure its distribution to the wholesale and retail trade throughout the country. He spends

his money in advertising his products to the consuming public, as well as to the distributing trade. Therefore to establish the success of his brand he has usually invested considerable time and money in the undertaking. Is he not, therefore, entitled to protection against price cutters, men who have no interest in the success of his brand other than to use it for their own selfish ambitions and whose price-cutting depredations will in time curtail, if not entirely destroy the distribution and success of this manufacturer's product?

The price-cutting operations of chain-store systems, department store, and catalogue houses are a menace to the success of the individual retail dealer. Such stores use cut prices on standardized or trade-marked goods for advertising purposes as a lure to get the consumers into their stores in order that they may induce the buying public to purchase merchandise other than the cut-priced standard goods, making an exorbitant profit often on goods of inferior quality

I have in mind the case of one firm that sold sugar for $1 a bag when sugar cost the jobber $1.20 and was sold to the retailer for $1.33. The statement of the owner of the store that evening was that they had lost between two and three hundred dollars in their transaction on sugar, but they did not care anything about the loss, if they could get the people in the store and get them upstairs they could get that all back.

The CHAIRMAN. Sugar is not a trade-marked article and not a patented article.

Mr. COOK. This sugar was in the sacks of the Federal Sugar Co., and one of its own brands which they put on the sack.

The CHAIRMAN. Then you want the Sugar Trust to have the right to fix the retail price of its products?

Mr. COOK. Not necessarily that, for no trust should have that privilege.

The CHAIRMAN. But the case you give is sugar, which is neither patented nor a trade-marked article.

Mr. COOK. Well, we are of the opinion that an article should be sold with a fair margin of profit, not a price that is unduly high or unfair to the consuming public.

The CHAIRMAN. Then who is to fix the price of the sugar, if you want it fixed? Who is to fix the price of the sugar?

Mr. COOK. In a general way the manufacturer would simply say, from the standpoint of the argument I am trying to present to the committee——

The CHAIRMAN (interposing). I understand; but let us take the case you give, of sugar. Let us not get off onto trade-marked articles and patented articles. You gave the illustration of sugar, so let us take sugar. Let us stick to the case you give as being unjust to the other retail grocers of your town. Now, who would you allow to fix the price, the retail price, of that sugar?

Mr. COOK. Any manufacturer could fix the price of his particular article. If it was a bag of sugar, he could simply say that bag of sugar should be sold for so much money.

The CHAIRMAN. Then if the sugar manufacturer be the Sugar Trust, you would give them by law the right to fix the price of that sugar, would you?

Mr. COOK. No, sir; I would not. I think there ought to be some regulation in connection with that.

The CHAIRMAN. What?

Mr. COOK. What regulation?

The CHAIRMAN. Yes. What would you do to stop the practice you have talked about?

Mr. COOK. What would I do to stop the practice?

The CHAIRMAN. Yes.

Mr. COOK. Well, I hardly know just exactly how to answer that, except in a general way I would like, from the retailer's standpoint, that the manufacturer should have the right to say what price his product should be sold for.

The CHAIRMAN. Well, I am not talking about the manufacturers generally, but you brought up the concrete instance which you cite—I suppose you want us to infer that injury resulted from this practice to the retail grocers?

Mr. COOK. Yes.

The CHAIRMAN. Well, I would like to know whom you would let fix the price of that sugar.

Mr. COOK. The manufacturer would be the one that I would say, in this particular case.

The CHAIRMAN. Then you want the Government to clothe the manufacturer of sugar—if it be a trust—with the right to fix the resale price of that sugar?

Mr. COOK. Now, Mr. Chairman, I am trying to cover that a little further on——

The CHAIRMAN (interposing). I understand, but I want to run this down, taking the case that you have been talking about. Now, if the manufacturer of sugar had the right to fix the resale price of it, haven't you, when you do that—legalized it—have you not created the power on the part of the Sugar Trust or of the people that are manufacturing sugar to have a monopoly, a restraint of trade in sugar? Haven't they the power to fix the price, the very thing they are supposed not to do under the Sherman antitrust law?

Mr. COOK. No, sir; I should hope not.

The CHAIRMAN. How do you avoid it? Of course, I can see some difference in the argument when you talk about trade-marked articles and copyrighted articles, but I think you are unfortunate in your illustration. However, I will not interrupt your argument.

Mr. COOK. I think that was an unfortunate selection. The reason I used that as an illustration was simply to show what unfair competition would resort to. It is in restraint of trade for the small dealer. Now, what would these men do relative to restraint of trade if they had unlimited means of putting anybody out of business? I will cover that a little further on. I suppose that this sugar question should not have been brought in at this time at all.

Mr. FLOYD. Now, why not, if a man that has a trade-mark, a patent that already gives him a privilege in the law—why should not the man that manufactures the commodity have those privileges also? Why not have the same thing apply to bread making and everything else?

Mr. COOK. A man who has an article and can show any rights—any vested rights—in that article by reason of his name or by reason of making it better than some other article, I would say that he ought to have the right to say what that article should be sold for, to protect his interests from men who wanted to get his goods marked with his name, to use for advertising.

Mr. FLOYD. What about the consumers? These arguments all relate to the manufacturer, the jobber, and the retail merchant; but what about the consumer that has to pay for these articles? Do you have any regard for them?

Mr. COOK. I should say we do.

Mr. FLOYD. How does it help you as a jobber to let some other man fix a price at which you sell your property?

Mr. COOK. I am a retail grocer.

Mr. FLOYD. How does it help you as a retail grocer to be here insisting that the manufacturer ought to have the right to fix the price of his property, and asking us to make a law to prevent you from having that right? My idea is that every individual who owns a piece of property of any description ought to have the equal right to fix a price on that commodity at whatever he sees fit—to give it away if he sees fit—for any legitimate purpose that he may have in mind. That is my idea of the right of any man.

Mr. COOK. Is not that one of the troubles that the Government has at the present time, the investigation of the trusts? Take, for instance, the Standard Oil Co. If the dealers have a perfect right, as you say, to give goods away, even to destroy competition——

Mr. FLOYD (interposing). I said for legitimate purposes, but where it is for an unlawful purpose, I would make it a violation of law. Some of the provisions of this bill are for that purpose.

Mr. COOK. Well, take the example of the sugar that I used a while ago—a bag of sugar, 25 pounds, selling for $1 when it cost the jobber $1.20. Is that a legitimate purpose? That is why I brought that up as I did. That is illegitimate competition, and that is why I am using it as an illustration.

Mr. FLOYD. Are you going to turn over the detail of business to the Government? Is that your idea?

Mr. COOK. Well, I do not believe that I would hardly know how to answer that.

Mr. FLOYD. In other words—let me ask you another question. If you should get Congress to adopt some principle to carry out the purpose that you desire, to give to the manufacturer the right to name the price to the jobber and control the resale price from the retailer to the consumer, the purchaser from the retailer, do you not believe that the next step would be a demand upon Congress to have some Government tribunal to fix prices? Do you think the public would allow one of the interested parties to fix the prices of commodities to the retailers, and would not the ultimate result and outcome of your proposal be that there would have to be some Government tribunal to fix prices? Then would there not follow that a demand for Government ownership—in other words, socialism? Does not your system lead to socialism?

Mr. COOK. Well, I can not see it that way. The business that is an evil to us as retailers is the business that I have cited here in this sugar case. For instance, this man—the gentleman representing the John D. Parks Co.—that concern has sold me Ivory soap at $3.75 a box, which cost the jobber $3.65, when the regular price is $4. Now, he made the statement that they were selling on a basis of 6 per cent, but that is not a basis of 6 per cent, and we are of the opinion that that is absolutely unfair in every instance, because there ought to be some way of regulating from a fair and honest stand-

point and giving a fair deal to everybody, so that there will not be any rebate, the same as the regulations for the railroads, so that a man can not come into my store and say, "I will sell you soap at $3.75 a box," and bill it out at $4, and hand me the quarter. Our objection is that that is unfair and unbusinesslike.

Mr. FLOYD. Let me ask you this question. There has been a general complaint of the mail-order houses and department-store concerns, like the one referred to, underselling. Now, is it not the trouble with the retail dealer to-day, and has it not been the trouble for the last 10 or 15 years, that the manufacturers insist upon the principle upon which you now stand, and has been undertaking to maintain the resale price, with the result that he has tied the hands of the retailer and opened them up to the competition of those who compete with them, and that you were helpless and powerless to help yourselves on account of your agreement?

Mr. COOK. No, sir; we would never do it under any agreement. It has been my understanding that if a manufacturer possibly had an agreement with the jobber—for instance, on Ivory soap, to be sold at such and such a price, and a carload of soap would be shipped from the factory to some foreign town and shipped back into another town and into the hands of another dealer under cover—my understanding is that they do not undertake to follow any proper channels that that soap should go through.

Mr. VOLSTEAD. But would it not tend in that direction toward making the retailer rather helpless? Take, for instance, Sears, Roebuck—would this control Sears, Roebuck? It seems to me that that concern, with its very large number of factories, its very large capital, and method of doing business, would be able to get the goods, regardless of this law.

Mr. COOK. That was one of the illustrations cited by the gentleman this morning who resented John D. Parks & Co., when he cited Kruger, of Cincinnati. I remember when Kruger started in business in Cincinnati, down on Second Street, with very small capital, but now he is a big man, with 200 stores, not only in Cincinnati, but in a great many towns around Cincinnati and even as far west as St. Louis. He has gone beyond the retailer, because he is a big manufacturer, and he owns canneries and slaughterhouses to supply his stores.

The CHAIRMAN. Do you want to prevent an enterprising man from doing that?

Mr. COOK. That is a combination of capital, and as we have looked upon it is somewhat a proposition in restraint of trade.

Mr. VOLSTEAD. To pursue my idea a little further, how would a local merchant be able to compete with Sears, Roebuck & Co., if you are going to fix the price at which he shall sell his goods? If you fix the price for the local merchant, he must not sell below that, but how will he compete with Sears, Roebuck & Co.?

Mr. COOK. We do not fix the price. The manufacturer fixes it, and the manufacturer is in competition with all other manufacturers of like products.

Mr. VOLSTEAD. But you tie the hands of the local merchant and he has still got to compete with Sears, Roebuck & Co. if he stays in business. How is he going to be able to compete unless he can lower the price of his goods the meet the situation?

Mr. COOK. If the goods were all to be sold at a stipulated price, the retail merchant would then pay the same price that Sears, Roebuck would.

Mr. VOLSTEAD. Yes; but do you imagine that you can compel Sears, Roebuck & Co. to sell at any such price? Sears, Roebuck & Co. would acquire the necessary stuff and manufacture themselves and ship them out and sell them at a low price. They might not have the same trade-mark, but they would be goods that would compete with articles that the retail merchant was selling, and he probably would not be able to get that class of goods at all, because Sears, Roebuck & Co. has their own factory.

Mr. COOK. That is one of the points I am going to bring out later on—that is, as to Sears, Roebuck & Co. They would have their own brand, and they will be able to get their own prices and make people think they are selling everything cheap for the purpose of selling their own standard goods on which they are making a great profit. When price-cutting stores sell standard articles at cut prices, sometimes even below cost, the consuming public think that the cut price should be the regular price of the commodity and believe that the other dealers who are attempting to obtain a fair profit from the sale of the article are robbing them. Naturally the individual retailer can not compete with such competition and will discontinue handling the particular brands which are being cut. The distribution of this manufacturer's product is curtailed and sometimes reduced to a minimum and the manufacturer suffers the consequence.

It is not to be presumed that a standard price will benefit only the manufacturer, wholesaler, and retailer. The consuming public will be largely benefited.

As I said a minute ago a man will cut the price of an article for the purpose of luring the people into his store and selling them something else that they would make an enormous profit on. For instance, take an article that could not be made a standard article that has been protected and protected solely by the efforts of the retail grocers until the law was held unconstitutional—but even at that, with the law being enforced generally throughout the entire State, the weight and measure law—for instance, take a bushel of potatoes. The law says that they shall weigh always 60 pounds; but I heard a man say, one time, that if he had a nickel for every time that one particular dealer had sold potatoes at short weight and a cut price, he could retire from the grocery business and get along the balance of his days. His money was simply made up from short-measuring potatoes.

Mr. FLOYD. That man was dishonest, of course.

Mr. COOK. I used that as an example of the way in which we attempt to protect the consuming public. That is an illustration of one of the things which we have done that was against our own interests. If we had wanted to be unfair, if we had wanted to cheat the consuming public, we would not have supported that law, because it provided for 60 pounds to the bushel and we could not get around it.

The CHAIRMAN. The States have passed laws, a number of them, against short weight, and I think New York has passed a law against false bottoms in baskets.

Mr. COOK. Yes, Mr. Chairman, you understand that there are two standards, the weight standard and the measure standard, and

that is why the law was declared unconstitutional. A man might give a bushel of potatoes by measure and it might not be a bushel by weight, and our argument was that that was the only fair way to handle it.

The CHAIRMAN. In the case of that man who was selling a bag of sugar at less than its cost, do you want us to meet that kind of business by legislation? That would give the sugar trust the right to fix the price of sugar.

Mr. COOK. Only in a general way of fixing the price of commodities from an honest standpoint.

The CHAIRMAN. Would that not have the effect that in order to get rid of this strength—which is reprehensible, I agree with you on that, and they ought to be exposed, and you honest grocers ought to expose him, and I think the public is coming to understand that it is merely a trick. If the public would simply buy sugar from him and nothing else, his trick would fall through; but you want us, in order to protect you from that trick of his, to give to the Sugar Trust, the sugar manufacturer, the power by law to fix the price at which this commodity shall be sold. In other words, you want us to legalize the restraint of trade, to fortify a monopoly, or to build up a monopoly in the sugar business?

Mr. COOK. No, sir; we do not in any way.

The CHAIRMAN. Would that not be the effect of it?

Mr. COOK. It might have that effect, using this sugar question as an illustration. But we desire that all trust be excluded from this provision as to price standardization.

Mr. NELSON. How can you make an exception in this case? Must you not protect the Sugar Trust in order to do so?

Mr. COOK. If the Sugar Trust sold a bag of sugar, would that make any difference from any other package of goods? For instance, the Sugar Trust, we will say, put out a brand of sugar—a package of sugar—how would that sugar be any different from any other package of goods?

Mr. NELSON. It would give the Sugar Trust the power to fix the price to the jobber, and also, then, to the retailer, and also to the consumer, would it not?

Mr. COOK. Not any more so than in any other package article or patented article.

Mr. NELSON. Is not that what you are asking for—the right of the original producer to fix the price to the consumer?

Mr. COOK. A standard price, yes; if specially branded.

Mr. NELSON. Then would not the Sugar Trust have this right to fix the price to the jobber and to the retailer and then to the consumer?

Mr. GREEN. Read that section there—section A—Mr. Cook.

Mr. COOK. The Stephens bill provides in section A (reading):

Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale; nor shall such vendor be a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail to the public.

The CHAIRMAN. I suppose you know that that bill is not pending before this committee?

Mr. COOK. Yes; that is the reason I did not refer to it.

Mr. FITZHENRY. At the time this competitor of yours was selling sugar for cost, $1.29 or $1, what were you selling it for?

Mr. COOK. $1.35, if I remember rightly.

Mr. FITZHENRY. Suppose the Sugar Trust had said that you could sell sugar for $1.30, allowing you 1 cent for handling that dollar's worth of sugar, what would you have done?

Mr. COOK. Under present conditions, I suppose we would have to sell it or cut out the sugar business.

Mr. FITZHENRY. Would that be fair treatment, for the Sugar Trust to say to you how much you could make on the sale of goods?

Mr. COOK. I think it would be better for the general consuming public, the retailer, and everybody if there was such a provision.

Mr. FITZHENRY. Would not that lead to the Sugar Trust practically running your business, and every other organization which has standard goods that you sell? Could they not say how much profit you should make on every article you sold? Would you not be bound to sell at their prices, or go out of business?

Mr. COOK. The manufacturer would be up against the problem of setting a price in which there would be a legitimate profit to the retail grocer.

Mr. FITZHENRY. A grocery store without sugar would not be much of a grocery store, would it?

Mr. COOK. No.

Mr. FITZHENRY. And your profit on sugar would have to be limited to just the amount allowed you by the Sugar Trust, or you would have to go out of business?

Mr. COOK. It would apply not only to the sugar proposition but anything else, so far as the standard price is concerned.

Mr. FITZHENRY. Do you think it would be fair to let the manufacturer say what profit the retailer should make on all lines of goods they handle?

Mr. COOK. As a retail grocer I would be perfectly willing to take my chances if the manufacturer had the right to set the price at which I should sell my goods.

Mr. FITZHENRY. The Government would have to decide whether the prices were reasonable?

Mr. COOK. Certainly, if the law went that far.

Mr. FITZHENRY. Do you not think the Government would be pretty busy trying to enforce reasonable prices for every standard article sold in the United States?

Mr. COOK. Yes; the Government is pretty busy on everything they have undertaken to regulate along these lines.

Mr. BEALL. What about the principle of the thing you are contending for? Do you believe it is right?

Mr. COOK. I think that a manufacturer who puts an article on the market should say what that article should be sold for, so that he would be able to protect his own interests, regardless of what my interests may be or of what the wholesaler's interests may be.

Mr. BEALL. Has anybody any interest in it except the manufacturer?

Mr. COOK. Yes, sir.

Mr. BEALL. Have you any interest in it as a retail dealer?

Mr. COOK. Yes, sir.

Mr. BEALL. Do you want to be a retail grocer with somebody else fixing the price at which you shall sell every article in your store?

Mr. COOK. I believe I would be a lot better off.

Mr. BEALL. Would you feel like a free-born American citizen with somebody holding the whip over your head and saying that you shall sell what you paid your money for at any particular price? Would you not be a little ashamed of yourself.

Mr. COOK. Well, that is possibly not a happy illustration.

Mr. BEALL. You said that you believed you would be better off if the manufacturer had the right to dictate the price at which you would sell anything that you had to sell. Do you mean that? Are you standing for that?

Mr. COOK. Yes, sir.

Mr. NELSON. I was going to suggest that you expect the manufacturer to make a price that will give you a large profit, do you not?

Mr. COOK. No, sir.

Mr. NELSON. Suppose he made you a price that would not give you any profit, would you think that is right?

Mr. COOK. We could not handle his goods then.

Mr. BEALL. You would not like that proposition, but it would be the same principle, would it not? Would you say it is right for any manufacturer to say to you as a retail grocer that you had to sell sugar at a loss?

Mr. COOK. No, sir.

Mr. BEALL. But if you could not handle sugar you would have to go out of the grocery business, would you not?

Mr. COOK. I would have to quit handling sugar.

Mr. BEALL. Suppose the importers and the manufacturers, all of them, said to you that you had to sell their goods at a price that meant a loss to you. You would have to go out of the grocery business, then, would you not?

Mr. COOK. Yes, sir.

Mr. BEALL. Do you think that would be a good condition of affairs?

Mr. COOK. I do not think they would do that.

Mr. BEALL. Do you not think the better condition would be something that would leave some independence with the American citizen to buy where he pleases, and sell where he pleases? Have you ever thought where your proposition would lead you to?

Mr. COOK. We have always been of the opinion that if the manufacturer set a standard price on his commodity there would be a fair profit in it for the retail grocer.

Mr. BEALL. Suppose he did not set a fair price, though?

Mr. COOK. Then we would not handle the goods. Competition would decide that.

Mr. BEALL. If everybody would adopt that principle, it would mean your going out of business, would it not?

Mr. COOK. Yes.

Mr. BEALL. Now, if you would be willing to give the manufacturers the right to fix the price at which every retailer in the country should sell their product, would you be willing for the manufacturer to not only fix the price at which the jobber should sell, the price at which the retailers should sell, but would you be willing for the manufacturer to go down to you, the purchaser, and say what he should do with the article that he bought? If he has got the right to dictate

what you shall do with the property that you have bought of the manufacturer, has he not the right to dictate to the purchaser from you, what he shall do with it?

Mr. COOK. The manufacturer of standard articles has always allowed a fair margin of profit to the retailer.

Mr. BEALL. I do not care what you have done in the past. I am trying to find out whether you stand for that principle, that the manufacturer should have the right to dictate to the consumer from you as to how he should use this product?

Mr. COOK. I think the manufacturer should have the right to fix the price on the article that he manufactures.

Mr. BEALL. That does not answer the question. The question is, If the manufacturer has the right to dictate to you, he has got the right to dictate to the man that buys from you. Do you think the manufacturer should have the right to dictate to your customer and say what he should or should not do with that article after he has bought and paid his money for it?

Mr. COOK. Yes; if the public good would be served by doing so.

Mr. BEALL. You think he should have the right to say to your customer—a woman living there in your town, for instance—how much of a certain article she should use on Sunday, how much on Monday, and how much through all the other days of the week; how much should be cooked and how much should be served? There is no limit to the power there that you would give to the manufacturer. Your customer is no better than you are, and the manufacturer ought to have the same right to dictate to the customer that he has to dictate to you. You said he has the right to dictate to you and you have said that he ought to have the right to dictate to your customers. Do you mean that?

Mr. COOK. Yes, sir; whenever necessary to prevent public injury.

Mr. WEBB. Take the reverse of the proposition. If the manufacturer had the right to fix the retail price, he could not allow you a reasonable profit, but for that $1.29 sugar he could fix a price of $1.75, if he chose, and people have got to have sugar, and they would have to pay $1.75 to you for what they are now paying $1.39. The manufacturer could run it up to $2 retail, if they chose, and the people would have to pay it, because they have to have sugar.

Mr. COOK. The sugar proposition is one that I am frank to confess is one that I should possibly not have used as an illustration, but it came in so plain to me that this would meet that sugar situation.

The CHAIRMAN. But you referred to a trick of the trade that I think is reprehensible, and you want us to furnish a remedy by legislation for that trick of the trade, and I do not see how we can do that without opening up a greater evil. That is what we are trying to get at; how you would prevent that trick without doing something worse. Of course, some of the States have passed laws for local conditions, and where the State is competent to deal with them that is all right; but you are here asking Congress, it seems to me, to give the power to restrain trade and monopolize trade; in other words, to give the Sugar Trust something that they have not now.

Mr. COOK. Our idea is quite the reverse. I may not have been able to make it plain to you from what I have said, but our intention in the matter is absolutely the reverse of that.

The CHAIRMAN. I understand what you are arguing for, but I do not see how we can do it.

Mr. COOK. We are up against a hard proposition there, and I will try to explain it a little more further on. The corner grocer is a necessity in present day merchandising. He furnishes to the neighborhood trade the maximum service at a minimum cost. He carries the family account on his books during periods of sickness or when the head of the family is out of work. He is the benefactor of the community in which he does business. The chain-store systems and department stores tend toward monopoly. They represent the congregation of capital into one system, and as they increase in size and power the business of the individual dealers decreases, and their numbers grow less. Perhaps the start of the chain-store system may be only one or two stores; then to this are added more and more, until the system may boast of one or two hundred and even a thousand. As the system grows, the number and business of the individual dealers must grow less. Then the chain system is not satisfied to distribute only; they start their own bakeries, their coffee-roasting plants, their canning plants, their abattoirs, and so on, until they are a monopoly. From a small beginning the system has become a huge business and monopolies the trade in its territory. The small individual dealer is unable to compete with such competition and is forced out of business. The Government has been active in fighting the Standard Oil Co., American Tobacco Co. and United Cigar Co., the Union and Southern Pacific Railroad companies, the New York, New Haven & Hartford Railroad, the American Can Co., the International Harvester Co., and other corporations that we looked upon as trusts, all of whom started in a small way—and I might say that we are right up against one of them now, the International Harvester Co.

Why should not the Government protect the small individual dealers of the country against the monopolistic chain and department store systems from becoming a trust or a monopoly? President Woodrow Wilson has said, "Safeguard American industries from unjust competition and they will take care of themselves."

If, by the inroads into his business by chain store systems and department stores, with their cut-price methods, the trade of the corner grocery stores is detracted, and these stores are compelled to retire from business; then, those particular neighborhoods lose the service and convenience of those stores, with detriment to the community.

It is noticed that it is only standardized or trade-marked goods that are cut. The unknown or private brand goods are not cut. The losses sustained by selling these standard goods at cut prices by a successful dealer must be made up by inflated margins on goods of unknown value and price. If they get the people into their stores they expect to sell them some other goods on which they make a big profit.

All sorts of schemes are resorted to by the unprincipled price-cutters to attract the buying public into their nets. Only a short time ago I read an article which told of a chain of drug stores slaughtering the price of an advertised medicine to 59 cents a bottle which actually cost the concern 67 cents per bottle. The people who were

attracted into the stores by the advertisement were presented with a substitute, which resulted in but few bottles of the particular advertised medicine being sold. Instead, the substitute put up by the chain store, itself, on which there was perhaps a profit of 50 cents a bottle was thrust upon the unknowing public. The article further said that the concern employed expert salesmen, who were obliged to substitute on 50 per cent of their sales or lose their jobs. We are of the opinion that the consuming public who are caught by such humbug methods of advertising pay dearly by allowing themselves to be talked into purchasing substitutes, the quality and price of which is unknown.

Cut prices will tend toward monopoly, and monopoly is one thing that the Government is fighting. By means of cut prices, the chain stores and department stores endeavor to eliminate the small dealers. If they are successful, after the small individual dealers are eliminated the prices will be higher than before. Big Business in cutting prices do so to undersell their competitors, to drive them out of business, and after they have the field to themselves up go the prices, higher than ever before, and the consuming public is the "goat." If we want to preserve the business of our small individual merchants, we must protect them from this growing tendency toward monopoly of the "big man," in the persons of chain-store systems, department stores, and mail-order houses.

The corner dealer is a necessary adjunct to the neighborhood in which he does business. The housewife can conveniently go to the neighborhood store in a hurry, or can have her needs satisfied by prompt delivery. But, as the corner dealer can not compete with the cut prices of the chain or department store on standard brands, and as he must make a profit on his sales, he must discontinue handling such goods, and the consuming public is inconvenienced by not being able to purchase the article in their community stores. If the resale price was established the consuming public could be satisfied that they were buying the merchandise at a proper and fair price, and the quality would be backed by the manufacturer. The consuming public is safer where competition is of merit rather than cut prices, as the latter tempt the dealer to frequently sell inferior articles at excessive prices. True competition is between the respective products of manufacturers, based on their respective qualities, and not competition in prices between different dealers.

One of the greatest difficulties encountered in economical living in this country is to know where to purchase goods that are worth the money paid for them. Low prices have been dangled before the public to such an extent that few realize what a fair price is, and therefore purchase two or three articles of a second quality instead of purchasing one of the first quality, thereby spending a greater amount of money for less results. The manufacture of first quality and honest goods has become a lost art in some lines of trade.

Most of us are aware that the Washington State Supreme Court, in a price-cutting case recently, upheld the right of the manufacturer to maintain the price on his flour, and in the decision handed down said, "It is fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases." John Wanamaker, the merchant prince of Philadelphia, is quoted as saying, "I want to keep away from the store that tries to catch me with that kind of a fish-

hook. If they lose on one thing, they will make it on something else you don't know of."

With regard to the interests of the manufacturer in his goods after he has sold them, the Washington State Supreme Court in their decision in the aforementioned case, says, "It will not do to say that the manufacturer has not interests to protect, by contract, in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement."

Louis D. Brandeis says, "Americans should be under no illusion as to the value or effect of price cutting. It has been the most potent weapon of monopoly, and means of killing the small rival, to which the trusts have resorted most frequently. It is so simple, so effective. Far-seeing, organized capital secures by this means the cooperation of the short-sighted, unorganized consumer by his own undoing."

It is said that the State of Oklahoma gives the corporation commission the power to fix prices. Complaints have come from parties not able to buy kerosene, or coal oil, at bottom prices, while large buyers with inside rates object to the commission taking the matter up. This corporation commission announces that it will fix both the wholesale and retail prices of oils in that State. If the naming of prices on oil works well, it may be taken up on other articles.

Mr. FLOYD. Now, you have complained of the department stores as price cutters?

Mr. COOK. Yes, sir.

Mr. FLOYD. These decisions of the Supreme Court which have held that the attempt to fix the retail price is unlawful, are recent. They occurred only last year, I believe. Now you have had a system in vogue, to my personal knowledge and observation—I say "you," I mean the manufacturers, for the last 10 or 15 years; it also has been my observation that during all that time there has been a decline in the business of the retailer and rapid growth in the business of the department stores, such as Sears, Roebuck and Montgomery, Ward & Co., and I think the reason is that the retail merchants have permitted a lot of manufacturers, in their own interests, to tie their hands so that they can not compete with their competitors, and allowed their competitors to destroy them. What have you to say to that?

Mr. COOK. I was just trying to think of a particular article——

Mr. FLOYD (interposing). In other words, if your system will work, why has it not worked during the last 10 or 15 years? Is not the very system for which you stand, the system that has made prosperous these chain stores and department stores about which you complain?

Mr. COOK. I can not think of a commodity in several years upon which we have been dictated a price at which it can be sold.

Mr. FLOYD. Why are you contending for it, then? It certainly is fundamentally wrong. It is certainly contrary to every principle of individual independence to say that any man—when I buy a commodity and pay money for it—to say that any man, simply because he made it originally, shall have the right to say what I shall sell it for.

Mr. COOK. I have in mind one article now that they have tried to make a standard price for, that when it was originally put on the market it sold at 15 cents, and then the quantity of the package was

increased and the price was put up to 25 cents, and now it is sold for 10 cents.

Mr. FLOYD. Is it not true that the system is an unnatural one and you can not maintain it by your organizations, and you are asking Congress to help you out and enable you to do something that you can not do naturally?

Mr. COOK. We have never made an organized effort to do it.

Mr. FLOYD. Well, as an individual then, you are here asking for legislation to relieve you from these conditions.

Mr. WEBB. Is it not your experience that the largest profits are made upon these standardized articles?

Mr. COOK. No, sir; I would not think that would hold good on standard articles.

Mr. WEBB. For instance, there was a man here the other day who manufactured Shur-on nose-glass holders. I think he said he sold them to the jobber for 75 cents a dozen, the jobber sold them for $1.75, and the retailer for $5 a dozen.

Mr. COOK. That would not hold good in the grocery business.

Mr. WEBB. But if you had the power to standardize all prices you could make it good.

Mr. COOK. A price like that is unreasonable. Senator Williams, of Ohio, asked me one time if the grocerymen were not making too much money in the grocery business, and I said to him, "Of all the grocerymen in your town, how many of them have been in busines for five years or more?" and he could only name three.

I am sometimes reminded of one time when I was talking to Judge Winters, of Ohio, relative to the evils of trading stamps as a medium of advertising and rebate. Judge Winters said to me, "Billy, why do you object to trading stamps; you don't have to give them?" I said, "I know I don't. Now, you are in the law business in Sandusky. You are in a big building there. Suppose the man across the hall is a lawyer and I am a client of his and I owe him $50. I go in and pay him the $50 and he gives me trading stamps. What would you think about that?" He said, "I would think he was a h— of a lawyer."

Mr. WEBB. Do you not think that the public will catch on to these tricks of the trade, that they are simply a bait, and that the public will catch on to them and shun them?

Mr. COOK. It does not seem so, in direct answer to your question. We brought that point up before the Ways and Means Committee on the proposition of the United Cigar Stores, along the lines that they are advertising standard brands of cigars simply to get the public to come to their stores. It seems as though the public is looking for something for nothing, looking for something to grab and run off with and not pay for it.

Mr. WEBB. I think you are right about that. I think the public likes to be fooled. I remember once there was an advertisement in one of the papers, "For $1 we will send you a prescription how to feed a horse on sawdust." Somebody sent for the prescription and when it came it said, "Mix the sawdust with bran, the more bran the better." Of course, after that not many people in that community ordered that prescription. I know that there was over in my country, for instance, a few years ago a man that sold sugar just as you described here for 5 to 10 cents on the dollar less than the other stores

sold it. For a few weeks a great many people went in there to buy that sugar, but they soon learned that he made it up on other things, and they quit, and now the people pay no attention to his advertisements whatever.

Mr. COOK. I know of one concern over in Ohio that tried to keep everybody else out of town. They will take the closest competitor I might have and then give him goods and pay the people for going there, just for the sake of cutting out competition. Those are the things that we think come right along the line that I was trying to present to you here. It is not our intention to come before your committee advocating any combination or any trust in restraint of trade. It is simply a means of regulating standard prices for the general protection of the consuming public, as well as our interests.

Mr. GREEN. The next gentleman is Mr. Sol Westerfeld, of Illinois.

The CHAIRMAN. We will be very glad to hear you, Mr. Westerfeld.

STATEMENT OF SOL. WESTERFELD, OF CHICAGO, ILL.

Mr. WESTERFELD. Mr. Chairman and gentlemen of the committee, my name is Sol. Westerfeld, of 1745 Washington Boulevard, Chicago, Ill., and I am in the retail grocery business at 1409 West Madison Street, Chicago.

On behalf of the National Association of Retail Grocers, an organization composed of thousands of retailers from all over these United States, none of whom can be classified among our so-called merchant princes, but who belong rather to that numerous army of small hard-working merchants, who earnestly and industriously follow the vocation of supplying 90 per cent of the food and other necessities to the consumer, I have the honor to address your honorable committee in advocacy of the principle of H. R. 13305, introduced by the Hon. Mr. Stevens, of New Hampshire, "The one-price-to-all bill," and in opposition to those provisions of the tentative bills which prohibit price standardization.

Mr. DYER. What bill is that, Mr. Westerfeld, the one that you advocate?

Mr. WESTERFELD. 13305, introduced by Mr. Stevens.

Mr. DYER. By Mr. Stevens, of Minnesota?

Mr. WESTERFELD. No; of New Hampshire. I have a copy of the bill here.

Mr. DYER. Very well.

Mr. WESTERFELD. This bill, in my opinion, contains precisely that which the retailer and consumer of these United States should have without in any way playing into the hands of the monopolies or trusts. I will get to that later.

Coming from the ranks of the smaller dealer, with the experience of 25 years of active service behind the counter, augmented by the lessons learned as a member and officer of the various organizations of retailers, I flatter myself to have a wide experience in retail merchandising, its troubles, and commonly termed unfair practices.

These unfair practices, not so much perpetrated by the small merchant, but rather practiced against him and against the unsuspecting consumer, are the sole reasons for the demand for legislation of the character now under discussion.

In big business you have already conceded the wisdom of such laws, as in the uniform railroad tariffs and express rates, in the prohibition of the giving of rebates, and other similar laws.

In small business, such as the vocation followed by me and those whom I represent, our Government has practiced the very opposite, and has pronounced as restraint of trade any honest effort made by the manufacturer desiring to protect himself and his product, his customers, the dealers, and the consumer by naming the price at which his product should be sold.

It is therefore our experience that as time passes the big interests engaged in the retailing of merchandise become bigger, the smaller merchants smaller, and unless the relief we seek is granted speedily I fear that ere long we shall have in this fair land only two classes of merchants—a few gigantic merchant princes and a great number of very poor small stores, whose keepers and employees will barely eke out a living. Can we afford to have this condition prevail?

Can we afford to build up or, to say the least, permit the building up of the most gigantic trust ever perpetrated upon the American public?

You can kill this pernicious octopus, threatening not only the smaller dealer but the consumer as well, by denying him that upon which he feeds. His sustenance is primarily indiscriminate, unlimited price cutting.

You will recall the methods pursued by the Standard Oil Trust, the Sugar Trust, Beef Trust, and those other big menaces to the general prosperity of our people.

Those large interests, constantly at war with those who interpose themselves between them and the pocketbook of the consumer; yes, at war with our Government itself.

The very method employed by these monopolies mentioned is the method of the retail octopuses, the damnable method of killing competition through price cutting; and more the pity, our present laws rather encourage than hinder this slaughter of the innocents.

After the small dealer has been so disposed of, beware, consumer, for the insatiable appetite of these big trade pirates, who will never be satisfied with a fair compensation for any service performed.

The smaller competitor once out of the way and the big interests in sole control it is he who will dictate his terms to manufacturer and consumer.

The merchandise I am most familiar with is groceries. I know the price we pay to the manufacturer and I know what we sell for to the consumer. I also know our cost of doing business, and I know that the cost of conducting the business of the smaller dealer is considerably less than that of the larger interests, usually the price-cutter referred to.

Mr. DYER. You buy most of your goods from jobbers, do you?

Mr. WESTERFELD. A great majority of merchandise, yes; although a certain amount of manufacturers sell direct to the dealers.

Mr. DYER. But the greater portion you get from jobbers?

Mr. WESTERFELD. Yes.

Mr. DYER. Do you know what the jobbers pay the manufacturers for these goods?

Mr. WESTERFELD. In most instances, yes; as far as it refers to the class of merchandise that will be covered by any proposed law, I do know what the jobber pays. It is not secret by any means.

Permit me to go back and supplement some of the remarks made by Mr. Cook. There seems to be a general impression—at least in some quarters an impression seems to prevail that the retailer favors a condition that would make it possible for the manufacturer of any particular article consumed by the public to name the price at which that article should be sold. Nothing is further from that, in our intention; neither is it possible. The only merchandise that could be governed at all by any proposed law, just as much as they are governed now by existing law, is possibly 1 per cent of the merchandise carried in my store. For instance, there are a few manufacturers who, through extensive advertising, have created a market for their products. We find that these products extensively advertised are the ones generally used by the price-cutter, who reimburses himself on the other end by demanding all the traffic will bear on merchandise with which the consuming public are not familiar.

For instance, I read an advertisement appearing in last Sunday's Chicago papers. The advertisement is from one of our department stores, one of our State Street stores, and I find that they are quoted—mind you, they are well-advertised products that are used—they are quoted at or possibly below the cost to this particular store, but on the other hand I find a column of merchandise with which the public is not familiar quoted at ridiculously high prices. To illustrate: I find right here in the center, "flour on Wednesday, $1.45 a sack." In the next column "Fels Naphtha Soap in this store, 10 bars for 39 cents." Ten bars for 39 cents would be less than cost to the dealer. We find, however, opposite this—and I wish to speak about that later—an advertisement of "Extra Oolong or English breakfast tea"—it does not say whose tea, but merely "Extra Oolong or English breakfast tea," and if it does not pay 100 per cent on the cost I am willing to forfeit my reputation as a retailer. Why, of course, this particular store can use well-known, well-advertised merchandise, merchandise which is a household word in every family, a necessity, and sell it at cost, or less than cost, and reimburse itself on unknown merchandise with which the consuming public is not familiar.

Mr. WEBB. What does that soap sell for at retail?

Mr. WESTERFELD. Five cents a bar; it costs the retailer 4 cents. I have prepared a short schedule of profits made on the goods that we would like to have protected, and they are not excessive.

Applying the law of averages to big business as well as to small, I can readily figure that any cut in price on one or more articles, means the increase in price on others.

Therefore, we must not be surprised if this is the actual condition, although ever so well disguised.

The consumer, knowing the regular price of widely advertised products, assumes that in the event of such articles being offered at a lower price, all the merchandise offered is correspondingly low. This supposition on the consumer's part is precisely the aim of the price-cutter, but nothing is further from the actual condition as it prevails.

I also want to mention sugar, although before I go into this particular phase of it, I want to say this, that I am of the opinion that Mr. Cook did not express himself sufficiently clearly. If the bill

under consideration had any tendency to play into the hands of the Sugar Trust and make it possible for the Sugar Trust to compel me to charge its price to the consumer, I would be opposed to the bill.

I would far rather go on doing business as I am doing now. Mr. Cook did not intend to leave that impression, I am sure. The bill, however, does not in any way apply to the product of the Sugar Trust, because, in the first place, it provides that the trust could not take advantage of it. I have reference to the Stevens bill now. Furthermore, sugar being a commodity that is no longer in the hands of any particular trust, and not being trade-marked, but rather being a staple to be purchased from various sources in bulk, and not under specific trade-mark, it would never be in a position to be taken advantage of in this particular.

But to get back again to the argument: The very first thing I find in this advertisement is this, "Granulated sugar, with grocery order of $2 or more, butterine and meat not included, a 25-pound sack of sugar, $1.07." There you have the argument of the price cutter staring you in the face. They will sell you sugar at less than cost. We will lose—let us see how much they will lose; only a trifle, possibly 5 cents—on that order. We will lose 5 cents on that order for sugar, 25 pounds of sugar; but you must buy $2 worth of merchandise with it that we shall name—and rest assured, nothing on which an exorbitant price is not made can be included in that order. Do they not explicitly say that certain merchandise can not be included in that order? That is precisely the condition from which the consumer is suffering to-day.

Mr. WEBB. Doesn't that show that the public is catching onto their game? The public is evidently getting wise, and they go to these department stores and say, "I will take some of this cut-price stuff, and not more." Now, they see that the public is getting wise, so they hitch on something else. Do you not think that they will get wise to that pretty soon and that the whole matter will adjust itself?

Mr. WESTERFELD. I have great confidence that the American consuming public will eventually get wise to everything, but I do not wish to wait until they do get wise. I want to help them. I want to protect them and I want the consumer protected just as much as I am asking protection for the retailer.

Mr. FLOYD. Did I understand you to say that the principle for which you were standing would apply to only about 1 per cent of the goods in your store?

Mr. WESTERFELD. The trade-marked, largely advertised merchandise to which any proposed legislation would apply would only be possibly 1 per cent of the merchandise actually handled in my store. It could not apply to merchandise sold in bulk.

Mr. FLOYD. If it only applied to 1 per cent of the goods in your store, how can it seriously affect your business?

Mr. WESTERFELD. I believe I have endeavored to demonstrate that. It is by calling the attention of the consuming public to some supposed bargains being offered, using it as a bait to attract the consuming public, not to sell them 1 per cent of the goods of which we complain, but simply inasmuch as it brings them to the stores and gets profitable business away from me and my fellow retailers.

Mr. FLOYD. That is all right, and I do not agree to any form of dishonesty in business or anything else. I think people ought to be frank and open and treat the public fairly, but tell me how you can remedy that evil by getting Congress to tie your hands and let the dishonest men still be dishonest? We can legislate honesty into men that are dishonest.

Mr. WESTERFELD. I am going to come to that later on.

Mr. FLOYD. Let me illustrate my point further. You are insisting upon the right of the manufacturer to fix the resale price. If he has that right under the law, you, as an honest man, make an agreement with him and you will stick to it; but the dishonest man will not stick to any agreement where it is to his interest not to do so, and he will get the same commodities, and if he can not buy them directly from the manufacturer he will get somebody to go out and buy them for him. Then, what would you do?

Mr. WESTERFELD. But he can not publicly make use of that advantage—or disadvantage, rather—as he does now. As a retailer I would gladly forego the sale of any articles enumerated——

Mr. FLOYD (interposing). Why could not he do just what he is doing now? There is no law in this country now that prevents a man from selling his own property at any price he sees fit, whether it is a standard article or not.

Mr. WESTERFELD. I am not citing the conditions as it would prevail under any law that was passed. I am citing that condition and comparing it with the conditions existing now. At the present time the price cutter, whether dishonest or honest, is absolutely at liberty to sell at any old price, absolutely disregarding the wishes of the manufacturer in the matter and not regarding his competitors—we would not expect him to do that, possibly—not regarding the interests of the consuming public. He is his own sole judge as to what he shall sell, how he shall sell it, and at what price. It is by the very methods that I am endeavoring to show up which forces an injustice to the consuming public. He is taking an unfair advantage of his knowledge as to his merchandise in general upon the part of the consumer. He is using the advantage gained through extensive advertising in exhibiting the merchandise on which the cut prices—some proprietary article well known, and he never cuts on anything unknown. For instance, if he has an eight-column advertisement, you will never find anything advertised below price with which the general public is not familiar, and the things on which he makes the big profit he merely mentions, as "imported mushrooms," but he does not say what kind.

Mr. FLOYD. I understand your point.

Mr. WESTERFELD. He does not cut those prices. He only cuts a few well-known articles that he wants to use for advertising.

Mr. FLOYD. I understand your point, but what I want to know is, how giving the manufacturer the right to fix the retail price now, making it legal—it is not legal now, the Supreme Court of the United States having held that he has no control over it after it leaves his hands and goes into the hands of the retailer—how would our passing a law giving the manufacturer the right to fix the price to the jobber and fix the retailer price to the consumer, and make those kinds of contracts, so that the manufacturer could bind you up—how is that going to protect you against the dishonest men that will use those

thinks in fraudulent advertisements? On the other hand, does it not rather tie your hands and make you a victim thereby, because you can not compete with him on those particular articles that he chooses to cut prices on?

Mr. WESTERFELD. I have no fears of ever being the victim of any law that would legalize the right of the manufacturer to name the price. Competition will take care of the manufacturers—competition between the manufacturers, I mean.

Mr. FLOYD. I think the law would take care of the manufacturer and take care of the jobber and the retailer, but I think another trouble would come that the consumer would not stand for, and that the houses against which you complain would grow bigger and stronger, and the retail concern would get the worst of the bargain.

Mr. WESTERFELD. I am contending that exactly the opposite will prevail, and that the consumer will come nearer getting a square deal under such laws than he is getting now. He will not be victimized by this law——

Mr. FLOYD (interposing). Why was not the effect of the system when it was in force for the last 10 or 15 years—I suppose it has been in force for that length of time—why was not that the effect of the system before the courts declared that it was unlawful, when the manufacturers were endeavoring to maintain the price all over the country?

Mr. WESTERFELD. In my feeble way I would answer this, that the retailers being rather large in number, that large bodies move slowly, and the education of the retailer himself is far from that which we desire it to be. It takes a long time for the retailer to wake up to his own interest. I believe that if the retailer years ago had appeared before this legislative body with the true story of the living conditions—I believe that the Sherman antitrust act would be in the very language that we seek now.

Mr. FLOYD. Nobody claimed for a long time that these contracts which they had made throughout the country were illegal.

Mr. WESTERFELD. Only on trade articles. Again I wish to remind you that, as evidenced by the very cases pending in court—which have been decided in court, comparing them with the multiplicity of merchandise sold in the United States every day and every year—the few isolated cases that have been brought into court and there adjudicated or yet pending are not to be compared with the mercantile business of the whole country.

Mr. FLOYD. If you give to these men who have standard articles a special privilege, do you not see that every manufacturer will take up a trade-mark and seek to gain that same advantage until finally the whole business of the country will be brought under a system of trade-marks?

Mr. WESTERFELD. No; I believe there are more manufacturers opposed to the naming of the retail price than there are in favor, and when I say I believe that, I speak from experience. Let me illustrate. The manufactuer of canned tomatoes and canned corn, the manufacturer of any ordinary commodity, is not interested in what his product shall be sold for. He is a manufacturer for only a limited period of the year and wants to dispose of his commodity as quickly as he can, and he does not care what becomes of it if he gets a fair profit.

Mr. WEBB. And he will not take advantage of this law, if we pass it?

Mr. WESTERFELD. No; we do not think he will. Again let me call your attention to this. We hear so much about the high cost of living, that everything has gone up within the last 10 years or 20 years—which no one will deny—I call your attention to the fact that the manufacturer who has endeavored to protect the retail price of his article, in that case the retail price of that particular commodity has not fluctuated within the last 10 or 15 years. Let me illustrate that point. Take Kellogg's corn flakes, one of the manufacturers that is indicted at the present time. Kellogg's corn flakes is selling at 10 cents a package; it has always sold for 10 cents a package, and nobody has ever attempted to sell it for less than 10 cents, and the only thing the Kellogg people want to do in controlling price is to say that 10 cents in all cases gives a reasonable profit. The profit is debatable, whether it is reasonable or not, but we do not care to have that taken away from the retailers who are pushing that article. Again, we want to make it possible for the consumer anywhere and everywhere to find Kellogg's corn flakes on the shelves of the retailer.

Mr. WEBB. That is a trade-marked article?

Mr. WESTERFIELD. Yes; we fear that if competition is allowed to cut the price of Kellogg's corn flakes beyond a reasonable profit the retailer, not finding it profitable, will discontinue the sale, and, in that case it would be difficult for the consuming public to find that particular commodity.

Mr. FLOYD. Didn't the world last a long time before corn flakes were invented?

Mr. WESTERFELD. Very true; but the world existed before we had electric lights, but we would not want to do without them.

Mr. FLOYD. Not electric light. I am not boosting corn flakes.

Mr. WEBB. How many retail grocers do you represent?

Mr. WESTERFIELD. Mr. Green, I believe, can supply that information.

Mr. GREEN. The National Association numbers nearly 100,000.

Mr. WEBB. When did you, as retailers, first begin to agitate this standardization of fixed prices for articles?

Mr. WESTERFIELD. In 1907 I was one of the most firm antagonists of the retail price proposition, and I am not ashamed of it. In 1907, when it was first agitated that it would be in the interest of the retail grocers that the manufacturers name the retail price, I resented it. I said I did not wish to become an automaton—the manufacturer says how much money the customer shall put in a certain slot if I respond with a package. I was greatly opposed to it, but during the year following I studied the matter very carefully, and while I was not in favor of it then, and while we have never done anything as an association to encourage price fixing, since I have begun to look into into the thing, I will say that my prejudice against the manufacturer naming the retail price has been entirely removed not only from the view point of the retailer, but considering it in the larger view as that of the American citizen and consumer. For I realize that while I am a dealer in groceries, I am a consumer of other commodities, and when the manufacturer tells me what to pay for any other commodity that I use in my house, I come under the same restrictions that I wish the grocers, at least, to be under.

Mr. WEBB. Did you not first advocate this proposition on the theory that you would defend the fixing of the price of a copyrighted or trade-marked article?

Mr. WESTERFELD. Yes.

Mr. WEBB. And hasn't the Myers medical case—Myers against Daniel, decided that they could not only not fix the price of a trade-marked article, but they have now come to the conclusion that that is good in all cases?

Mr. WESTERFELD. Under proper restrictions. I would not under any circumstances have any trust or any monopoly to be placed in the position to have absolute control of the price. I would not for the purpose of agreement permit that a price should be fixed by collusion of a given group of manufacturers, nor by the collusion of a given group of manufacturers and wholesalers, nor by a group of manufacturers, wholesalers, and retailers. I want absolute, wide-open competition, and I believe—at least I shall endeavor—I should be presuming too much to say that I would be able to convince you, but I shall endeavor to convince you that my logic is correct.

How many times have you or your families, or your neighbors, been induced to go to a cut-price store after bargains, to purchase products of known merit, at prices considerably lower than the regular price, only to be informed that the particular merchandise you wanted would only be sold at the advertised price if you purchased a certain amount of other goods with it.

Or, perhaps, you found one sales person leisurely engaged to sell the particular advertised article, unable to and unwilling to serve all desiring to buy of the bargain; or, again, you were informed that the stock carried for the sale was exhausted and you were offered something just as good, of unknown merit and questionable value, as far as you knew.

Yet, with all this oft repeated experience of the consumer, the system seems to succeed. Truly we must agree with Barnum, "The American public wants to be humbugged."

However, those who have given serious thought to the underlying principles of price cutting and to its net results to the purchaser refuse to be humbugged any longer.

Mrs. Frederick, of the Housewives' League of America, is one of those rare women who has studied this subject thoroughly. I fully agree with her when she says there are no "bargains."

I must clear up any possible misconception of my point of view by saying that I do believe there does exist such an animal as a "genuine bargain." On one occasion I crowded around a bargain counter, had my plexus torsus twisted out of shape, suffered a dislocation of my dorsal humberis, wrecked my best hat, tore out the armhole of a good waist, and secured three and one-half yards of genuine Valenciennes lace for only 78 cents.

That was five years ago. Like the well advertised tramp, I have bought no other since then.

I have noticed too, as a consumer—

says Mrs. Frederick—

that these price-cutting stores never fail to pick the best known and most widely advertised articles on which to cut prices.

The CHAIRMAN. You are quoting what the lady said before this committee, aren't you?

Mr. WESTERFELD. I believe this is what she said before this committee. My quotation, however, is very short, and I merely want to give the consumer's experience..

I notice that they delight only to assault a price that is fixed, which proves to me that they are cutting prices only when they are convinced that the cut will cause a sensation. If there were no trade-mark, one-price standards, they would be without any materials for sensation. They are destroyers, not builders. There is no sincerity at all in their great fuss about benefiting the consumer by a cut price.

How many times I have seen those alluring signs: Three cans of Campbell's Soups for a quarter; "special" on Uneeda Biscuit, 4½ cents per package, only two to a customer; one day only, Gold Medal Flour, 24½-pound bag for 79 cents; Scott's Emulsion, regular 50-cent size, 39 cents.

However, I shall not worry the committee with an extensive quotation, but proceed with my own statement.

This from a woman, a consumer. Would that every woman of our land possessed the same acumen as Mrs. Frederick. There would be no need of such laws as we ask.

Yet, in the absence of a general high intelligence and full understanding of the underlying, or should I merely say lying, motives of the price cutter, and in the presence of the gullibility of the average consumer, I can only see one remedy, and that is to make it legal for the manufacturer to name the price at which he desires to have his product sold to the consumer.

I have no fear that this price will be exorbitant; competition will take care of that. Any manufacturer who has not a monopoly fixes the selling price of his product at his own peril. He can not hurt anyone but himself. Self preservation will compel him to fix a fair price—fair first to the consumer and then to the retail and wholesale merchants who handle their product. If he fixes the price too high, to the consumer will turn to some competitive product, and the price-fixing manufacturer has driven trade away and injured no one but himself. If he fixes the price too low and does not maintain quality, the product is not attractive to the merchants nor consumer, and they turn from it to some more attractive competitive article, and again the price-fixing manufactuter has injured no one but himself.

Mr. FLOYD. If the public has the acumen to discover these things you have just described, would it not quickly discover the glaring fraud which you paint with reference to price cutting, and turn away from it too?

Mr. WESTERFELD. The public would be slower to discover the matter I complain of—indiscriminate price cutting, used for the purpose of selling big profit-paying articles—because the consuming public is not familiar with the values of merchandise in general. The consuming public, however, would soon detect a deterioration in the quality in any article with which the public is familiar. It would soon detect if the price became exorbitant.

There was one thought I wanted to make and did not quite finish, and that is that in general the very article on which the manufacturers seek to control its resale price has remained about the same. Notwithstanding there has been an advance along the lines of other merchandise in general, that is true. I would trust the consuming public to detect any unfair dealing, to detect any unfair advantage taken by the manufacturer or dealer where I know I could not, from experience, trust the consuming public to detect the real underlying motive of price cutting as far as it concerns the cutting of prices on well-advertised trade-marked articles.

Mr. FLOYD. Let us take the matter of watches. That is a business in which this price fixing is very extensive. In the matter of the better grades of watches we have the Waltham Co., the Elgin Co., and the Hamilton Co. Why is it there is no competition practically in those watches? You get a watch of about the same grade for about the same price, no matter from which company you buy.

Mr. WESTERFELD. I am absolutely unfamiliar with the business. I have no opinion to offer on that. I shall only discuss the matters so far as they pertain to the grocery business, of which I know a little something. I leave that question to the watchmaker.

Mr. FLOYD. What is the particular commodity upon which you want to maintain prices in the grocery business?

Mr. WESTERFELD Any widely advertised merchandise which is——

Mr. FLOYD (interposing). Do you think widely advertising necessarily makes the quality of a commodity good?

Mr. WESTERFELD. No; it does not, not necessarily.

Mr. FLOYD. Do you not think that sometimes the advertisers are like price cutters—dishonest, and putting up glowing advertisements for articles without any real merit?

Mr. WESTERFELD. I would say that advertising, no matter how wide it may be, unless it is backed by merit of the goods, is not valuable advertising.

Mr. FLOYD. I do not name any particular article.

Mr. WESTERFELD. I can name them.

Mr. FLOYD. I will not insist upon that. You say that if the price is too high or the quality is different, that the competition will settle it. Suppose you were handling an article as to which the price is standardized. Your competitor sells a substitute at a lower price, representing it is just as good. Do you not think the consumer can detect the difference?

Mr. WESTERFELD. Precisely, and he does detect it.

Mr. FLOYD. Then when he is deceived, will he not come back to you?

Mr. WESTERFELD. I do not complain of that condition. This is something entirely foreign to the bills under discussion. It has nothing to do with price. Again I beg to remind the committee——

Mr. FLOYD (interposing). You have gone on to another subject? I beg your pardon; I did not realize that.

Mr. WESTERFELD. You may depend upon it that in the promotion of his own business and for the preservation of his business in the field of competition, any manufacturer fixing a price must fix a fair price, fair to the user and fair to the dealer.

I am referring to the Stephens bill because certain remarks have been made as to the trust being in a position to control the price of their products. I believe that section A really will prevent that.

Section A of H. R. 13305 is very explicit as to the exact conditions that have to be complied with before a manufacturer may receive the benefit of the proposed legislation. It absolutely prevents monopoly when it says:

Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article, or articles, of commerce as shall be covered by such contract or sale; nor shall such vendor be a party

to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold, either to dealers at wholesale or retail, or to the public.

It is such wise provision as the foregoing, providing against the possibility of any vender, or class of venders, securing control of any particular class of merchandise and to use such control, or arbitrarily and exorbitantly fix prices.

It is this safeguard afforded the interests of the honest dealer and the consumer which makes me enthusiastic in the support of H. R. 13305, for I want it understood that my sense of fair play makes me just as bitterly opposed to the receiving of unfair advantages by the classes of merchants to which I belong, as it makes me oppose the granting of these unfair advantages to the larger and piratical interests.

We ask equal advantage to all and special privilege to none. We plead for the preservation of the small merchant. We plead for the conservation of the small town, for methods such as I have complained of not only drive the small merchant out of business, but eventually destroy the small town. In our large cities the department-store and chain-store systems are the most destructive price-cutters and are slowly, but surely, destroying the smaller merchants. In the smaller towns and rural districts the mail-order houses are the official undertakers of both town and merchant.

The latter once destroyed, but one funeral will be necessary, for without the merchant the town can not survive. You have it in your hands to give new life to the legitimate business interests of the land.

Protect us against our enemies; protect us against ourselves, for many a small merchant has invited the sheriff's notice upon his door by trying to meet the competition of the price cutter, but not having the ability to sell a big quantity of big profit-making merchandise to offset his losses on the standard well-advertised merchandise sold at or below cost, he soon met his Waterloo.

We must bear in mind that extensive advertising is the chief means of attracting attention, not only to the goods on which the price has been cut, but also to profit-paying goods.

The small merchant, not being able to afford this advertising, can not take full advantage of the benefit accruing from the sale of big profit-paying merchandise.

Groceries particularly are made the target of the price cutter in spite, or perhaps because the profit to the distributor, even if sold at regular prices, is lower than in most any other line of business. Groceries are, as a rule, used as a leader in order to sell millinery, lingerie, clothing, and other merchandise, paying a profit from 33 to 100 per cent. I have it on good authority that a large mail-order house has no hesitancy in stating that they take a loss of $200,000 per annum in their grocery department. The answer is obvious.

Such items on which the public can not readily determine values and on which a large percentage of profit is obtained, make up this loss, plus a profit.

To illustrate: A certain department store in the city of Chicago recently displayed in its show windows wall paper, at 12 cents per roll. One of my neighbors in the paint and wall paper business offers this same paper regularly at 6 cents per roll; another paper marked at

15 cents per roll, my neighbor offers regularly at 7 cents per roll. Another pattern I found marked 59 cents per roll, and the identical pattern bearing the same factory number is offered by the smaller dealer at 25 cents per roll.

But to refer back again to groceries. Permit me to submit some facts as to the cost and the regular selling prices to the consumer, of a number of well-known articles, setting forth the per cent of profit obtained at regular prices.

Article.	Dealers' cost per dozen.	Cost per can.	If sold at regular price to consumer.	Profit.	Per cent of profit.
Campbell's soups	$0.90	$0.07½	$0.10	$0.02½	25.00
Quaker oats	.94	1.0783	.10	.0217	21.70
Kellogg's C. F.	.82	1.0777	.10	.0223	22.30
Shredded wheat	1.20	1.10	.12½	.02½	20.00
Cream of wheat	1.50	1.12½	.15	.02½	16.67
Uneeda biscuit	.50	1.04½	.05	.00½	16.67
Dr. Price baking powder	4.60	1.38½	.50	.11½	23.33
Royal baking powder	4.75	1.3958	.50	.1042	20.84
Rumford baking powder	2.90	1.1917	.25	.0583	23.32
American family soap	2.85	1.0432	.05	.0068	13.63
Fels naphtha	4.00	1.04	.05	.01	23.00
Ivory soap	4.00	1.04	.05	.01	20.00

1 Package. 2 Case (66 cakes). 3 Cake. 4 100 cakes.

My desire is to show general consumption on the part of the consuming public, on the part particularly of the educated persons who do not pay much attention to either the details of the cost to the dealer or to their own cost of the merchandise enumerated, on which an endeavor has been made on the part of the manufacturer to maintain the price, or that the price was or was not exorbitant, or at least did not pay an exorbitant profit to the dealer.

As you will observe, the goods enumerated, whose names are household words all over the United States, even if sold at the highest prices asked by the small dealer, pay but a small, if any margin, over the cost of distribution to the consumer. These same brands, however, are the ones most often advertised at cut prices. It is they that make the best bait to catch the unsuspecting consumer.

Inasmuch as we small dealers are injured by this practice; inasmuch as the consumer is often misled and made to pay higher than regular prices on other merchandise; inasmuch as the manufacturer is at present powerless to either protect himself, his product, the dealer, or the consumer, we respectfully request of your honorable body to afford all of us this reasonable protection. In the words of Huxley, "My experience of the world is that things left to themselves do not go right."

I thank the committee.

STATEMENT OF MR. CHARLES G. DEIBEL, OF ST. LOUIS, MO.

Mr. DEIBEL. Mr. Chairman and gentlemen, my name is Charles G. Deibel. I am a retail grocer of St. Louis, Mo.

I will not impose on your time, gentlemen, for two reasons. One is that I am not capable of taking up a great deal of time in oratory and the other is that I am a little bit misinformed as to the character

of the bill that was to be brought up at this hearing. The part of the bill that I have in mind is that section of the bill called the Stephens bill that takes up the interests of the consumer, the retailer, and the manufacturer. That was the part that appealed to me, and I believe that with reasonable deliberation and thought, probably some provisions could be made whereby all of their interests could be safeguarded.

I want to suggest a practical illustration that has occured in my business affairs, suggested by the addresses that have been given before you here to-day in regard to giving the manufacturer the right to have something to say in regard to the resale of his merchandise. If that is in order, I will make that as brief as possible. I will give you a practical illustration, and I will mention names, so that everything will be authentic.

The Curtice Manufacturing Co. manufacture canned goods, and they are of a high character. They have a high reputation wherever they are sold. I have handled them extensively up until the last few years. I had bargained at one time with those people for 150 cases of peas, where they were unfortunately placed in the position of getting into a controversy with a jobber who had been handling their product who turned their canned goods over to a price cutter. The reason for that was that the goods had become old and, I believe, the Curtice Bros. had refused to take them back. At least the jobber made that plea, and this fellow had them advertised in the St. Louis Post-Dispatch at a very low price on account of the character of the goods. That set the standard price, at least for that season, on that particular commodity, and naturally I had to refuse to sign the contract, because the goods were cut away below profit. That is what I supposed would come up before this committee. I had supposed that things of that character, where the consumers', retailers', and manufacturers' interests were at stake, would be considered by the committee to-day. As I am unfortunately misinformed in regard to this matter, I will merely thank you for the courtesy of the opportunity to address you even this briefly.

STATEMENT OF MR. E. O. SNYDER, OF COLUMBUS, OHIO.

Mr. SNYDER. Mr. Chairman and gentlemen of the committee, I deem it a privilege to appear before your committee and in a few words tell you some of the troubles a retailer of our class has to meet and overcome. In giving you these reasons I will try to prove that they not only benefit the merchant, but the consumer as well. Standardized prices will make better merchants, because they can render better service to the public, employ more labor, pay higher salaries, handle a better quality of goods, and conduct the store in a more wholesome way, instead of being forced to compete with the unfair competition which we have throughout the country to-day.

We, the so-called smaller merchants, can conduct our business on a much smaller margin of profit than the catalogue, chain store, or department store can, yet by their methods of advertising, bargain sales, etc., they are able to attract more people to their stores than we by taking some well-known and nationally advertised articles or commodities and selling them at or below cost. Sell perhaps one to a customer, or, during a certain period on a certain day, for one hour

only, and lure the unsuspecting public to their store and dispose of other merchandise at a regular and increased price; or by saying to the consumer that they have another brand which is just as good, or we have sold out and won't you try a package or can of this, which they will substitute and take a larger profit. A certain department store in our city advertised in last Sunday's paper a certain brand of flour at 63 cents per sack, which was 2 cents per sack less than they or we could buy it for, to say nothing about the loss they would have in the delivery service, bookkeeping, and collecting for same on this flour. Now, this loss would have to be made up in some other way. There is no concern that can serve the public at cost or less to-day. The success of this country is founded upon a profit-making basis, and in order for it to be taken in a fair and equal way we must have fair and equal competition.

If it were not for profit the Government could not exist. Labor could not survive, taxes could not be paid, and these ninety millions of people would be in a worse state of existence than some of the inhabitants in the less civilized countries are to-day.

I believe this bill ought to become a law, because I believe that it will make competition keener and the fight for business more than it is to-day. It will benefit the consumer because the manufacturer will have to give quantity and quality to the customer or he will not buy the article.

There is more competition, or as much, among the manufacturers to-day as there is between the merchants, so a manufacturer will accept this law at his own peril. He must give the consumer as much for her 10 or 15 cents as his competitor will or the consumer will not buy it. Neither will the merchant handle it. A manufacturer in placing his article on the market first figures what he can put his product in the hands of the consumer for. He must give them as much as he can and the best that he can for the money or they will not buy it. Then he must also, and does, figure a legitimate profit for the distributor. Then he figures that by so much advertising he will be able to make his goods popular and in demand. That the volume of business will allow him to market his goods on that basis. Otherwise his goods will not become popular with either the consumer or the merchant and his advertising is lost and he is soon forced out of the business and his place taken by some other who will furnish the quantity and quality.

I could cite you to many cases of where a manufacturer has been injured by the unfair merchant using a well-known article for a bait. A certain case of a butter manufacturer who had built up a good business by giving the merchant and consumer a square deal had his product put on sale at less than cost, charging the loss to advertising. The manufacturer appealed to him after this sale had been made. But it was too late. The dealers began the only recourse, namely, substituting. The manufacturers' own employees suffered for they were paid upon a commission or profit-sharing basis. Their salaries were cut from $25 per week to $12 and $14 according to their own statements. The firm in turn had to either spend additional money in rebuilding its business or suspend, and cause losses with its stockholders.

Other cases could be cited. Special agencies could be broken up that now have to be open to protect the manufacturer. It is the strong against the weak. We place policemen upon the corner to

protect the public against injury from the crowded traffic on our streets; health and sanitary officers and laws to protect the public against the unscrupulous manufacturers or dealers, and the Interstate Commerce Commission to adjust differences arising from time to time, but the merchant or manufacturer who wants to live and conduct business on a fair basis has no protection.

You can readily see when these conditions are kept up what the future will bring forth. This unfair class will have a monopoly on the business after it has driven out the little fellow which now comprise 95 per cent of the merchants to-day. History will tell you the result of this kind of dealing. Cases have been cited you here; you can imagine the price of shoes, if made by only one or two manufacturers. Or breakfast food, razors, pianos, automobiles, etc.

The Government standardizes the rates on postal supplies such as postal cards, stamps, etc., fixes freight rates, passenger fares, and many other branches of the commercial world has this protection. Why not the merchant? The retail merchant throughout the country is the second largest employer of labor, exceeded only by the railroads. The success of the merchant in turn benefits thousands of families and homes. Gentlemen, we are all consumers.

I only sell one line of goods. I buy other necessities of life from fellow dealers in the way of clothing, hats, shoes, furnishings, and dry goods, hardware, drugs, furniture, etc. The farmer or so-called producer does the same. He can not produce all that he needs to exist on. He will be protected by the fact that when he goes to purchase the items he needs from his merchant he knows he will receive the best and most value for his money.

You remember the bygone days when the merchants had numerous prices for their goods, and it depended on the power or ability of the customer to drive a good bargain to get the best price. But think of the vast numbers who did not and can not pull the price down to the right basis under that system. But these customs have practically been done away with. The popular "one price to all" is now considered the better way of merchandising where it is maintained. It was a long step in the right direction.

Now let us take another step forward and further protect the consumer by allowing the manufacturer to name his resale price. That the housewife may send her child to our stores and buy her commodities and goods at the best price that article can be sold for, and feel just as safe and satisfied as though she had made the purchase herself. It would give prestige and confidence to the merchant as well as to the consumer. Competition will then be upon service, in which the public will benefit.

Gentlemen, we want good, clean, healthy competition, but we can not have it under the present conditions, so therefore I hope you will pass this bill.

STATEMENT OF MR. JOHN BRAYSHAW, JR., OF WASHINGTON, D. C.

Mr. BRAYSHAW. Mr. Chairman and gentlemen of the committee my name is John Brayshaw, jr. I reside at 1310 Massachusetts Avenue SE., Washington, D. C., and conduct a retail grocery store at Sixth and A Streets SE. I have no prepared speech, and have been asked by the president of the Retail Grocers' Association, of

which I am a member, to make a remark or two in regard to this bill.

Believing that the laborer is worthy of his hire, we feel that a manufacturer who places on the market an article that is nationally advertised and has national repute has a right to uphold the profit or at least a reasonable compensation for the man who distributes this product.

I call to mind that when I came to Washington 15 years ago the best brand of peas on this market was Schreiber's Silver Label Peas, put up at Union Mills, Carroll County, Md. In this time the population of this city has increased somewhere between 10 and 20 per cent, and the quantity of Schreiber's peas consumed in this city has decreased nearly 50 per cent, and due to the continued cutting of the price of this pea to such an extent that it became unprofitable. After a little experience with the price cutters, Mr. Schreiber sacrificed the Washington market as a market for his peas.

This proposition has injured the manufacturer and that injury is accomplished by the price cutting, to which I understand this bill is aimed to give a free hand.

The statement has been made here that the cost of a traveling salesman, by distribution through what was termed by the speaker "regular channels," is 6 per cent. In our line of business I know of no salesman who receives a commission of over 2½ per cent. On sugar, their percentage is 1 per cent.

One of the members of this committee asked if this bill would not encourage the large mail-order houses rather than discourage them because they were manufacturers. I would say that Sears, Roebuck & Co. and Marshall Field & Co. would never get an order from a Washington consumer for a box of their naphtha soap at $3.50 where they would for Fels Naphtha soap at $3.50. They can use these goods, but they can not manufacture Fels Naphtha soap and they can not put "Fels" on it, and "Fels" is what the people know it by. It does not mean merely naphtha soap. It must be Fels Naphtha soap. If we have protection of an article the people want, it does not make any difference to us how big the mail-order houses may grow or what possibilities they may open through themselves; that does not make a bit of difference.

Some one has said that the retail distributor is a necessary evil. I do not agree with that statement. I am a retail dealer, and I do not consider myself a necessary evil, or an evil at all, by any means. I consider myself a good citizen and an advantage to the community, and I do not consider that I take anything from the community that I do not earn. As Mr. Westerfield has said, many of the retailers have had the red flag put up in front of their store on account of their price cutting and the ignorance of their business on their part and the fact that they did not know what it cost to do business. If we have performed some office in the economy of transporting merchandise from the manufacturer to the consumer, we are entitled to some compensation for that service.

There is no question but what the selling price on maintained or standard-priced goods must be reasonable, as the fact that it is popular shows that the public regard it as standard, and if it were too high they would not pay it. So I can not think the public would be imposed on by this bill.

One of the officials of the Consumers' League who is supposed to uphold the masses of purchasers, the ultimate consumer, says that the maintenance of standard prices would be an advantage to the consumer preventing the idea of working off something that is not as represented by means of this bait. I do not think that to allow the manufacturers to protect their goods through the hands of the dealers would go to the extent of permitting them or suggesting to them to say what a consumer should do with it or how much they should use. It seems to me that is carrying it entirely too far, because the consumer is not a dealer. The consumer buys it for but one purpose, and that is his own use, and I can not see how this law, that would protect the handling of it through the channels of merchandise, would be passed on to the consumer or would in any way restrict what the consumer did with it after he received it.

I feel that the enactment of this law, which would prevent manufacturers from maintaining a standard price on goods which they had manufactured, would not keep other manufacturers from putting a similar article on the market and would do away with competition. As has been stated here, there are goods which can be duplicated by other manufacturers. We would not give Mr. Fels the only right to manufacture naphtha soap, but we would give the only right to manufacture Fels Naphtha Soap, and if some one else can put on the market a naphtha soap that can equal Mr. Fels's soap he would be in no danger. There is no question but what if Mr. Fels put the price of his soap at 6 cents a bar, competition would prevent him maintaining that price without legislation. I do not see how this standard price proposition can work a hardship on the consuming public in any way.

I thank you, Mr. Chairman and gentlemen; that is all I desire to say.

STATEMENT OF MR. GEORGE W. SAWKINS, OF TOLEDO, OHIO.

Mr. SAWKINS. Mr. Chairman and gentlemen of the committee, I came here under a little misapprehension, but I have listened to the remarks made and questions asked by the committee, and I gather from them that you are seeking information as to the conditions of the retail merchant for your guidance in preparing a law to remedy evils which we feel we are "up against."

I have been a retail merchant about 15 years. Previous to that time I was a seller of goods for an eastern house to the trade. While the question has been asked in considering this matter if the consuming public would not grasp the difference in goods offered by fake advertising, etc., and that would be a means of protection to the retail merchant. In a sense I would answer by saying yes, in a limited way, because the consuming public is not seeking education, when you consider the part of the consuming public with which you come in contact—that is, the housewives, their chefs or cooks, who come into the retail store to obtain supplies. They are not looking for that education. They do like to endeavor to do business with the merchant who has established a reputation for honesty. In establishing that reputation for honesty he has gained a name for square dealing, honest representation, and his guarantee as to the quality of the goods which he places before the consuming public.

The question has been asked if the merchant sells an article at 10 cents, for instance a tomato, and you are selling the same article at 15 cents, would not the public say to you, "Why should you charge 15 cents for a tomato when I can get it at your neighbors for 10 cents?" The consuming public are not aware of this fact; they do not know the component parts that nature puts into a tomato. In the average season the tomato, which used to be known by the old-fashioned name of "love apple," contains seven-tenths water. There are a great many manufacturers who put in the other three-tenths of what nature put into that commodity into the cans, and they are sold then at a cheaper price. Honest manufacturers in their processing and canning of these goods eliminate as nearly as possible the seven-tenths water and put in the solid portion of that tomato. In doing so they lose a great deal of that product, as you will understand, in its canning. Therefore they do not get as many cans out of a bushel of tomatoes as the man does who puts in the ten-tenths of water.

How many of the consuming public come into your store and ask for that information, and how much time in your busy experience are you going to have for educating the general public with reference to such matters, so they will understand why you charge 15 cents when your competitor charges 10 cents for apparently the same article? I have endeavored, in my humble way, so far as possible, to educate the public in that way. It has borne good fruit.

I might say that I can get along in my business without any law. I can conduct it and educate the consuming public, so far as possible, as to the nature of goods I sell in my square dealing. But we have in competition with us fully 75 per cent of dealers who are not educated as to the kind of goods which they sell.

I appeared before the canners' convention in our city recently and asked that one of the principal things for consideration and promulgation should be education as to the quality and kind of goods they put into their cans; not so much for the benefit of the consuming public as for the benefit of the retail merchant who distributes their goods, so that in his way he might become educated and explain to his trade or the consuming public the merits of the different goods and the possibility of getting better value for the higher price which they pay for these commodities.

We are against the price cutter. In my experience as a seller of goods to the retail trade I have learned to take that position very positively. I might say that in my business I have in the neighborhood of 4,000 items to sell. I have in mind an article which this importing house which I represented owned and sold at a profit of 5 per cent. My price to the wholesaler was $2.50 per dozen. I have seen that article advertised in department stores and the bottle placed in the show window with a tag placed on it "19 cents per bottle." Twelve times 19 cents is $2.40. The only way they could buy those goods from me was to pay me $2.50 per dozen, with one-half of 1 per cent net cash discount. How could a department store sell those goods for 19 cents when they cost them over 20 cents? They did it for a purpose. What was the purpose? It was to inveigle the consuming public, who are not educated, into their store.

I have known a prominent retail merchant in a cut-rate store to advertise a standard article of goods that was in the control of the

competitor and that no one in the city could get but this other man. The cut-rate man advertised that article at a price below what it could be owned for by the other man, and when the consuming public came into the store and asked for that article, and in my presence the clerk came and said, "I have a call for this article," and of course he would be told to say, "We have had such a sale on it that we are entirely out," when, as a matter of fact, he never had a single item of that article in his store. That is fake advertising, and I am in favor of the legislative party passing a bill for pure advertising.

Mr. FLOYD. Your State Legislature could take care of that, could they not?

Mr. SAWKINS. Yes; and they are taking care of it in a great many States, but I believe there should be a Federal law.

Mr. GRAHAM. Congress has no power to legislate over intrastate matters.

Mr. SAWKINS. I am not familiar with that fact, of course.

Mr. GRAHAM. We could not pass a law that would be effective in controlling local conditions in cities and towns in a particular State.

Mr. SAWKINS. If we had a pure advertising law, similar to the State laws, cases similar to the one I saw the other day would not occur. A man advertised a $30 overcoat for $9.98. It was purchased and investigated, and found that the coat at its greatest value was not worth over $12. That is misrepresentation; that is lying. It is injurious to the smaller merchant.

Mr. GRAHAM. We agree with you that those things are reprehensible and ought to be cured in some way, but that does not pertain to the only question which we can consider here.

Mr. SAWKINS. I mention that incidentally.

There has been some question asked here as to the right which should be accorded manufacturers. I have refused to sell to a cut-rate store a carload of goods where my greatest customer in that city bought only 75 cases, and the minimum car was 350 cases. It told the cut-rate man frankly the reason was because "you are putting these goods in your store and you will cut the price down so that there is no profit in handling them, and when I come around next year to take my contracts for these goods, the balance of the trade will refuse to buy because they will say I have placed them in the hands of an unprincipled dealer, destroying their profits, and that they can not handle them for that reason." Who suffers?

Mr. GRAHAM. You are speaking of a trade-mark article?

Mr. SAWKINS. No; it was tomatoes. It had the manufacturers name on of course.

I have done that; I have refused to sell that man those goods, in order to protect the smaller merchant.

Mr. FLOYD. Are you a manufacturer?

Mr. SAWKINS. No, sir; but I represented a manufacturer at that time. My manufacturing firm upheld me in that, because this dealer said, "if you will not sell them to me I will write to the house." I said, "I control this territory. If I say you can not have these goods to the injury of my firm they will not sell them to you." I wrote in to my employers and told them the circumstances, and they refused to sell to him. But how many manufacturers and how many merchants and how many salesmen will take the stand I did, to protect the small man? Very few.

Mr. FLOYD. I do not think there is any disagreement among us that the manufacturer ought to have the right to fix his price, and if you are a jobber you ought to have the right to fix your price. But there are a great many of us who do not think the manufacturer has any business fixing the price for the jobber or the price for the retailer.

Mr. SAWKINS. Why not?

Mr. FLOYD. There is the point of difference.

Mr. SAWKINS. Why not?

Mr. FLOYD. Because it is contrary to every rule of right. What right has a man, simply because he has manufactured an article and sold it to me, if I have paid him in full value for it, to say what I shall do with it?

Mr. SAWKINS. Has he not the right to protect his interests?

Mr. FLOYD. Not in that way. He has until he parts with title to his property; but you would subvert every principle of personal liberty. In applying that principle to the trade-marked article, you can apply it to every other article and no one would ever know who had the control. If you can control it to the retailer, on the same principle you can control it in the hands of the purchaser.

Mr. SAWKINS. Why not? Who would be injured?

Mr. FLOYD. I say there are some of us who do not agree with that.

Mr. SAWKINS. Can you give me a valid reason why not? Who is to be injured?

Mr. BEALL. The best reason is that this is the United States of America where every man is a free and independent citizen. That is a good reason.

Mr. SAWKINS. And I stand on that principle.

Mr. FLOYD. That is the principle on which this Government is founded; that is that a man shall exercise the control over that which he owns absolutely, so long as he does not injure the general public; but when someone else buys it and pays for it, it is as much his as his horse or his house.

Mr. SAWKINS. How do you define "the general public?" Who constitute the general public?

Mr. FLOYD. The highest interest in the general public is the individual citizen.

Mr. SAWKINS. Do you consider the general public to be simply the consumer?

Mr. FLOYD. I think the highest interest of the general public is to protect each individual in his personal property rights; but you propose to take away from these retail merchants one of these fundamental rights and give it to the manufacturer—that is the right to fix the price on what you own.

Mr. SAWKINS. No; I do not understand it is a fixing of the price.

Mr. FLOYD. But you let the manufacturer fix it?

Mr. SAWKINS. I want to accord the honest manufacturer this privilege to protect his own interests.

Mr. FLOYD. I do, too, and to fix that price high or low as long as he owns the property.

Mr. SAWKINS. You agreed I had a right to refuse to sell that man a carload of goods?

Mr. FLOYD. I would not deny you the right to choose your customers.

Mr. SAWKINS. I did it for the reason that I wanted to protect my firm.

Mr. FLOYD. You had a right to do that if you owned the goods, but if you sold them to the merchant then you had no right to fix his price.

I agree with you that when you get control of the property an honest way for you to do business is for you to fix a price and maintain it; but I want you as the retailer to fix it. I do not want the manufacturer to have any such right over your property. I want you to have that right. I want you to have the same right over what you buy and own that the manufacturers have over what they buy and own.

Mr. SAWKINS. The question was asked here as to the attitude of associations endeavoring to fix prices. I was one of the gentlemen who opposed the matter, and I was credited with being one of the principal means of defeating it at that convention. I asked my association to be sent to Boston for the specific purpose of defeating that again. Previous to going there I had this experience:

I had a 250-box buyer of a certain article. Those goods I could buy at that time at $2.70 per case of 100 pieces in the case, which meant 2.7 cents a piece. That article was being sold in a dry-goods store, that did not have groceries at all, at 10 bars for 25 cents with a purchase of $1 or more.

It has been said the consuming public will get onto this business, and they will in a little while, but there are bargain seekers, people that do not stop to consider the why and wherefore of their purchases, and they are led into this store by virtue of that sale. It has been stated openly by people in that very business that "we are using this as a leverage to get them into our store, and we will sell them another article then, and will put on the restriction that they must buy at least $1 worth of other merchandise, and we will make 100 per cent on one of those articles." That is the proposition we are up against. A department store is in a condition to do that, to meet any kind of competition.

I paid no attention to that. When a customer would say to me, "Why can't you sell me 10 of these for a quarter?" I said, "I can if I wanted to do business for pleasure or for my health; but I am in pretty good health, and I am in the business for a means of making a living. I can not do better than 7 bars for a quarter." It costs me nearly 20 per cent to do business. I tell my customers the exact price, and I tell my clerks to do the same thing; I do not allow anyone to misrepresent one single thing.

Shortly after that advertisement came out we found a small retailer in my neighborhood meeting that same competition. In a few days I found another retail store meeting that competition, and selling 10 bars for 25 cents. I wrote to the manufacturer and inclosed this advertising matter, telling them I was one of their largest buyers, and calling their attention to the fact that retail merchants were beginning then to slaughter their goods. I said, "I am writing to you in this way as means for you to protect your own interests, because if it goes on I will refuse to buy one more piece of

your goods. It is up to you to protect your interests." A gentleman waited on me shortly after that, claiming that he was the district manager and had the control of 31 men. I asked, "Did you come here purposely to see me?" He said he had done that. I said, "When did you arrive?" He said, "Just now." I said, "Did you come direct from the depot to my place of business?" He said, "I did." He wanted to know what I wanted him to do. I said, "Protect your interests." He argued, and wanted me to go on doing my business. I answered all his arguments. I said, "If a man wants to take a $20 bill and divide it up into 5-cent pieces and step out in front of his place and throw them out to the newsboys, he has that right. There is no law preventing him from giving things away. There is no law preventing an unscrupulous merchant giving your goods away at a loss." The point that I made with him was that he should protect his interests. "How am I going to do it?" he inquired. I said, "Put a restriction on the man who buys your goods." He owned those goods, and I did not own them until I bought them. I asked him to follow up his brands of goods and protect himself, because otherwise he would lose my business. If he lost my business and the business of every other merchant, that manufacturer would have to close up and do no business. I leave it with you gentlemen whether there should not be some restriction to protect the manufacturer and to protect me.

I believe the Sherman law was placed on the books to protect us against the big interests, and it was not placed on the statute books to the injury of the small merchant, but it is being invoked now to the detriment of the small dealer. Why should not we, if we have an association, have the right which we are denied now, under the Sherman Act, to advertise or, leaving out the advertising, why should not we have the right in our association to say to our members, "Here is a manufacturer that is permitting his goods to be placed in competition with you to your injury; let us notify every member that he is doing so, and then we can protect ourselves by not buying those goods or forcing him to protect his goods." Under the Sherman Act we can not do it; it would be in restraint of trade.

Some inquiry has been made as to fixing prices. We do not care anything about that. We think the manufacturers ought to have some control as to the limit which these goods should reach in going to the consumer's hands, to protect himself against the price cutter and the unscrupulous and dishonest merchant, who will sell those goods at less than cost and try to force me to meet this competition. He ought to be permitted to say, "These goods shall not be sold by any merchant below a certain price."

Mr. FLOYD. What you want is a rule to protect the manufacturers, because they could not sell these goods unless some manufacturers made them.

Mr. SAWKINS. Protection of the honest manufacturer will be protection to us. That is what we want.

Mr. FLOYD. If the manufacturer did not sell goods to these price cutters they could not handle them, could they?

Mr. SAWKINS. Some of them could not. They make that stipulation, that they will not sell to certain stores because they are price cutters. We ought to have the protection. I think the Sher-

man Act should be amended in this way: Legislation shall be passed that a commission be appointed before whom we can be forced to appear. If a man is an unscrupulous price cutter in selling goods below the actual manufacturer's price, his competitors can cite him in restraint of trade, if he wishes to appear before this commission. Let them cite both sides to appear, and let that commission be the judges of the reasonable profits to which the man should be entitled, and punish the man who does an unreasonable, dishonest disrupting act.

Mr. GRAHAM. If that were true, ought not the consumer to have the right to cite the manufacturer who fixes the price so as to tell whether or not that is a fair and reasonable profit which the manufacturer is obtaining?

Mr. SAWKINS. The consumer can do that same thing.

Mr. GRAHAM. When you reach that stage, has not all the liberty and independence been taken away?

Mr. SAWKINS. I would not want the commission to settle prices. I would want them to determine whether I was getting an unjust profit. I am buying and selling these goods, covering my cost of doing business, so it would net me 2 per cent for my own labor, and I might sell these goods so that it would net me 25 per cent, or even 40 per cent, which would be an unjust and unreasonable profit.

Mr. GRAHAM. If we were to pass some law, and it were constitutional, permitting the manufacturer to do what you say with all goods, following down to the retailer and controlling the prices at which they shall pass to the consumer and that operated until the consumer felt it was an injustice, and if the price was too high to the consumer, then the consumer could come before us and say, "We want you to pass an amendment by which the Congress shall say to the consumer the price which he shall pay," where would you end? Would not that be plausible?

Mr. SAWKINS. There is no consumer, unless he has mercenary ideas, who is going to question the profits of a merchant.

Mr. GRAHAM. If we were going to establish that a manufacturer might fix the price, would it not be just as fair for the consumer, if he desires to do so, to band together and form an association and come to us and say, "We want to fix the price of the articles we consume"?

Mr. SAWKINS. You are advancing an argument that I am contending the manufacturer shall fix the prices. I say he shall protect his interests, that they shall not go below certain prices.

Mr. GRAHAM. That is fixing the minimum price?

Mr. SAWKINS. Yes.

Mr. GRAHAM. Suppose the consumer said, "We want to fix the price as it is to be sold to us."

Mr. SAWKINS. I would permit it.

Mr. GRAHAM. You would permit that?

Mr. SAWKINS. Most assuredly, because the consumer, if he is honest, will never say a word against a man making a reasonable profit.

Mr. GRAHAM. But what are you going to do with two parties if there is any difference in the prices?

Mr. SAWKINS. If you had an equitable law on your books which will protect the merchant in these lines, and if anybody came to you and asked for an unreasonable law, you would not have to grant it.

I consider it unreasonable for any consumer or party of consumers to come before you and ask you to amend the law which simply says that the retail merchant is protected by a small percentage of margin.

Mr. GRAHAM. Do not you, as a citizen and a business man, think it is very dangerous ground to enter upon the fixing of prices for the people who are engaged in business, taking away from the business the natural law of supply and demand that controls it?

Mr. SAWKINS. It might tend to danger in that way and it might not. We have a few dishonest manufacturers. As was stated by one manufacturer in remonstrance about the way his goods were sold and the prices at which he placed them before the public, he found the best interests were being conserved for his manufactured article keeping the retailer poor and not permitting him to make any profit. In all equity is that just, as reasonable men, that we should be ground down, that we should be forced to get out of business and become a serf or slave, and lose our independence about which these gentlemen spoke, by becoming the employees of a large interest?

Mr. GRAHAM. Could not the manufacturer obviate this difficulty by electing you as his agent and distributor of his goods?

Mr. SAWKINS. That is done to a great extent. I have a line of goods in my store that no other merchant in the city of Toledo can buy. I have these goods as my protection against the unjust and unscrupulous dealer. I have that line in my store that no other merchant can buy.

Mr. WEBB. Do you not think if the Government fixed the price at which the manufacturer sold his goods and fixed the price at which you sold them it would be only a step for the Government to fix the price for the man who manufactured the article—that is, the laborer—and would have to fix his salary or his wages, and then it would come to a universal communism or socialism?

Mr. SAWKINS. I am against the Government fixing of prices.

Mr. WEBB. You have just suggested a method by which the Government would fix prices.

Mr. SAWKINS. No; I suggested the manufacturer be privileged to say that his goods shall not be slaughtered.

Mr. GRAHAM. But you allow the Government to come and say whether or not his profit is reasonable. That very power carries with it the absolute power of fixing prices.

Mr. WEBB. They are uninseparable.

Mr. SAWKINS. In a way, but it is a matter of protection.

The CHAIRMAN. After you operate under that law a while and the consumers had tried it for a while, the consumers could say, and probably would say, the manufacturer and retailer were getting too much out of those goods; that the cost of living is too high. Here is a commodity, a breakfast food, for instance, that costs 4 or 5 cents, they would say, and they are selling it at 10 cents; that is too much profit. The consumers might say all that and the consumers, you know, are in the majority.

Mr. SAWKINS. Can you cite me to any article that costs 5 cents that is sold for 10 cents?

The CHAIRMAN. I only suggested that as an imaginary example.

Mr. SAWKINS. Can you cite me to any article of that kind?

Mr. CHAIRMAN. I was only supposing that, as an example to illustrate my point.

Mr. SAWKINS. We can suppose anything, you know. I could suppose extremes in my arguments.

The CHAIRMAN. Suppose the article retailing for 10 cents cost only 5 cents; the consumers, who are in the majority, might say, "We think that is too much profit." Do you not think the consumer could, with equal propriety, demand that the exercise of that power be put to his benefit in some instances?

Mr. SAWKINS. Let him have it. I do not want it to discriminate and make a class legislation. The Sherman law was so well thought of that they embodied it in their acts in Canada, and they went up against this argument which you suggest, and after continuing it, they adopted it in the form I spoke of.

The CHAIRMAN. You are not altogether correct. We have the Canadian act here and they did not adopt it as you say.

Mr. SAWKINS. If we had a commission something similar to the Interstate Commerce Commission, it would accomplish the purpose I have in mind. They regulated and did away with rebates on railroads. Why can not you have a commission that will do away with rebates and unjust discrimination against the small merchant?

Mr. FLOYD. Let us see if that will work. The Interstate Commerce Commission has jurisdiction over railroad rates. A shipper complains that a certain rate is an unreasonable rate. If he makes a satisfactory showing, the Interstate Commerce Commission will hold that is an unreasonable rate and require the railroad company to lower it. But there is nothing in that system that would require them to raise the rate, is there? If the railroad company wants to cut its rates down, there is nothing in that system that prevents them cutting them down unless it is in the nature of a rebate.

Mr. SAWKINS. Was not the Interstate Commerce Commission created for the purpose of preventing unreasonable adjustments as to rates?

Mr. WEBB. Yes; and that is because the railroads are monopolies.

Mr. SAWKINS. If the retail grocer is asking unreasonable rates for his goods the commission which I have suggested could cite him to appear before them, and he could show the manufacturer's price, the jobber's price, the retailer's cost, and then his basis of doing business, say a 10 per cent basis. It has cost me 20 per cent to do business.

Mr. FLOYD. The point I want to get in your mind is this: You cite the Interstate Commerce Commission which deals with rates and railroads. They are not allowed to discriminate or give rebates.

The CHAIRMAN. And a railroad is a public utility, too.

Mr. FLOYD. Yes. The point I want to emphasize and bring to your attention, Mr. Sawkins, is that there is nothing in that law that would prevent the railroads, provided they do it uniformly, from lowering their rates on any commodity. It only interferes where they get it up to a point where the commission holds that the particular rate is unreasonable because it is too high. Suppose you had this commission and they applied the same principle as the Interstate Commerce Commission. You are selling at the standardized price and your competitor is selling at a lower price. Acting on the principle they would have no authority to make him sell at a higher price, but they could hold that your price was unreasonable and make you lower it, if you have the same system in vogue in reference to your business as is in vogue with reference to railroad rates.

Mr. SAWKINS. I will take my chance against any fair committee of American citizens saying my price is unreasonable if I make only 2½ per cent profit.

Mr. FLOYD. I am talking about the principle of the thing, of taking away from a man the control of his own business and putting that authority into the hands of a commission established by the Government.

Mr. SAWKINS. Is it not a fact you have seen this sort of an advertisement, "We own our own building and pay no rent. If you are trading with the corner grocery, they are asking you an unreasonable profit, because they have to pay rent." That is an untruth.

Mr. FLOYD. I think your remedy is along the line you have already indicated, to prevent fraudulent and false advertising, which you can in any State where that is done under your local law.

Mr. SAWKINS. As I stated, I believe you are sitting here to listen to what the merchants have to say, to get our expression, and to learn from us our troubles, so it may be a guide to you in enacting laws which will be equitable for the American citizenship of this country. Am I right?

The CHAIRMAN. That is right. We are trying to propose some useful legislation.

Mr. SAWKINS. I do not know whether you are all lawyers who are members of this committee. It may be possible none of you ever had any experience in merchandise, and therefore your ideas are theoretical.

Mr. GRAHAM. I have had a good deal of experience in the retail-grocery business.

Mr. SAWKINS. And you were glad to get out of it, I dare say.

Mr. GRAHAM. I can not say that.

Mr. SAWKINS. I believe that 75 per cent of the men who do get out of it are mighty glad to get out of it. In my business I have kept a carbon copy of all my accounts. When I get through with my inventory I bring in a cold-blooded accountant and get him to tell me my condition. I am quoted in the city of Toledo as being the highest-priced man in Toledo. My own profit, after a cold-blooded accountant went over my books and accounts, was shown to be 2.47 per cent. Am I making any money in the grocery business in serving the general public early and late?

We really are demanding at your hands careful thought and just action in the matter of protecting the retail merchants of this country, because if you do not do it, this business is going to go into the hands of those in control of the concentration of business, the big business interests, who are in control to-day, and who will eliminate all the independents the gentlemen have spoken about. I do not want to see the retail merchant put out of business and become a mere serf of the moneyed interests who are controlling all lines of business. I think one of the means to prevent that is to amend your Sherman Act in such a way that you can protect the retail merchant. The retail merchant is the advance guard of civilization. Go back into history as far as you wish. Who was the first man, after the explorer and adventurer, to break ground? It was the retail merchant. He locates in a certain district and meets the different sections, and their schools are erected and buildings are erected. He is the greatest educator and the greatest means of advancing civilization that is known.

In proportion to the number of men the retail merchant has a larger amount of money invested and pays more taxes than any other group of men. They protect the consuming public more than any other class of business men. The mail-order houses, the large concerns, demand that you must put down the long green in order to get your goods. In times of strikes and in times of financial disasters who is the protector of the consuming public? It is the retail merchant. He extended credit to the widow and orphan, and to the man who could not get his money.

We demand at your hands protection for us, the retail merchant, when we are such good citizens as we are. Protect us against the combination and this unjust and dishonest competition. You can do it. While you may have a theoretical idea of some sort with reference to the business, from what we have said to-day you will get a nucleus that will give you a chance to formulate a law that will protect us against unjust discrimination, and that is what we are asking at your hands. I am not versed in the law, and I am not in a position where I can tell you gentlemen how to word these amendments; but after you have listened to the retail merchant you ought to gather some idea as to how it should be done.

Mr. GRAHAM. These questions are intended to make plain to you the difficulties and troubles that exist on the other side in considering the relief for which you ask, and in considering whether or not this is the proper source from which the relief may flow. There are many things about which Congress can not legislate, and that is our purpose in pointing out these difficulties to you, so you may address yourselves to those things and give any reason you may have for desiring the legislation you seek.

Mr. SAWKINS. I would like to see the Sherman law amended so that we will have the privilege, without violating the law, to protect our interests. But the retail merchant to-day has not that privilege. You have taken it away from us. We can not combine together in our social organizations and say that we shall expose the dishonest manufacturers, because we will be cited to appear before the court. Is that just that a law should be on the statute books denying us a liberty we ought to have as good American citizens to protect ourselves? You enact a law to prohibit us from doing that, and yet you permit the other man to go to work and put us out of business.

Mr. WEBB. There is no law prohibiting you from exposing the fraud of your competitor, is there?

Mr. SAWKINS. Oh, yes.

Mr. WEBB. Tell me where it is and what it is?

Mr. SAWKINS. If we meet in association and report that a certain manufacturer is advertising an article for which we must pay $2.50 per dozen and he says that you can buy that at any retail merchant's place for 25 cents. But let me say, first, that it costs me 20 per cent to do business. There are different ways of figuring percentage. The wrong way, which most of us figure, is on the buying basis. Twenty per cent of $2.50 is 50 cents. The cost of the article with my cost of doing business thus would be $3. We sell that article for 25 cents a package and get the $3. What have I got for profit? I come before my association, and I say, "Gentlemen, here is an article being advertised for $2.50 per dozen. They also advertise

that we must sell it for 25 cents per package. It costs 20 per cent for doing our business. Let us agree that we will not handle that man's goods." Under your Sherman Act, if somebody brought the evidence in that we agreed to do it——

Mr. WEBB. Would it be necessary to get an agreement under those circumstances?

Mr. SAWKINS. Why wouldn't it be? We say to this party, "Gentlemen, here are the conditions; you are losing money on every package you sell. Let us agree that we will not buy them." If you can find an officer of this Government that can prove that we have agreed, two or more of us, or that we have come to that agreement, he will have us cited and punished for forming a combination in restraint of trade. Is that just?

Mr. FLOYD. That is nothing more less than the boycott that you are advocating. If we give you that right, labor is here demanding the same right.

Mr. SAWKINS. We are not asking that.

Mr. FLOYD. But the labor organizations are before this committee, demanding that right, and so were the farmers organizations demanding that right. Suppose we concede all of these rights to all of you, what kind of a condition would this country be in?

Mr. SAWKINS. We are not asking that. We can not come to an understanding of that sort, however, without coming under the Sherman law. Why should we be forced to handle these goods at a loss?

Mr. FLOYD. If any competitor puts out false advertisements you could expose him, could you not? If some competitor puts out a false advertisement, could you not make it public and expose it as an individual?

Mr. SAWKINS. Then he will bring suit against me and I have not any means to defend myself. Because of his means and power and money, and I having no means to defend myself, he is able to sue me, and I am up against that sort of a proposition.

The CHAIRMAN. Referring to these products that have been talked about, that are being sold for less than cost in order to entice the consumer into certain stores and then sell him other things, why could not you expose that sort of a performance without violating any law?

Mr. SAWKINS. I do expose it.

The CHAIRMAN. That is right.

Mr. SAWKINS. But as I said in my opening remarks, I can possibly run my business without caring what laws you put on the statute books, so long as they do not interfere with me doing business. I have a certain amount of trade, which, in time, I will educate. I put it up to the consuming public, and I will be perfectly satisfied with the judgment of 90 per cent of the consuming public. When a consumer says to me, "I can buy a 25-pound sack of sugar for $1 at Mr. Brown's store; why can't you sell it?" I will say, "Mrs. Jones, I can, but I want to put it up to you in this way: it costs me $1.20. I will lose the 20 cents on that sack of sugar. If I do much of that kind of business I will have to retire from the business and get a position, maybe at a moderate salary. I will lose my independence as an American citizen; I will lose my privilege to educate my children. Do you want me to carry on my business in that way and

lose money in that way?" Four out of five of the ladies and men, when you put it up to them in that way, will say, "No; I will pay your prices."

Mr. GRAHAM. You have lost the best argument of all, which is, that the man who does that will take that loss out of the customer on some other article unjustly.

Mr. SAWKINS. I know that. Most of them think they are getting something for nothing, however.

The CHAIRMAN. I find that the majority of them do know it, because the very advertisement shows that they will not let a man have one of those cut-price articles unless he agrees to buy so much of other merchandise, upon which there is no cut price.

Mr. SAWKINS. In answer to that, we have a large store that belongs to a chain of stores, with an unprincipled method of doing business. They have taken away two of my best salesmen. Those two salesmen go to my customers from house to house, and they call them every morning over the telephone. They are selling a certain brand of soap that costs to-day, in carload lots from the manufacturer, $2.90 a box, at 10 bars for 25 cents on a dollar purchase of goods. They have come into my neighborhood, which is that part of Toledo known as the West End, composed of the better and best class of people, and have gone into the kitchen and into the house and said to the housewife, "We want your business away from Mr. Sawkins. We will sell you 10 bars of soap for 25 cents." "But," they say, "I have to buy a dollar's worth of goods." Then they are told, "No, we have made an exception in this neighborhood; we will sell that soap to you on a 50-cent purchase." In the middle-class section they demand a dollar purchase. It is that competition I am up against. We want some protection against that.

Mr. FITZHENRY. Can not you make your employees contract with you not to go into a competing business for a certain length of time after leaving your service? Did you ever try that?

Mr. SAWKINS. I do not think any man can take away a man's citizenship in that way.

Mr. FITZHENRY. That is the way the Jewell Tea Co. does it.

Mr. SAWKINS. I would not ask an employee who is an American citizen to make any kind of an agreement that he would not work some place else if he became dissatisfied in my place.

I thank you, Mr. Chairman.

STATEMENT OF MR. JOHN A. GREEN, OF CLEVELAND, OHIO.

Mr. GREEN. Mr. Chairman, we have a great many difficult conditions in our business with which to contend. We would not come here and take up your time if we did not think we could give you some information that would eventually work out for the benefit of the whole. I have studied the conditions in the grocery business in all its phases for a great many years, in pretty nearly all lands, under all conditions, and your bill, tentative, No. 2, sections 3 and 4, prohibit the fixing of prices, which is one of the matters with which we have to contend. We have been in favor of it, as was brought out here to-day, after years of consideration, taking it up first and experimenting with it on the Pacific coast, taking it up at the national convention in Dallas, and coming on down to Boston. I am just proud enough to say that

a man who can make a successful business in the retail grocery trade can succeed in any business under heaven.

Mr. FITZHENRY. Running a bank would be child's play, wouldn't it?

Mr. GREEN. Oh, yes, indeed. [Laughter.]

Mr. GRAHAM. There is one suggestion I would like to make, in view of the curtailment of the hearing, and that is that the multiplication of speeches does not make any difference. You have put before us, by the men who have spoken, a certain line of thought that you wish us to consider, and the illustrations need not be given further, because they are principles which we understand just as well as you who seek them. You want the manufacturer to have the right to protect, down to the retailer, the prices in the sale of his articles. You go one step beyond the others who have been here, who ask it only on proprietary, patent, or trade-mark articles. You go to the extent of asking it upon the necessities of life as well—anything that is well advertised. We understand that position, and merely to multiply speeches on that subject would not help us any more than simply to get clearly before the committee the exact position which you occupy, which you have done in a very able manner. I think the gentlemen who have spoken have done that very ably.

Mr. GREEN. Thank you for the compliment, Mr. Graham.

Mr. FITZHENRY. The committee has very high regard for the retail merchants. We feel that any man who has the ability and intelligence and energy to make a success of the retail grocery business in this country, as the conditions are to-day, is a very remarkable citizen, and we are glad to see him and to hear from him.

The CHAIRMAN. I am sure every member of this committee, in his home town, patronizes his retail grocer and never sends off for any goods to these mail-order houses. I know that is true in my case.

I want to say that this afternoon, a short while ago, I saw Judge Adamson, of the Interstate and Foreign Commerce Committee of the House, and introduced Mr. Green, your spokesman, to him, and asked him to give you a hearing to-morrow on the Stephens bill. He signified that his committee would be willing to hear you, but that he would probably want to limit your time to two hours. We have taken practically the whole afternoon with you here this afternoon, and were very glad to do it, and would give you even further time if it were possible.

Mr. GREEN. You have been very liberal and very kind and we appreciate it.

The great criticism of the retailer in the last two or three years has been that he has been made responsible for the high cost of living to a very great extent. Through this criticism and through this notoriety or publicity has come about an evolution in the business. All our efforts have been driven toward educating men in efficiency and the better mode of doing business. If I had not been here to-day, I would have been in Lincoln, Nebr., where there are 700 men occupied in that meeting to-day. In St. Paul, Minn., there are probably 500 or 600 men to-day, taking up these things and discussing them. In both of those halls to-day they are able to say, for instance, "My loss on bills is one-tenth of 1 per cent," etc. That is brought about by our discussion of the matter of handling collections. All those matters are discussed fully and freely in these

meetings. The day is gone when the losses in accounts is cutting any figure in the cost of doing business. That has all been brought about through organization and education and the coming together of men.

I spent 30 years of my life behind the counter. I am not such a very old man, at that. I spent the best part of my life in studying these conditions. The German Government has given greater attention to the retail merchant than we have. I hold in my hand here the consular reports of Germany. I secured this in England a year ago. I sent Mr. Clayton, your chairman, a copy of two or three sections of this a few weeks ago.

The CHAIRMAN. I wish you would incorporate that in the record as a part of your remarks.

Mr. GREEN. I find that Mr. Levine, special agent of the Bureau of Corporations, Department of Commerce, has said "We can not get that." I have quoted from this in several instances over the country. He said, "We can not get that; I wish you would put that in the record."

The CHAIRMAN. We shall be glad to have you incorporate that in the record, Mr. Green, as a part of your remarks.

Mr. GREEN. I want to impress upon you, gentlemen, our earnestness. After years of study of the best means of conducting a retail business, we are still considering this very problem of the manufacturers naming the price at which the consumer shall have his product—the consumer, mind you—and we have presented the matter now as best we could. We have had, in this connection, all of the unpleasant public notoriety; we have had them calling us thieves and everything else. I want that stopped. I want to see the manufacturer have a fair remuneration; I want to see the retail dealer have a fair profit; and I want the consumer to have the privilege of buying the products from me for what they are worth. Then we shall be eliminated from this unpleasant public notoriety.

Again, Mr. Chairman and gentlemen of the committee, on behalf of myself and those with me and those whom we all represent, I desire to thank the committee very heartily for the courteous hearing they have extended to us.

(The documents referred to are as follows:)

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THE GERMAN LAW OF 1909 AGAINST UNFAIR COMPETITION.

(Report by Sir Francis Oppenheimer, His Majesty's commercial attaché for Germany.)

SECTION I. INTRODUCTION.

The German law at present in operation to remedy the abuses of unfair competition came into force on October 1, 1909. The principle underlying this law introduced no innovation into the code. There had been previous legal provisions aiming at abolishing similar evils, but at first they consisted only in some general principles embodied in the codes of the various German States, and were seldom put into practice because the keen competition which is a development of modern Germany had devised methods beyond the reach of the older laws. When the law of 1896 was enacted it gave legal redress only in certain specified cases of unfair competition. It contained no general clause like the French civil code applicable against all concurrence déloyale, because German judges are disinclined to interfere under circumstances which do not constitute infringements of specific legal postulates.

Subsequently the law of 1896 was supplemented by certain paragraphs of the German civil code, which came into operation in 1900, though at first it was questioned whether these paragraphs, and more especially the more widely worded paragraph 26, could be invoked. Though some decisions ensued, the clear statement of a general principle was still needed to fight the growing evil; at the same time there was a demand for more stringent laws against certain abuses which the law then existing could not visit with sufficient rigor.

THE LAW OF 1909—GENERAL REMARKS.

1. The law of 1909 contains both a general principle (par. 1), which supplies a weapon against unfair practices generally and an enumeration of a number of unfair practices specifically. The former is dealt with in Section II of this report. The latter are set out in Section III under separate headings, with comments on the relative paragraphs of the law and an account of recent legal decisions.

2. The law of 1909 improved upon the older one in so far as it extended to the employer, under certain circumstances, the liability for unfair practices by his employee.

3. Furthermore, the law has increased the maximum fines. It has added the possible punishment of imprisonment and payment of compensations to a maximum of 10,000 marks.

EXPLANATION OF THE LEGAL REMEDIES.

The remedies are by way of civil as well as by criminal procedure.

A. *Civil remedies.*—The civil remedies are actions for damages and for injunction.

The action for damages rests either upon the wording of the particular paragraphs of the laws (pars. 1, 14, and 16) or upon a special paragraph of the law establishing an action for damages collectively for a number of paragraphs (par. 13 grants it for cases under pars. 3, 6, 7, 8, 11, and 12; pars. 19 grants it for pars. 17 and 18). In other cases under the law an action for damages may lie in accordance with the terms of the civil code, e. g., paragraph 15 relies for damages upon paragraph 824 of the civil code.

The action for an injunction rests equally upon different rights; it is granted either by the particular paragraphs of the law (pars. 1, 3, 14, and 16) or by a special paragraph of the law collectively for certain definite provisions of the law (par. 13 for pars. 1, 3, 6, 7, 9, 11, and 12). Again, the action for an injunction may lie in accordance with the terms of the civil code (in the case of par. 19 by par. 823 of the civil code), or the action for an injunction may rest upon a general maxim of the civil law (in the case of par. 15).

In case: in which the right of injunction is granted by two paragraphs of the law (e. g., against infringement of par. 1 by pars. 1 and 13), the former constitutes a general right and the latter designates the persons to whom it gives the right of action.

B. *The criminal remedies.*—The criminal remedies are of three kinds: (1) Penalties, (2) imprisonment, (3) damages claimed by way of criminal proceedings, in German called Busse. These criminal remedies can be best explained if they are examined under two headings:

(*a*) The criminal law being officially put in motion (Staatsanwalt) (1 and 2 above).

(*b*) The criminal law being privately put in motion (Privatklage) (3 above).

(*a*) Under the law of 1909 both the punishments by way of penalties and by way of imprisonment have been made much more severe than under the older law. The maximum of 5,000 marks and (or) the maximum of one year's imprisonment has been fixed under paragraphs 4, 8, 12, 15, 17, and 18; a maximum of 2,000 marks and (or) the maximum imprisonment of nine months under paragraph 20; a fine up to 150 marks or imprisonment under paragraphs 6, 10, and 11.

Public criminal proceedings are taken on the initiative of the public prosecutor in the cases of infringements of paragraphs 6, 7, 9, and 11 (in accordance with the wording of par. 22).

In all other cases public prosecutions, where admissible, are started only on the initiative of private individuals, if the public prosecutor decides that there is sufficient public interest for instituting the prosecution. The private initiative is left to the person injured, except in cases under paragraphs 4, 8, and 12, where the initiative can be taken by any person selling the same goods or rendering the same class of services as those the unfair sale of which by a competitor gives rise to the remedy under the law.

The civil and the criminal actions run concurrently; under the law they do not interfere one with the other.

(*b*) Criminal proceedings are possible also under the law without the intervention of the public prosecutor (Privatklage). It might be said that in such cases the person entitled to take action under the law (except paragraphs 1 and 3, which only admit of civil actions) adopts for the time being the role of the public prosecutor. When-

ever, under the act of 1909, a criminal prosecution takes place upon public or private initiative, the person injured can, in lieu of damages to be claimed by a separate civil action, claim damages by way of Busse as part of the criminal action. If a private person undertakes the criminal prosecution, he can claim the Busse as a matter of course; if the public prosecutor takes up the criminal charge, the person injured claiming a Busse becomes "subsidiary plaintiff" (Nebenkläger) in the public prosecutor's action.

The law limits the amount to be claimed by way of Busse to 10,000 marks. But the claims for Busse are rare, although, from the claimant's point of view, the criminal procedure for damages offers certain advantages; the claimant requires no private legal assistance, he saves the expense of a civil action, and the court has a freer hand in the admission of evidence. On the other hand, the amount of the claim is limited to 10,000 marks; even so, the claimant's chances of obtaining a substantial sum within this limit are small, for the German judges are inclined to grant criminal compensation only to the amount of the monetary damage shown in figures to have been actually suffered. They are inclined to disregard the injury morally done to a business, e. g., the necessity of extended advertising to repair the damage suffered. It is practically impossible to obtain by way of criminal procedure compensation corresponding to the damage actually inflicted. Yet once criminal proceedings for damages (Busse) have been taken, no civil action for damages can lie. Criminal proceedings, even private, if undertaken without the claim of a Busse, do not exclude a civil action for damages.

4. Whenever the provisions of the law of 1909 overlap and other laws would be available to remedy an abuse which can also be construed as unfair competition (fraud, copyright laws, trade-marks, etc.), that law is brought into operation which inflicts for the offense committed the heavier punishment.

5. *Foreigners.*—The rights of foreigners (i. e., persons or concerns whose main establishment is not within the German Empire) under this law are set out in paragraph 28. They are entitled to its benefits only in so far as by the laws of their own country German merchants are granted similar protection against unfair competition. Subjects of the United Kingdom are in Germany entitled to the same protection against unfair competition as is enjoyed by any German. The result has been achieved in a roundabout way. Paragraph 28 of the law, which is a copy of paragraph 15 of the older law, says that only those are entitled to bring an action under the law who have a "main" place of business in Germany. Accordingly, foreigners and Germans alike, if they had not a main place of business in Germany, were outside the protection of the law. An exception was made for those countries granting reciprocity; this reciprocity was, however, to operate only after an announcement in the Imperial Gazette. No such announcement has as yet been made. The position was entirely altered in 1903, when Germany joined the Paris convention of May 20, 1883, and the Brussels additional act (Art. 10 B), in accordance with which all nationaux of the countries which are members of the union having a business place in one of the said countries are protected against unfair competition. The word "nationaux" has been given the widest possible interpretation by the Reichsgericht.

There is no doubt, I am informed by one of the leading lawyers upon the subject, that British firms have brought actions in Germany which were based upon the law of unfair competition; but it would not be easy, though possible, to collect some such cases, because in the German law reports the cases are not as in the United Kingdom reported under the names of the parties, and their description is also omitted.

One of the most notorious cases of foreigners using the law of unfair competition for the protection of their business interests is connected with the famous Pilsen brewery. The original Pilsen brewery is an Austro-Hungarian firm. Is has, under paragraph 16, succeeded before the German courts in a claim to the exclusive right to use the word "Pilsen" for the beer brewed at its own brewery. Where the name "Pilsen" is to be used as a trade designation of a beer lightly brewed and in taste like the original "Pilsen," but brewed outside the original Pilsen brewery, the word "Pilsen" must be accompanied by some visible word or words clearly indicating the "non-Pilsen" origin of the beer.

For any offenses against the law of 1909 committed by foreigners abroad the German law gives redress, provided the person having committed the offense has in Germany a business (branch business) or domicile, permanent or temporary.

In some cases the law treats acts committed abroad as offenses committed within the German jurisdiction, e. g., letters containing offenses against the law posted abroad, but received in Germany, or advertisements inserted in the foreign press circulating in Germany.

For any offenses set out in the law of 1909 and committed abroad by Germans, the German courts give redress provided the act committed is liable to punishment by the laws of the country where committed.

SCHEDULE OF THE PARAGRAPHS OF THE LAW AGAINST UNFAIR COMPETITION) JUNE 7, 1909).

1. General clause; acts in course of business committed contra bonos mores.
2. What applies to "goods" applies also to agricultural produce, etc.
3. Action for injunction against unfair advertisements.
4. Penalty and (or) imprisonmant for intentionally deceptive advertising.
5. Exception in case of "traditional" designations.
6. Sale of bankrupt's assets, if no longer part of bankrupt's estate, must contain no reference to the fact of bankruptcy.
7. (*a*) Advertisements of sale must announce reason of sale.
(*b*) Regulations concerning sales to be issued by superior administrative bodies.
8. Penalty and (or) imprisonment in case of restocking for the purpose of a sale.
9. (*a*) Selling off is to be regarded as a sale for the purposes of this law.
(*b*) Except in case of customary season sales, to be fixed by the superior administrative authorities.
10. Penalties or imprisonment for infringement of paragraphs 7 and 9.
11. Regulations for the retail sale of certain commodities to be fixed by the Federal Council.
12. (*a*) Penalty and (or) imprisonment in the case of wrongfully bribing employees for the purposes of competition.
(*b*) The same penalty and (or) imprisonment to be inflicted upon an employee accepting bribes.
13. (*a*) Persons entitled to bring action for injunction (under paragraphs 1 and 3; also under paragraphs 6, 8, 10 and 12).
(*b*) Liability to pay damages (subparagraph 3; also subparagraphs 6, 8, 11, and 12).
(*c*) Liability of employer for acts of employee committed (under paragraphs 6, 8, 10, 11, and 12).
14. (*a*) Statements capable of injuring business of a competitor, if not substantiated, give rise to actions for damages and injunctions.
(*b*) Confidential information supplied for reasons of a justifiable interest gives rise to an action for injunction only if untrue, and to an action for damages if the information is known to be incorrect by the person supplying it.
15. (*a*) Penalty and (or) imprisonment in case of false information concerning another's business given malâ fide.
(*b*) Employer liable for such information given on the part of employee if made with employer's knowledge.
16. (*a*) Action for injunction against a person using another's name, etc., whereby a wrong impression might arise.
(*b*) Action for damages if person using such name ought to have known that a wrong impression might arise.
(*c*) These remedies are granted also if certain other business contrivances are used.
17. (*a*) Penalty and (or) imprisonment for employee betraying business secret.
(*b*) Same consequences fall upon persons having (subparagraph 17 (*a*)) acquired knowledge of a secret to use it for purposes of competition.
18. Liability to penalty and (or) imprisonment if the person who is confidentially entrusted in course of business with a person's models utilizes them for purposes of competition, or communicates them to others.
19. Action for damages for infringement of paragraphs 17 and 18.
20. Liability to penalty and (or) imprisonment for inducing another to infringe paragraphs 17 (*a*) and 18.
21. Limitation of claims under the act.
22. (*a*) The initiative to criminal proceedings falls in case of infringement against paragraphs 6, 10, and 11, to official prosecution; in all other cases to private prosecution.
(*b*) In cases of private initiative the motion for a prosecution can be withdrawn.
(*c*) Public prosecutions take place only in case there is a public interest involved.
(*d*) Private criminal proceedings take place before Schöffen courts.
23. Publication of judgment.
24. Competence of courts.
25. Interim injunctions.
26. In lieu of civil damages the injured can claim damages by criminal procedure to a maximum of 10,000 marks.
27. (*a*) In cases in which the Landgericht (provincial court) is competent the cases must be tried before its commercial section.
(*b*) The Reichsgericht is the court of final instance.
28. The protection of foreigners rests upon reciprocity.

29. Provisions concerning the selection of the superior administrative bodies mentioned in this law.

30. The law to operate as from October 1, 1909, and to supersede the law of May 27, 1896.

Section II. The General Clause.

1. The general principle with which the law of 1909 opens runs as follows:

Paragraph 1. "Whosoever commits in commercial intercourse for the purposes of competition acts which are contrary to 'good faith' can be brought before the courts, for the purposes of an injunction and the payment of damages."

It has been held that "acts" are deemed to be contrary to "good faith" if they are contrary to the sense of decency of the fair and just minded among the class concerned; an act to fall within the operation of the general paragraph must have been committed in commercial intercourse, which is intended to embrace all acts which are undertaken for the purposes of "business"; the act must have been undertaken with a view to competition. The value of this general clause is often questioned, chiefly because the judges are said to be inexperienced in commercial practices and have shown, as a rule, little ability in putting such general principles to practical use. The very fact that a later part of the law enumerates specific abuses increased at first the hesitation of the bench; it concentrates its attention upon these specific provisions, which, it argues, would be superfluous if the general clause were really intended for general application. But for the purpose of litigation the general clause is the most important provision of the law. Probably 99 per cent of all actions against unfair competition are based upon it solely or jointly with other paragraphs. Its wording applying to all "acts contrary to good faith" is exceptionally elastic; it has in practice received a very wide interpretation by the higher courts, more especially the Reichsgericht, which is the court of final instance. In consequence, this paragraph is now introduced into all pleadings, even if the action relies upon one of the other and more definite paragraphs. As a result of the decisions given by the Reichsgericht the lower courts are becoming more thoroughly imbued with the spirit of paragraph 1.

Section III. Specific Provisions.

The provisions of the law, as far as they aim at preventing the specific abuses of unfair competition, can be classed under the following seven headings:

(i) Provisions to prevent abuses in advertisements (paragraphs 3–5).
(ii) Provisions to prevent abuses in connection with "sales." ("Selling off," "Sellling out," paragraphs 6-10.)
(iii) Provisions to prevent unfair competition arising out of deceptive quantities sold in retail parcels (paragraph 11).
(iv) Provisions to prevent the bribing of employees (paragraph 12).
(v) Provisions to safeguard a man's business reputation against unfair comment by a competitor (paragraphs 14–15).
(vi) Provisions to prevent the wrongful use of a firm's name (paragraph 16).
(vii) Provisions to prevent disclosure of a firm's secrets (paragraphs 17–18).

(i) Abuse of advertisements (paragraphs 3–5).

These three paragraphs aim at preventing an unfair use of advertisements, the growing importance of which in a keen competition nobody is inclined to deny. Preventive measures were deemed necessary because advertising is more capable of abuse than it used to be in consequence of the facility of traffic, the spread of the press, and the progress made in the graphic arts.

In principle the law does in fact recognize advertising as a permissible help in trade and industry and leaves its fair use unhampered. Whether an advertisement is fair depends upon the conception of the public to whom it is addressed. Protection against "unfair advertising" is by this law accorded to the competitor in the same trade and not to the public.

These provisions of the law dealing with "unfair advertising" were framed especially to remedy the grievance against competitors fraudulently using royal warrants, titles, medals, and also to deal with those cases of "selling off" for the purposes of which stocks were being replenished.

The "selling off" of bankrupt stock is dealt with by a separate paragraph of the law (see paragraph 6).

Paragraph 3 (injunction against unfair trading).—"An injunction can be granted against any person who in public notices or communications intended for a wider circle of persons makes incorrect statements, if such statements, capable of conveying

the appearance of a particularly favorable offer, concern his business, more especially the quality, origin, method of manufacture, or the price of goods (including professional and industrial services), the method of supply or source of his merchandise, the title to distinction, the cause or purpose of sale, and the quantity of his stocks."

The law operates if the announcement is addressed to the public and pretends to state facts; it will not operate if the advertisement contains a personal opinion, however erroneous or so exaggerated that no one can thereby be seriously influenced. The statement must be de facto incorrect, either in so many words or by implication; it must be capable of implying a particularly profitable offer, according to the opinion of the public to whom it is addressed. The good faith of the advertiser is no plea against an injunction.

The law operates if the announcement concerns such questions as those expressly set out in the paragraph; but the operation of the law has the widest possible range, for it applies if the statements are made in connection with "business" generally, i. e., the business itself, the proprietor of the business as such, or the merchandise generally of the business in question.

The words "professional and industrial services" are added to extend the benefits of the law to those who pursue as a source of income arts, sciences, or what are called technical callings, e. g, civil engineers.

The Reichsgericht gave judgment in a case under paragraph 3 on February 6, 1912, in which case a boot store had advertised chevreau leather boots which had not been made from goatskins, but made from leather which had only been tanned in the manner of goatskins.

Paragraph 4.—"Imprisonment not exceeding one year and a fine not exceeding 5,000 marks, or either of these penalties, is inflicted upon any person who with the intention of conveying the appearance of a particularly favorable offer makes statements in public notices or communications intended for a wider circle of persons which to his knowledge are untrue or are capable of misleading concerning his business, and more especially the quality, method of manufacture, or price of goods (including professional and industrial services), the method of supply or source of merchandise, the title to distinction, the cause or purpose of the sale, and the quantity of his stocks.

"If such statements are made by an employee or agent in a business concern, the owner or manager of such concern is liable concurrently with the employee or agent, if the statements were made with the knowledge of the said owner or manager."

The statements must be untrue (not incorrect, as under paragraph 3), capable of producing the appearance of a particularly favorable offer and intended to do so. Various untrue statements in one advertisement constitute but one offense; but whether the repetition of a statement, e. g., an advertisement in the press, constitutes one or several offenses, is left to the discretion of the judge. The statement must be untrue to the knowledge of him who made it, and it must also to his knowledge have been capable of acting as an inducement to purchase.

The offense exists not only as between competitors but also as against third parties. Publication alone on the part of an employee does not constitute the offense; there must have been a statement untrue to his knowledge. An employee even if so acting under the instructions of his chief makes himself liable. If the firm consists of a company, the manager of the business is the person liable under the law; likewise the manager in cases in which the proprietor, for personal reasons, has no share in the management, e. g., the husband managing on behalf of his wife, who is proprietress of the business. In any case the manager or owner is liable, not both. The term "employees" means employees in the course of business. The law takes effect when the offense has been actually committed; an attempt to commit it is not punishable.

If actions lie both for fraud and under this section of the law, the action involving the heavier punishment takes effect and excludes the other. The main difference between the two offenses lies in the fact that to constitute fraud there must result loss of property to the person injured; in fraud there must be also the intention of illegally acquiring property advantages, whereas this paragraph 4 only presupposes the intention to mislead. Fraud in business, moreover, affects the customer, but paragraph 4 protects the would-be seller.

The Reichsgericht gave judgment in a case under paragraph 4 on November 3, 1911, a dentist having advertised a painless method of treating teeth, knowing his advertisement to contain a deception as far as his treatment was concerned.

Under the same paragraph the Reichsgericht gave judgment on November 21, 1911, in a case in which a person had advertised as his own work a poem accompanying a picture, which poem he knew was not his own production (false origin).

Similarly the Reichsgericht gave judgment on December 19, 1911, in a case in which a bank commission agent was found to have advertised his business as that of a "banker."

In a recent case a fine of 75 marks was inflicted upon a Berlin dealer in pianos under paragraph 4 of the law at the instigation of the "Central Bureau for the Prevention of Abuses of Unfair Competition." The dealer, in spite of repeated warnings by the society, had continued from time to time to offer pianos for sale in notices intended to make the public believe that the pianos had for private reasons to be sold before a certain date. The court held that the advertisement was intentionally misleading, because the public was thereby led to believe that pianos so advertised did not form part of the dealer's stock in trade.

Paragraph 5.—"The use of names which in the ordinary course of business serve the purpose of distinguishing certain goods (or professional services) without any intention of thus describing their origin are not included in the statements referred to in paragraphs 3 and 4.

"On the other hand, there are included in paragraphs 3 and 4 pictorial representations or other contrivances which are intended to and capable of taking the place of the statements there set out."

Names which have become trade designations for a certain species cease to become false statements of origin, etc., under this law, e. g., "Frankfort sausages." To decide the question of such a custom of trade the judge is guided by expert opinion (Chambers of commerce).

Any additions to such recognized trade designations intended to mislead bring the designation under the operation of the law, e. g., "Real Frankfort sausages." What was originally the name of a firm can be held to constitute only a trade description (e. g., "Liberty" silk). In some cases the question is one purely of fact and theoretically open to doubt (e. g., "Pilsener beer" is still regarded as indicating true origin, but "Bavarian beer" is regarded as designating beer brewed like the Bavarian).

Similar questions concerning wine, champagne, and brandy are dealt with by the "Wine law, 1909."

The meaning of the second part of paragraph 5 is best explained by instances. Among pictorial representations which would fall under the operation of the law would be the representation of a "bee" on a bottle of sirup resembling honey if such sirup were sold below the market value of honey. The most interesting decision in respect of "other contrivances" so far given by the courts is that of a daily paper filling its advertising space with advertisements from other papers, but for the publication of which the paper in question had no order. It was held that the contrivance of thus swelling the number of published advertisements was capable of unfairly producing the impression that, owing to the great number of advertisements published, the paper was a particularly favorable or popular one for the purpose of advertising.

(ii) "SELLING OFF."

Paragraphs 6 to 10, which deal with "sales," constitute an innovation made by the law of 1909 and are intended to prevent the epidemic of unfair sales, which are injurious to the trade of the straightforward tradesmen. They are the paragraphs of the law now most frequently brought into operation, but as to their usefulness there existed at first the widest diversity of opinion.

Paragraph 6.—"If in public notices or communications intended for a wider circle of persons a sale of goods is announced which are derived from a bankrupt's assets, but which no longer belong to the bankrupt's estate, it is illegal to make reference to the fact that the goods are derived from the assets of a bankrupt.

"Any statement so made renders him who makes it liable to a maximum fine of 150 marks or to imprisonment.

Whilst the previous paragraphs aim at suppressing erroneous or false facts in advertising, this paragraph forbids the use of a true fact for the purposes of advertising. The sale of the remnants of a bankrupt's stock had become a profitable business carried on by certain traders. If their trade was not of a high class, at least the bankrupt estate benefited by the popularity of such sales.

The statement that the goods "to be sold off" are the assets of a bankrupt's estate may after the passing of this law be made only by the trustee in bankruptcy. The trustee in bankruptcy is, in respect of advertising a sale, bound by the provisions of paragraph 4 of this law.

It is the duty of the police authorities to intervene in all cases in which the regulations of this paragraph are infringed. There is no private right of action under this paragraph.

Paragraph 7.—"Whosoever announces in public notices or communications intended for a wider circle of persons the sale of goods under the designation of "selling off" is bound to state in such announcement the reason which has occasioned the sale.

"After consulting with the proper legal representatives of trade and industry, the superior administrative authorities are at liberty to issue for the announcement of particular kinds of sales directions to the effect that previous to the intended sales a body appointed for that purpose by the said superior authorities be informed concerning the cause of the sale and the time of its beginning, and that such body be furnished with a schedule of the goods sold. Any person is entitled to inspect the said schedule."

The provisions of this paragraph aim at those sales which are deemed unfair to competing traders, because for the purposes of such sale stocks are bought or because for the purposes of such sales the stocks genuinely to be sold out were replenished.

"Selling out," as such, is not forbidden by the law, nor is it intended that the authorities should interfere with genuine sales. For their protection the law enacts that the reason of the sale be publicly stated; that the superior administrative authorities should be enabled, when necessary, to exercise a control through duly appointed representative bodies; the replenishing of stocks for the purposes of sale is absolutely prohibited.

The wording of the paragraph giving the superior administrative authorities a certain control in the matter of selling out is intentionally vague, because it was held that the regulations would have to be varied in different trades and in different districts.

There is no doubt that the provision requiring a schedule of the goods which are to be sold off has had the desired effect upon the whole practice of these sales, because it greatly hampers the proceedings; moreover, as any competitor can inspect the schedule of goods to be sold, an unfair tradesman is deterred from arranging an "unfair" sale, because by so doing he might be divulging some of his trade secrets, for the superior administrative authorities are at liberty to lay down any rules they think fit concerning the details to be included in the schedule.

A distinction is made between selling out and those regularly recurring sales which are a necessity in many branches of trade.

Paragraph 8.—"Whosoever in his announcement of a 'selling off' offer for sale goods which have been procured solely for the sale renders himself liable to imprisonment for a maximum term of one year and (or) to a maximum fine of 5,000 marks."

Since the passing of this law all replenishing of stocks for the purpose of "selling off" is under all circumstances prohibited. It is illegal thus to replenish "abusively" the stock before the announcement of the sale or after the announcement. It is recognized that in practice the question whether the stock has been "abusively" replenished before the announcement of the sale is not always easy to decide.

Paragraph 9.—"The provisions concerning the announcement of a sale as set out in paragraph 7 (2) and in paragraph 8 extend to any other announcement which concerns the sale of goods because a business is being given up or because from an existing stock dealings in a particular kind of goods are being relinquished or because a particular stock is to be cleared.

"The provisions of paragraphs 7 and 8 do not apply to any seasonal or stock-taking sales, which are described as such in the announcement of sale and which are customary in the ordinary course of business. The superior administrative authorities, after consulting the proper legal representatives of trade and industry, can issue regulations concerning the number, time, and duration of the customary season and stock-taking sales."

Such terms as "white week," "cheap days," etc., are not regarded as announcements of "sales," and so do not fall within the provisions of the law; but the law applies to any expressions which are but veiled announcements of sales though the word "sale" may not appear.

Partial sales (e. g., sales of linen because linen is no longer to be sold in the particular business announcing its sale) are treated like sales generally. The promise of presents or favors to accompany any purchase on certain days does not fall within the provisions of the law.

Season and stock-taking sales the law recognizes as indispensable, if they are recognized as a custom in a particular trade. The fact that the superior authorities are called upon to issue regulations concerning such sales has offered practical difficulties, because these authorities did not deem themselves entitled under the law to issue regulations for each trade individually, but only for all trades generally in the particular district. Yet the usefulness of such sales depends more particularly upon the propriety of the date fixed, which varies according to localities (e. g., near stations) and industries (e. g., ladies' hats and paper goods).

Generally speaking, paragraphs 6–10 are those under which, in case of infringement, the criminal prosecution is undertaken on the public prosecutor's own initiative, i. e., officially. This criminal prosecution does not bar the right of a civil action. In fact, various trade conciliation committees (i. e., Altona) have reported that it is chiefly under these paragraphs that they are called upon to intervene. In Kiel a special subcommittee has been appointed to deal with offenses against these paragraphs. This subcommittee reported a year after its constitution that it had every reason to be satisfied with the success of its labors.

On August 14, 1911, the German Central Union for Trade and Industry unanimously adopted a resolution encouraging the formation of local committees and subcommittees to watch the abuses connected with sales, which, it stated, could not under present circumstances be entirely reached and eradicated by the arm of the law. Only determined activity by local committees could, on the one hand, educate the masses of traders, and on the other, bring such pressure on the public prosecutor as to cause him to take the necessary action. It also added that it was essential that, as far as "sales" were concerned, the ground must be systematically prepared for a more stringent law.

A civil action for damages in the case of the infringement of paragraphs 6 to 10 lies if the infringement is committed by acts which had aimed at the success thus obtained (intent), or if the success was obtained with negligent indifference as to the law (negligence). In spite of the efforts made by the conciliation committees, these paragraphs occupy the courts perhaps more frequently than any other paragraphs of the law, with the exception of paragraph 1, which gives rise to a civil action only.

On December 18, 1911, the Reichsgericht decided a case involving an infringement of paragraph 8. It was decided that restocking for the purposes of a sale was punishable under the law, even if the party selling off had acted only after having obtained professional advice that his intended action did not conflict with the law.

The Reichsgericht gave a decision in a case involving paragraph 9 on January 5, 1912. The case dealt incidentally with the advertisement of a sale in a particular shop, to expedite the disposal of certain goods.

(iii) PROVISIONS TO PREVENT DECEPTION AS TO QUANTITIES SOLD IN RETAIL PARCELS.

Paragraph 11.—"The Federal Council (Bundesrat) is empowered to lay down rules to the effect that certain goods sold retail may thus be offered for sale or sold in the ordinary course of business only in prescribed units of number, measure, or weight or so offered for sale or sold only with indications upon their wrapping concerning number, measure, the place of manufacture or the place of origin of such goods.

"In the retail sale of beer in bottles or jugs the indication of the liquid measurements may be prescribed, with an allowance for appropriate shortage.

"Regulations so issued by the imperial authorities must be published in the 'Imperial Gazette' and laid before the Diet immediately or at its next meeting.

"Any person disregarding the regulations of the Federal Council is liable to a maximum fine of 150 marks or imprisonment."

It has in certain cases become a tradition of trade that goods are sold in certain quantities, etc.; if a smaller quantity is sold and at a cheaper rate, but in a wrapping resembling the wrapping of the quantity usually sold, there is no fraud and such a proceeding does not fall within the provisions of paragraphs 3 and 4 of this law, yet the proceeding must unfairly damage the fair trader. Such unfair competition is provided against by this paragraph 11. The police intervene, but there is no civil action.

The provisions apply solely to certain goods, and then only if sold retail and in the course of business, but apply to such goods also if of foreign origin when sold retail within the German Empire.

Regulations under this paragraph have been issued concerning the retail sale of yarn (Nov. 20, 1900, and Nov. 17, 1902) and of candles (Dec. 4, 1901).

These regulations were actually issued under the similar section 5 of the prevoius law, viz, as to yarn, regulations issued November 20, 1900, and November 17, 1902; as to candles, regulations issued December 4, 1901.

When this section of the law was again debated (1909) claims were from different quarters put forward for the issue of similar regulations concerning the retail trade in chocolate, soap, string, pens, and various articles of trimmings. So far no regulations concerning the retail sale of these articles have been issued. On the other hand, a lively agitation has of late been undertaken in favor of subjecting the retail sale of chicory to similar regulations. As to chicory the Chamber of Commerce of Oppeln urged in November, 1910, that the parcels sold retail should by law be made up in net weights of 125, 200, 250, 400, and 500 grams of chicory, as the quantity actually sold was deceptive owing to the elaborate packing of the parcels. The agitation in favor

of such a measure was afterwards greatly helped when, apparently owing to the rise in the price of chicory, the factories reduced the traditional parcels of one-third kilogram to 300 grams without notice to the public that the new parcels resembling the old contained a lesser quantity (report by Chamber of Commerce of Rottweil). Similarly the Chamber of Commerce of Rottweil has recently renewed the suggestion, dating as far back as December, 1906, that the retail sale of soap should be legally limited to units of 125, 200, and 500 grams, with a maximum shortage allowance of 10 per cent.

(iv) PROVISIONS TO PREVENT THE BRIBING OF EMPLOYEES.

The provisions of the law in this respect were an innovation in 1909 and have been passed to put an end to the abuse of "greasing" (Schmiergelder).

As to the necessity of this provision industrial circles disagreed. On the whole, the small traders denied that there was any need for it; the representatives of the larger industrial concerns on the other hand clamored for protection against a system which had become unbearable. The principle underlying the paragraph has been explained to amount to this, that a bribe which is not made for the purpose of competition or which has no corrupt purpose is not visited by the law, but that a bribe made for corrupt purposes with a view to competition is punishable, even if the employee has has not failed in his duty to his employer. There was an intention not to interfere with the system of "innocent" pourboires, but it is admitted that it will in practice often be difficult to draw the distinction between a corrupt bribe and an innocent gift.

Paragraph 12.—"Whoever in the course of business and for the purposes of competition offers, promises, or grants presents or other advantages to an employee or agent of a business concern with the intention of obtaining for himself or a third party through the corrupt behavior of such employee or agent a preferential treatment in the matter of goods or industrial services is liable to imprisonment not exceeding one year and (or) to a fine not exceeding 5,000 marks, unless under some other law a heavier punishment is incurred.

"The same punishment is inflicted upon the employee or agent of a business who in the course of business demands or accepts presents or other advantages for the purpose of obtaining for another in competition a preferential treatment with reference to goods or industrial services.

"Whatever has been received or its value is by the judgment in such cases forfeited to the State."

The provisions of this paragraph apply only to the course of business; e. g., the domestic servant receiving gifts from the butcher is not included under the law.

The grant and acceptance of presents for the purpose of preferential treatment in competition against another is not itself a corrupt practice, for the law has expressly added that the gift must pass "corruptly." If, for instance, it is a recognized practice of trade that the employee receives from the seller a gratuity, such gratuity can not be said to pass "corruptly." A reward paid after the contract is concluded is not a bribe unless previously promised, directly or by implication. The interpretation of the word "corruptly" has offered considerable difficulty, and the law in its present form is deemed unsatisfactory—so much so that a society has been formed the members of which have agreed to prohibit gratuities of any kind.

The provisions of this paragraph apply also when the employer has suffered no loss or injury by the offense, which is one against fair competition.

The paragraph was an innovation of the law of 1909; it had been inserted under great pressure from the industrial community. It is then all the more remarkable that practically no cases were brought before the courts under this paragraph, in spite of the admittedly wide existence of the evil of bribery, until, toward the middle of 1911, a "Society against the Abuse of Bribery" had been started with the determined purpose of attacking the evil. There had been a general disinclination on the part of competitors, who are granted the right of action under the law, to put paragraph 12 into operation, because the competitors, when merchants, admitted that any such action would seriously affect their business. Since the formation of the society, however, legal proceedings have become more frequent. Thus, on its initiative, a case was tried at Torgau in June, 1912. The society had moved the public prosecutor against a buyer on behalf of a limited company which had given preference to two firms, in one case by changing the cheaper offer of another firm, for which preference the buyer had in all received bribes amounting to 4,800 marks. The said "buyer" was sentenced to three months' imprisonment and a penalty of 1,350 marks. His two accomplices, who represented the firms which had obtained the unfair preference, were condemned in penalties amounting to 1,600 and 750 marks, respectively.

In its first annual report the "Society against the Abuse of Bribery" complains that the judgments of the Reichsgericht are inclined to apply paragraph 12 only if the

employer has been financially damaged by the acceptance of a bribe on the part of his employee; furthermore, that, according to a judgment given by the Reichsgericht, February 8, 1912, it is to be regarded as a criterion of the offense whether the person accepting the bribe has sufficient influence to procure a preference in favor of the person bribing.

To attack further the offense of bribing, the society has decided to support in every possible way any civil action for damages taken under paragraph 12 by any of its members.

(v) PROVISIONS TO SAFEGUARD A MAN'S BUSINESS REPUTATION AGAINST UNFAIR COMMENT BY A COMPETITOR.

While paragraphs 3 and 4 of the law are designed to keep within bounds any recommendation of goods which would otherwise be unfair, paragraphs 14 and 15 give protection against unfair comment on a man's business activity and credit by a competitor. These two paragraphs give different rights of action, the first against comment which is unfair because it can not be proved to be correct, the second against comment that is intentionally false.

Paragraph 14.—"Whoever makes or disseminates for the purpose of competition statements concerning the business occupation of another, concerning the proprietor or manager of another's business, concerning the merchandise or industrial services of another, capable of damaging the course of business or the credit of its owner, is bound to compensate the person damaged to the amount of the damage suffered, provided the truth of the statements made or disseminated can not be proven. The person so damaged can also claim an injunction against the continuance of the statement or its dissemination.

"If the statements made are confidential and if the person making them or the person to whom they are made has a justifiable interest in the statements made, the claim to discontinuance is only admissible if the statements made or disseminated are in fact contrary to truth.

"The claim for compensation can only be maintained if the person making the statement knew or ought to have known that the facts stated were incorrect."

The statements must be statements of facts; they need not be publicly made; the method of making them, whether by word of mouth or in writing, is immaterial. The expression of an opinion does not fall within the operation of this paragraph. The onus of proving the truth of the statement falls upon the person making it. No action under this paragraph lies for statements which are proven true, even if damaging; on the other hand, if the statements can not be proven to be true, the good faith of the person making them constitutes no good defense.

The statements must be capable of damaging the competitor in his business capacity or in his credit. The onus of proving possible damage falls upon the person bringing the action; only the person threatened with such damage can bring the action; the action can be brought against any person, not only against a competitor; but the statement must have been made for the purpose of competition of either the person who made it or of a third party.

On February 10, 1912, the Kammergericht in Berlin decided a case under paragraph 14. A medical institute for radium cures had published a statement to the effect that in cases of diabetes successful cures had only been undertaken by its own treatment. A competitive institute using radium for the same purposes succeeded in an action against the first-mentioned institute, the judgment of the Kammergericht relying greatly (though not exclusively) on paragraph 14.

Subsection (2) of paragraph 14 applies to confidential information sought and given by parties justifiably interested, e. g., those inquiring confidentially of an inquiry agency as to the standing of a firm. The law protects such agencies, the usefulness of which it recognizes for business purposes.

Paragraph 15.—"Whoever makes or disseminates in bad faith statements concerning the business of another, concerning the proprietor or manager of another business, concerning the merchandise or industrial services of another, which are contrary to truth and which are capable of damaging the course of business of another renders himself liable to a maximum term of imprisonment of one year and (or) to a maximum fine of 5,000 marks.

"If statements of the kind set out in the above section are made or disseminated in a business concern by an employee or agent, then the owner of the business concern becomes concurrently liable together with the employee or agent, if the statement was made with the knowledge of the former."

The statement must be false to the knowledge of him who made it, but it need not be made for the purpose of competition; consequently it is held that such cases of

slander and libel are not properly included under the law of unfair competition. The statement must be capable of damaging the business of the person slandered (or libeled); the person having made the statement can not plead a justifiable interest.

As already stated, subsection (2) of paragraph 14 applies to the cases of confidential information given by inquiry agencies. It is remarkable that, in spite of their very wide use in Germany, cases in which these agencies are concerned hardly ever occupy the courts. While, on the one hand, the business community is satisfied that these agencies supply useful information, long experience has, on the other hand, taught these agencies to supply their information as the law demands, truthfully and impartially.

On November 7, 1911, the Reichsgericht was called upon to give judgment in a case concerning a confidential agency; but it was a case finally resting upon the construction of paragraph 20, because the services of an employee of the firm, the subject of the inquiry, had been requisitioned to obtain the confidential information needed by the agency as the basis of the information to be supplied.

(vi) PROVISIONS TO SAFEGUARD A FIRM'S NAME.

Paragraph 16.—"An injunction lies against whoever uses in business the name or special designation of a business or of an industrial enterprise or any printed matter in a manner capable of leading to confusion with the name or particular denomination which another is entitled to use.

"The person who so uses another's name is bound to compensate such other person for any damage suffered if he knew or ought to have known that his wrongful use was capable of leading to confusion."

The term "special designation of a business" includes all marks or other devices used for distinguishing a certain business from other businesses, provided they are recognized by the business classes in question as a distinguishing mark of such business. These provisions do not apply to the protection of "trade-marks" or "wrappers" (vide Trade-Marks Act, May 12, 1894).

The usefulness of this paragraph, which protects a man's ingenuity in such matters as do not fall under the laws concerning patents, copyright and trade-marks, is generally admitted. A man's name is protected by the commercial code in so far as it is used as the name of his firm; the trade-mark law protects a man's name as far as a trader's goods are marked therewith. Paragraph 16 protects a man against the unfair use by an anonymous competitor of a name for which the former has established a reputation; the use of pseudonyms against use by unfair competitors is also protected.

No person is entitled to the use of a stranger's name for the designation of his business, goods, etc., except when the stranger's name is added in some such form as "formerly of Messrs. X and Y," or "pupil of Z," etc.

The term "special designation" denotes neither name nor trade-mark, but a device to impress the local public with a distinctive sign; there is no objection to another person in the same trade, but in another town, using the same device, but locally the right to the special designation is acquired by priority in a particular branch of industry. General designations, such as "bazaar," "optical institute," do not fall within the operation of this paragraph, nor do such signs as have become recognized as applying to a whole trade, e. g., "The Smoking Indian" for a firm of tobacconists. On the other hand, individual letters, a combination of a number, can be used and are entitled to protection.

"Business marks" include special designs of vans, of liveries, the decoration of shop windows, the get-up of catalogues, of circulars, of printed matter and the use of telegraphic addresses. It is only requisite that "business classes" recognize these marks as distinguishing marks; these business classes are constituted not only by other merchants in the same branches, but also by the buying public, commercial travelers, etc.

The use becomes wrongful if capable of leading to confusion among the buyers of that particular class of goods. A claim for damages arises if a false impression has been caused and the person using the device has shown negligence or malice in using the particular design.

This paragraph 16 corresponds to paragraph 8 of the older law, but has considerably widened the terms of the latter by admitting also a cause of action in which there exists only a possibility of innocently misleading the public, whereas the former law had limited the cause of action to cases of intentional deception. The paragraph 16 is now not infrequently invoked by firms which believe themselves damaged by a competing firm using a similar name. It would be difficult to lay down any leading principles which have so far guided the courts. The Reichsgericht was invoked in a case in which the parent firm of dealers in boots called "Carl Stiller" attempted to

prevent the son dealing in the same goods under the style of "Carl Stiller, junior," but the case was decided against the parent firm.

At present a case is pending before the Reichsgericht in which the parent firm of cigarette makers at Dresden, styled "George Jasmatzi & Co.," invoked paragraph 16 to prevent the son's firm of cigarette makers styling itself "George A. Jasmatzi Sons." In the lower courts judgment was given against the parent firm.

(vii) PROVISIONS TO SAFEGUARD THE SECRETS OF A BUSINESS AGAINST ANY ATTEMPTS ON THE PART OF AN UNFAIR COMPETITOR TO OBTAIN KNOWLEDGE THEREOF.

Paragraph 17.—"Any employee, workman, or apprentice in a commercial enterprise who communicates during his term of employment business secrets with which he is entrusted in consequence of his business employment, or of which he has otherwise obtained knowledge, provided the secrets are thus communicated for the purpose of competition or with the intention of damaging the proprietor of the commercial enterprise, becomes liable to a maximum term of imprisonment of one year and (or) a maximum fine of 5,000 marks.

"To the same punishment becomes liable he who utilizes for his own benefit or communicates to others business or trade secrets of which he has obtained knowledge by one of the methods designated in the foregoing subsection or by some action on his part which is contrary to the law or good faith."

The obligation to secrecy on the part of an employee is limited to the term of his employment. The secret must be a trade secret or a business secret; the fact which the law protects must be a real secret, but need not be an absolute secret (e. g., when the proprietor of the business has himself already communicated the fact to several customers who are, by law, regarded as partners in the secret); the secret need not constitute an absolutely new fact, but must appertain to the business in question and be unknown to others; the proprietor of the business must have an interest in the secrecy of the fact. "Trade and business" secrets embrace, e. g., list of customers, origin of the merchandise, inventions which have not been patented, price lists, samples and models, the annual balance sheet, etc.

The secret is protected against the indiscretions of the employee, whether such employee is paid or not paid for this employment; no term is fixed as a criterion for what constitutes "employment," and temporary employment falls within the provision of the law.

The employee must have obtained knowledge of the secret as a result of his employment. Any invention made by the employee in the course of his employment becomes his employer's secret, and the employee is supposed to have obtained knowledge thereof in the course of his employment.

The employee is prohibited from communicating during his term of employment business secrets to others, but he can not be prevented from utilizing them for his own purposes; after the term of his employment he can communicate secrets which he obtained during his term of office and can utilize them, provided he has not obtained his knowledge through the unfair communications of another employee or by some action contrary to law or good faith.

An attempt to communicate a trade or business secret does not fall within the operation of the law.

Paragraph 18.—"Whosoever unfairly utilizes or communicates to others for the purposes of competition designs or instructions of a technical kind, more especially drawings, models and patterns, cut patterns and recipes, communicated to him in the course of business, becomes liable to a maximum term of imprisonment of one year and (or) a maximum fine of 5,000 marks."

This paragraph constitutes an innovation in the law and was devised to remedy an evil which could not otherwise be visited, more especially in the lace-making home industries, when a competitor's agent called and selected from the patterns in hand and belonging to another firm specimens for which he gave orders for the benefit of the competing concern which he represented.

The law for the protection of a pattern (Jan. 11, 1876), which requires registration, novelty, and special character, protects only the author; none of its requirements apply to cases to be remedied by this paragraph. Similarly, the law for the protection of artistic designs (Jan. 9, 1907) presupposes an artistic character which would not necessarily apply to the cases embraced by this paragraph.

This paragraph of the law then protects business ideas which have not been copyrighted, before their publication by the owner, against the breach of faith by non-employees.

There must be some kind of business relation between the owner and the party to whom the design, model, etc., is entrusted; it is not necessary that the design, model, etc., constitute a trade secret.

So far, the law has but rarely been put into motion under the terms of paragraphs 17 and 18. I am, however, informed that as a deterrent the law has worked wonders, and that a very wide evil which could not be previously dealt with (especially the methods now made illegal by paragraph 18) has died away. The effect which paragraphs 17 and 18 have had are said to be the best justification for this law of June 7, 1909, the spirit of which was vehemently attacked even by such leading representatives of the German industrial and commercial community as the Aeltesten der Kaufmannschaft, Berlin.

On November 24, 1911, the Reichsgericht gave judgment in a case under paragraph 17, when it was held that it constituted an infringement of the law to supply a competitor with a list of the tailors employed by the employee's firm; similarly it was held to be an infringement of the law if an employee supplies a competing firm with a list of his employer's customers.

On December 12, 1911, the Reichsgericht decided that the supply to a competing firm by an employee of certain printed forms used in the business in which he was employed was no infringement of the law, as the forms in question could not be held to have constituted "business secrets" (par. 17). The same case decided that paragraph 18 did not apply because the forms were accessible to the employee in the ordinary course of his employment, and the words "in the course of business" used in paragraph 18 of the law had previously been held not to include the relationship between employer and employee (par. 18).

Section IV. Practical Working of the Law.

As stated above, the law came into operation in October, 1909. Lawyers and merchants agree that the period which has elapsed since is not long enough to enable a definite opinion to be formed as to its working results. There was a diversity of opinion as to its usefulness from the first; on the whole, so far, none have changed their opinions.

Some thought, led by the Aeltesten der Berliner Kaufmannschaft, that the law constituted an uncalled for interference with a trader's freedom of action and enterprise; that the provisions were too paternal; and that, more especially the right of the superior administrative authority to interfere in the matter of sales, was a mistake, because such authorities were notoriously devoid of any commercial savoir faire. This opinion appears justified by the fact that the interests of individual trades were not considered by these superior authorities when fixing common dates, etc., of sales for the industries of their administrative areas.

The following are some of the criticisms which have come to my notice: The provisions aiming at the evil of bribery are deemed unsatisfactory in their present form by the large traders because the provisions do not go far enough. By the small traders because they go too far.

The provisions attempting to prevent the restocking for the purposes of a sale are resented by the wholesale trade, because its members may be held liable for such unfair practices indulged in by the retailers; while the retail trader has already discovered ways and means of circumventing these provisions of the law.

Again, in those cases in which the police authorities or the public prosecutor is entitled to intervene it has been found that too much is left to the initiative of those filling these offices locally; some are deemed to interfere too frequently, others to interfere too reluctantly. The public prosecutor is bound to interfere in the public interest; yet private protection societies, constituted for the purpose of watching over the fair application of the law, have found it difficult to move the public prosecutor, even when a particular society was unanimous that he should intervene in certain cases.

The benefits expected from the general clause (par. 1) have not been fully realized; the judges who are without any commercial training, hesitate to put it into operation because, as pointed out above, the same law has directed their notice to special offenses.

The severity of the possible fines is generally approved by the retail trade; but the fact that some of the abuses are to be visited with imprisonment is resented, because in certain cases the employer is held responsible for the act of his employee. On the whole, the provisions of the law dealing with "sales" can probably, so far, boast the most satisfactory results, though little can be found upon the subject in legal proceedings and the legal press.

Arbitration and Conciliation Committees.

As it had been found invidious and difficult for individual members in a particular trade to take legal proceedings against a competitor who might be a personal acquaintance in the same station of life, local trade societies or committees of the chambers of

commerce were formed to take up such cases. As a result most such offenses are now settled out of court. The law has given those bodies, which jealously watch over the interests of their members, an effective weapon; and the law, without being brought into operation, thus helps them to keep competition within fair and reasonable bounds.

The Chamber of Commerce of Berlin was the first to appoint an "arbitration committee" from among its members in matters of "unfair competition," and its example was soon followed by the Chambers of Commerce of Dusseldorf, Coblentz, Trier, and other cities. The functions of these committees are described as enlightening the masses of small traders upon the subject of the law, as educating them to a higher standard of commercial morality, and as arbitrating among competitors in cases of suggested infringement.

The chambers of commerce and other official trade organizations as such have in most cases declined to appoint from among their members committees for this purpose, because, as pointed out by the chamber of retailers at Hamburg, such corporations being parties to the actions they can not act as judges. However, in most cases these corporations have at least agreed to appoint one of their members as an expert to assist the conciliation committee. A translation of the rules for the constitution and proceedings of the Dusseldorf Trade Conciliation Committee is appended, because its scheme has been adopted as the model by most of the other trade conciliation committees throughout Germany (Appendix).

The Dusseldorf Conciliation Committee had between October 1910, and the end of January, 1912, been asked to intervene in 32 cases under paragraphs 3 and 3 alone. In 17 cases the matter was satisfactorily dealt with. The conciliation committees of Frankfort-on-Oder, Hanau, and Munich, on the other hand, reported at the end of the first year of their existence that they had had no occasion to take any action, either under paragraphs 3 and 4 or under any others.

In February, 1912, the Chamber of Commerce of Detmold circularized the German chambers of commerce to institute combined action for the collection of the names of commodities now being advertised for sale under misleading designations (paragraph 5). All chambers of commerce are to collect instances of "false designation of merchandise," so that eventually sufficient material be gathered together for the proscription throughout Germany of definite cases of false trade designations now generally in use. The Chamber of Commerce of Berlin had published such a list, limited to textile goods, as long ago as June, 1910. With a final list generally approved, says the Detmold Chamber, the task of trade conciliation committees under paragraphs 3 and 4 of the law will be greatly facilitated.

As evidence of the hesitation at first shown by the judicature in taking action on the strength of any cases brought to its notice by the conciliation committees generally, the resolution which the general meeting of the "Central Union of German Societies for Trade and Industry," Berlin, passed on October 24, 1911, is of considerable interest:

"This general meeting sincerely regrets that, even with the more stringent law against unfair competition now in operation, the judicature does not pay sufficient regard to the opinions expressed by the circles most concerned. The board of the central union is, therefore, requested to draw the attention of the minister of justice to this shortcoming, since even the official explanation annexed to the law has signified the initiative and the cooperation of the circles concerned as indispensable. The experience so far gained with the new law has taught that the professional committees can the more easily dispense with public litigation the more their proceedings are known to secure the support of the judicature."

It would appear that the memorandum handed to the minister of justice has already had a certain effect upon the view since taken by the various courts.

THE PUBLIC PROSECUTOR.

Criminal proceedings are by virtue of paragraph 22 of the law taken on the initiative of the public prosecutor in case of offenses against paragraphs 6, 7, 9, and 11 of the law. In these cases the public prosecutor has no option in the matter, and as a result a number of prosecutions have, since the passing of the law, constantly occupied the various courts. Yet some cases even under these four paragraphs would never come to the notice of the public prosecutor if his attention were not specially called thereto. The Chamber of Commerce of Freiburg has, e. g., reported (1911) that it had found itself compelled in certain special cases under paragraphs 7 and 9 to draw the attention of the public prosecutor to instances of glaring abuses.

In all cases, however, where the public prosecutor has an option in the matter there was at first a general disinclination to take up the cases, for the prosecution was only

too ready to declare that no public interests were involved and that the private individuals injured had their remedies under the law. Only in a few towns where the trade conciliation committees took particular pains in preparing the briefs for the public prosecutor less difficulty was experienced. In consequence of pressure brought to bear from above, a change of opinion has gradually supervened. Even so, the number of prosecutions has not seriously increased, for most infringements are dealt with in the first instance by the trade conciliation committees, and even if their efforts fail and the cases have to be brought before the courts, the cases are proceeded with civilly and not criminally, for the conciliation committees desire preeminently to achieve locally a discontinuation of the illegal practice complained of (with possibly civil damages for the persons injured); but it is not deemed in the interest of the industrial community as a whole to inflict upon the trade of the country the slur of frequent criminal prosecutions.

The position is somewhat different in the cases taken up by the Society for the Prevention of Bribing. This is not a local but a national society, whose membership includes others besides merchants (lawyers, etc.). The action of this society is prompted by motives different from those of the local committees, and there is a certain determination to invoke the help of the public prosecutor to put down the evil.

PRACTICAL EXPERIENCES IN THE COURTS.

The penal provisions of the law were not at first frequently applied. Even to-day their application is comparatively rare—certainly in comparison to the number of civil actions tried under the law. As pointed out at the beginning of this report, paragraph 1 of the law is used to support perhaps 99 per cent of all actions taken under the law; this paragraph 1 gives no remedy by way of criminal procedure. Admittedly criminal action is most frequently taken under paragraphs 7, 8, 9 (dealing with sales), paragraph 17 (betrayal of secrets), and paragraph 12 (bribery).

There is not necessarily any relation or connection between the award of civil damages and the conviction with payment of penalties. The civil and criminal actions are tried in different courts—the cases in which damages are claimed by way of criminal procedure (busse) are rare.

As to the quantum of the criminal and civil penalties the following general statements may be made:

(*a*) The cases of imprisonment are exceedingly rare; they are practically limited to cases under paragraph 17, viz, to cases where important trade secrets have been betrayed. Two such cases have been reported in the press. The case of imprisonment mentioned above (p. 17) in connection with an offense of bribery was in so far an exceptional case, as the court took a serious view of the fact that the employee receiving the bribe had altered the cheaper tender submitted by a third party.

(*b*) The penalties imposed tend to be low. The criminal cases under the law of 1909 are tried by the schöffengericht, i. e., a judge, and schöffen (nonprofessional judges). If the schöffen are noncommercial (e. g., artists, professional men, etc.) the fines are lower; if they are commercial they are higher, for such a tribunal is inclined to take a more serious view of the offense committed. It is true a possibility of imposing heavier penalties than had been formerly the case was granted by the law of 1909, the limit now being fixed at 5,000 marks, because it was thought that the penalties which could, until then, be imposed were out of all proportion to the profits made by some of the illegal practices, e. g., by illegal sales. If there has been no occasion for applying heavier penalties since the passing of the new act the reason is due to the fact that the prospect of imprisonment, which can be imposed with or in lieu of the penalties, has probably eradicated the worst abuses. A report from the Chamber of Commerce of Freiburg states that in several cases in which it had invoked the assistance of the public prosecutor "severe" penalties had been imposed; unfortunately, no further details are given.

(*c*) The civil damages allowed under the law vary, but are, as a rule rule, slight. The trade conciliation committees have practically throughout limited the amount of damages which they can allow; the amount where so limited does not, as a rule, exceed 15 marks in each individual case.

As far as the courts are concerned, the quantum of damages allowed depends greatly upon the constitution of the court which is called upon to try the case. In some districts the cases are tried by the Amtsrichter (a professional judge of the lower order). This class is proverbially devoid of "the practical knowledge of life," and the damages which it grants under this law are perhaps best described as "nominal." In cases in which the actions are tried by the Landgericht there is a better chance of substantial damages, because these courts have a commercial section, in which practical industrialists share the bench and they are better able to gauge the damage actually suffered.

A case recently tried before the appeal court is characteristic as a criterion of the amount of damages allowed. A combination of Munich brewers sued a Berlin brewery for selling its beer as "Munich" beer, in a manner tending to deceive the public concerning the true origin of the beer. As damages 5,000 marks were claimed. Though the Berlin brewery circularized 28,790 caterers and public houses and 400,000 private individuals for the purposes of offering the beer the labels and advertisements of which were deceptive, and though the Berlin brewery had admittedly succeeded in selling its beer, the superior court allowed damages only to the extent of 1,000 marks. The Munich breweries were, however, declared entitled to damages to the extent of 300 marks for each case of infringement after the publication of the judgment (Feb. 2, 1912).

APPENDIX.

RULES OF THE CONCILIATION BOARD FOR DEALING WITH CASES OF UNFAIR COMPETITION (DUSSELDORF).

1. The object of the conciliation board is to elucidate and settle disputes in cases of unfair competition, whether between persons engaged in commerce or industry or with associations representing the interests of such persons, within the area of the jurisdiction of the Dusseldorf Chamber of Commerce.

2. The conciliation board shall consist of a president, two members and an official of the chamber of commerce to act as assessors.

3. The president of the conciliation board, one member and six deputy members shall be elected by the chamber of commerce, the second member and six further deputy members by the retail trades committee of the chamber of commerce. In case the president is unable to act, the oldest member present shall take his place.

4. When a complaint as to unfair competition has been preferred against a trader, the president of the conciliation board shall at once inform him thereof and inquire whether he will recognize the conciliation board as the competent tribunal to deal with the matter. If such consent is not notified to the president within two days after the dispatch of the inquiry, it shall be presumed that assent has been withheld.

5. By laying a complaint before the conciliation board the complainant relinquishes the right of prosecuting the matter further before the ordinary courts. This right is restored to the complainant by the refusal of the defendant to consent to proceedings before the conciliation board.

6. Immediately after the defendant gives his consent to proceedings before the conciliation board, the president shall summon a meeting for as early a date as possible.

7. The president is only authorized to commence proceedings when he has ascertained that the following conditions have been complied with:

(1) The complainant must have deposited his complaint in writing, have made a definite application for decision to the board, have produced written evidence and furnished an exact statement as to any further evidence he proposes to submit.

(2) Complainant and respondent must appear in person or be represented by another trader holding written power of attorney.[1]

(3) Complainant and respondent must have signed documents showing:

(*a*) That they assent to the composition of the conciliation board and have no objections to raise against any members as being prejudiced;

(*b*) That whatever may be the result of the proceedings of the conciliation board, they will not take proceedings before the ordinary courts in the case in question;

(*c*) That criminal proceedings will not be taken, or, if commenced, will be withdrawn;

(*d*) That they will not publish the proceedings of the conciliation board or the result thereof by printing or otherwise, or in any way assist in such publication;

(*e*) That they will recognize the decision of the conciliation board as a final arbitration award.

8. Complaints made by a trader, who in the opinion of the board has at any time contravened the stipulations of section 7, shall not be admitted to procedure.

9. The decision of the conciliation board may not go further than the application made in writing, and, in addition, may only involve a fine not exceeding 250 marks, payable to the funds of the chamber of commerce for use in connection with payments for popular lectures.

10. The question of the payment of the costs of the proceedings, if any, shall be decided by the conciliation board.

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[1] The power of attorney must be stamped in accordance with law.

11. The decision of the conciliation board shall be discussed and agreed upon in secret session; it shall be communicated in writing to each of the parties concerned. A written statement of the reasons for the decision need not be given.

12. If several complaints are laid in respect of the same act, the conciliation board shall only take action when all the complainants join in taking action.

13. If, although a matter has been decided by the conciliation board, proceedings in regard thereto are taken before the ordinary courts, the board may refund either wholly or in part, if and so far as it thinks equitable, any fine which may have been imposed and paid.

INTERIOR LEGISLATION. GERMANY. LAW AGAINST UNLAWFUL COMBINATION.

JUNE 7, 1909.

We, William, by the grace of God, Emperor of Germany, King of Prussia, etc., order, in the name of the Empire and with the consent of the Federal Council of the Reichstag, the following:

SECTION 1. Every person who, with the end of competition, commits any business dealings contrary to good morals is liable to be enjoined from the commission of these acts or liable in damages. (Not sure about the injunction; the word used is technical—"assignee.")

SEC. 2. Within the meaning of the present law the term "merchandise" includes all agricultural products and those of trade and industrial interest generally. ("Praestation" refers to such trades as dyeing, etc., and is probably a poor substitute for the German word "leistungen.")

SEC. 3. Whoever in public announcements, or in communications destined to reach a large number of persons, shall have furnished on matters relating to commerce—and in particular on the nature, the origin, the mode of manufacture, or the price of merchandise, or any industrial trade activity, the mode of acquisition of merchandise or the source from which they come, on the possession of awards, or the cause or the nature of a sale, or of a quantity of stock in hand—false statements, and in such a manner as to give an offer a particularly advantageous appearance, shall be enjoined from continuing the use of such false statements.

SEC. 4. Whoever, with the purpose of giving an offer a particularly advantageous appearance, shall make in public announcements, or in communications destined to reach a large number of persons, statements knowingly false, and such as would lead to error in connection with matters relating to commerce—regarding business matters, and in particular to the nature, the origin, the mode of manufacture, or the price of merchandise or industrial activity, to the mode of acquisition of merchandise or the source from which it comes, the possession of any awards, the cause or nature of any sale, to the quantity of stock in hand—shall be punished by imprisonment of the maximum of one year or a fine of a maximum of 5,000 marks, or by either of these penalties.

When the false statements mentioned in the preceding paragraph come from an employee or agent of an enterprise, the proprietor or director of that last is punishable concurrently with the said employee or agent, provided he had knowledge of the act.

SEC. 5. The provisions of sections 3 and 4 are not applicable to the use of names employed in business dealings to designate certain merchandise or industrial activities which do not indicate the origin of these last.

The pictorial representations and other arrangements destined and liable to take the place of such statements should be included in the provisions mentioned in sections 3 and 4 and subject to their penalties.

SEC. 6. If in public announcements or communications destined to reach a large number of persons one publishes the sale of merchandise coming from a bankrupt stock, but no longer forming a part thereof, he is forbidden to mention in any manner whatsoever that the said merchandise comes from a bankrupt stock.

Any infringement of this mandate shall be punished by a fine of 150 marks in the maximum or by imprisonment.

SEC. 7. Whoever in public announcements or communications destined to reach a large number of persons publishes the sale of merchandise, qualifying it as a liquidation, must indicate in the announcement the cause which gave rise to the liquidation.

After having heard industrial representations and competent commercial representations the superior administrative authority may prescribe that, before proceed-

ing to the announcement of certain liquidations of a private nature, one may declare to the administration indicated by it (the superior administrative authority) the cause of the liquidation and the time when it shall commence, giving a list of the merchandise to be liquidated. Everybody shall have an opportunity to know the contents of these lists.

SEC. 8. Whoever after having announced a liquidation puts merchandise on sale solely in view of this liquidation is liable to imprisonment for one year and a fine of 5,000 marks in the maximum, or either of these penalties.

SEC. 9. Every other announcement for the sale of merchandise, due to retirement from business, the withdrawal from sale of a certain article, or the liquidation of a certain amount of merchandise placed in store, shall be under the same rule as to liquidation as shown in section 7, paragraph 2, and in section 8.

Liquidations for the purpose of seasonal change, or for the purpose of inventory, which are so designated in the announcement, and which are according to custom in the ordinary course of commerce, are not subject to the rules of sections 7 and 8. A superior administrative authority may, after having heard industrial and competent commercial representations, make statements relative to the number, the time, and the duration of the usual liquidations for seasonal change or for inventory.

SEC. 10. The following are punishable by fine of a maximum of 150 marks or by imprisonment:

1. Whoever, contrary to the rules of section 7, paragraph 1, neglects to indicate in the announcements of the liquidation, the cause which gave rise to that last.

2. Whoever acts contrary to the rules arising by virtue of section 7, paragraph 2, or who, in complying with the provisions of that section, furnishes inexact statements.

3. Whoever acts contrary to the rules prescribed by the superior administrative authority by virtue of section 9, paragraph 2, sentence 2.

SEC. 11. It may be decided by resolution of the federal council that certain merchandise can not be sold or put on sale in commerce except in conformity with certain units of number, dimensions, or weight, or except they are marked on the package with the number, dimension, or weight, as well as the place of origin or production of the merchandise.

In connection with the retail business of beer, it may be resolved that the bottles or jugs have their contents marked on them, regulating convenient limits for tolerated errors.

The resolutions made in this regard by the council (federal) shall be published in the Bulletin des Lois de l'Empire, and be submitted to the Reichstag immediately or at its next meeting.

Infringements of the resolutions by the federal council shall be punished by a fine of 150 marks at the maximum or by imprisonment.

SEC. 12. Whoever in the course of business or in the end of competition offers, promises, or accords to an employee or mandatory of an enterprise presents or other advantages, for the purpose of obtaining for himself or for a third person, thanks through the unfair operations of the said employee or mandatory, a preference in the obtaining of merchandise or industrial markets is punishable by imprisonment for a year and a fine of 5,000 marks or either of these penalties, unless some graver penalties are applicable by virtue of other legal provisions.

The same penalty is applicable to the clerk or mandatory of an enterprise who in business exacts, causes a promise of to be made to himself, or accepts presents or other advantages (to procure for third persons), thanks to his unfair operations, a (treatment of) preference over another in obtaining merchandise or industrial markets.

The judgment shall provide that the thing received or its value be confiscated for the profit of the State.

SEC. 13. In the cases provided for in sections 1 and 3, the action for prohibition of the unlawful acts may be brought by any industrial who manufactures or puts in commercial circulation merchandise or prestations, either identical or analogous, or by associations for the protection of industrial interests in so far as these associations are permitted to commence civil suits. The above said industrials and associations may equally bring actions to have restrained the acts committed by persons in violation of sections 6, 8, 10, 11 and 12 of the present law.

The following are liable in damages caused for their delict:

1. Whoever in the case provided for in section 3 had knowledge or was chargeable with knowledge of the falsity of statements furnished by him. One can not bring the action for damages against the editors, printers, or propagators of printed periodicals, unless they know the falsity of the statements in issue.

2. Whoever has intentionally or negligently infringed the provisions of sections 6, 8, 10, 11, and 12 of the present law.

If, in an enterprise, an employee or mandatory commits acts which are illicit in the terms of sections 1, 3, 6, 8, 10, 11, and 12 of the present law, the action to restrain the unlawful acts may be also brought against the proprietor of the enterprise.

SEC. 14. Whoever with the purpose of competition expresses himself concerning or mentions facts regarding the establishment (Erwerbsgeschaft) of a third person, or about the person of the proprietor or director of the establishment which are calculated to injure the business or the credit of its proprietor, must make good the damage to the injured party, in so far as he can not prove the truth of his assertions. The injured party may also bring an action against thim to enjoin him from repeating or spreading the affirmations in question.

If it is a matter of confidential communications, and if one who has made or received the communication has a justifiable interest in the same, the action to enjoin may only be commenced when the facts mentioned or spread are contrary to the truth. The action for damages in such a case can only be brought when the author of the communication knows or ought to have known the falsity of the facts asserted.

The regulation contained in section 13, praragraph 3, is applicable by analogy to the cases provided in the present section.

SEC. 15. Whoever expresses himself concerning and speaks of the establishment of a third person, or the person of the proprietor or of the director of that establishment, or about the merchandise or industrial activities of a third person, knowing that they are false, or makes false statements likely to injure the business shall be punished by imprisonment for a year and a fine of 5,000 marks in the maximum, or by either of these penalties.

When the statements mentioned in the preceding section have been made or spread by an employee or mandatory of an establishment, the proprietor of that last is punishable concurrently with his employee or mandatory, if he had knowledge of the unlawful act which was being committed.

SEC. 16. Whoever in business makes use of a name, firm name, or private designation of an establishment or of an industrial enterprise or of a print, in such a way as to create a confusion with the name, the firm name or the private designation of which a third person makes legitimate use, may be sued by that person and enjoined from such usage. He who has rendered himself liable to such an action must make reparation in damages to the injured party, if he knew or ought to have known that such wrongful abusive usage was calculated to create confusion.

The signs and all other matters destined to distinguish one establishment from another, which in the are considered as a distinctive sign of that establishment, are included under the term "private designation of an establishment." The present regulations are not applicable to the marks of merchandise and the condition of products. (Secs. 1 and 15 of the law of May 22, 1894, on marks of merchandise, Bill. d. lois de l'Emp., p. 441.)

The regulation contained in section 13, paragraph 3, is applicable to the cases mentioned in the present article.

SEC. 17. Every employee, workman, or apprentice of an enterprise, who, in the purpose of competition or with the purpose of harming a proprietor of an enterprise, has confided to a third person, during the legal duration of his engagement, commercial or industrial secrets which have been confided to him, or which otherwise have come to his knowledge, due to his employment, is punishable by imprisonment for one year and a fine of 5,000 marks or either of these penalties.

Whoever illicitly exploits or communicates to others, with the purpose of competition, commercial or industrial secrets knowledge of which he has obtained in one of the manners indicated in the preceeding paragraph, or by an act contrary to law or good customs, for which he would be rendered guilty, is punishable with the same punishment.

SEC. 18. Whoever illicitly utilizes or communicates to other models, prescriptions of a technical nature, and in particular designs, models, patterns, cuts, and receipts which are confided to him in the course of business, is punishable by imprisonment for one year and fine of 5,000 marks, or either of these penalties.

SEC. 19. Infringements of the provisions of sections 17 and 18 also make the delinquent liable in damages. If there are several delinquents, they are liable as joint debtors.

SEC. 20. Whoever, with the purpose of competition, excites others to commit an act in contravention of section 17, paragraph 1, or of section 18, is punishable by imprisonment for nine months and a fine of 2,000 marks in the maximum, or either of these penalties.

SEC. 21. The actions to restrain unlawful acts or for damages provided in the present law, are filable only within six months from the moment the injured party has had knowledge of the unlawful act and of the person of the delinquent, or independently of that, in three years counting from the date when the act was committed.

As far as concerns actions for damages, the period of prescription does not commence to run before the date when the damage was caused.

SEC. 22. Except in the cases provided in sections 6, 10, and 11, penal prosecution only takes place upon complaint. In the cases provided in sections 4, 8, and 12, each of the industrials and association mentioned in the first paragraph of section 13 has the right to bring complaint.

Every complaint may be withdrawn by its author.

Acts which are punishable and prosecution of which is only allowed upon complaint may be prosecuted in a private action by anyone having a right to complain without his having to go first to the public minister. The latter will only institute a public action when the public interest demands it.

The "echevin" tribunals (sort of aldermen) are competent to pronounce upon prosecutions by private action.

SEC. 23. If a condemnation is pronounced in one of the cases provided in sections 1, 6, 8, or 12, it may be ordered that the condemnation be published at the expense of the delinquent.

If a condemnation is pronounced in one of the cases provided in section 15, the injured party must also be allowed the right to publish, within a certain supplementary time, the condemnation at the expense of the condemned.

In case of acquittal, the tribunal shall at the demand of the accused order the publication of the acquittal; the expenses relating thereto shall be supported by the treasury of the State, if they have not been charged up to the denunciator or author of the private action.

If by virtue of one of the provisions of the present law an action has been commenced to enjoin unlawful acts, the judgment shall accord to the winning party the right to publish, within a certain supplementary time, the decree of the judgment at the expense of the losing party.

The mode of publication shall be fixed by the judgment.

SEC. 24. The tribunal of the department in which the defendant possesses his industrial establishment, or in default of that, his domicil, has exclusive jurisdiction of actions brought by virtue of the present law. The tribunal of the place where the defendant resides in the country or if he has no such residence, the tribunal of the department in which the illegal act was committed has exclusive jurisdiction of persons who possess no industrial establishment nor domicil in the country.

SEC. 25. To guarantee the right, mentioned in the present law, of obtaining injunction of unlawful acts, provisional orders may be rendered even in the cases where the conditions provided in sections 935 and 940 of the Code of Civil Procedure have not been fulfilled. The tribunal of the district (Amtsgericht) in the department in which the act which justifies the demand was committed is competent to give such an order; the provisions of section 842 of the Code of Civil Procedure are otherwise applicable.

SEC. 26. Besides the penalty prescribed by virtue of the present law, the injured party may demand that the offender be condemned to pay him a further penalty (Busse) the maximum of which is 10,000 marks. The persons condemned to the payment of this penalty are liable as joint debtors. The allowance of a further penalty excludes all other demand for indemnity.

SEC. 27. The civil process (proces) in which a claim is brought, by action (action) on the provisions of the present law, should, as far as the Landgerichte (superior tribunals of a province or county) have jurisdiction in first instance, before the parts of these courts which have charge of commercial business.

In the civil "proces" in which a claim founded on the provisions of the present law is formulated by means of an "action" or of an "exception" the deliberations and the decision in last instance, within the meaning of section 8 of the law introducing the law on judiciary organization, are within the jurisdiction of the tribunal of the Empire.

SEC. 28. One who does not possess a principal establishment in Germany can only invoke the protection accorded by virtue of the present law by a publication inserted in the Bulletin des Lois de l'Empire establishing that German industries enjoy an analogous protection in the country where the principal establishment is situated.

SEC. 29. The central authority of each of the Confederated States shall determine, within its territory, what authorities shall be considered as constituting the superior administrative authority within the sense of the present law.

SEC. 30. The present law shall take effect on the 1st of October, 1909. At this moment the law of the 27th of May, 1896, for the repression of unfair competition (Bull. des Lois de l'Emp., p. 145) shall cease to have force.

In faith of which we have signed with our own hand, and affixed the Imperial seal.

Given at the Nouveau Palais, 7th of June, 1909.

[L. S.]

GUILLAUME.
VON BETHMANN-HOLLWEG.

Law (No. 137). About Penalties for Using Incorrect Designation of Merchandise, Etc.

[Approved by H. M. King Christian X., June 8, 1912.]

Section 1. The party who sells merchandise, or offers merchandise for sale, must not place upon such goods, upon their labels or wrappers, on signs relating thereto, or upon billheads, invoices, and other business literature, designations which—

(1) Either contain an incorrect statement regarding the place (or country) of production of said merchandise, their brand, material, method of manufacturing, or, at least, are of such a character as to create an erroneous presumption in any of these respects; or

(2) Are calculated to give the purchasers the impression that all the various brands carried by the firm originate in the same place (or country) of production, or have been manufactured according to identical methods, although this is only partly the case; or

(3) Erroneously state that the goods have been awarded exhibition honors, or have been recommended by authorities, or have obtained patent protection still in force.

Violations are punished by fines of not less than 50, nor more than 2,000 kroner. Under aggravating circumstances, especially in case of frequent repetitions, the punishment may be increased to six months' ordinary imprisonment.

Furthermore, the defendant shall, if the incorrectly designated goods are still in his possession or at his disposal, be ordered by the judgment rendered to correct the incorrect designation or, if the goods have not been manufactured in this country, export said goods from the country, if he so prefers.

Sec. 2. If the incorrect designations of goods are published by advertisements in the press, by handbills, or by particularly conspicuous signs, such advertising will be considered an aggravating circumstance.

Sec 3. Designations that contain an incorrect statement as to the place of production of the goods (incorrect name of the place) are not liable to the penalties aforementioned when the designation in question, according to general views or to usage in the trade, indicates the brand or the method of manufacturing the goods and the like, but not the place of production.

Where the interest of public justice makes it desirable, a royal proclamation shall stipulate that certain designations are to be excepted from this rule. Violation of such proclamation is to be punished as mentioned in section 1.

Designations consisting of statements as to currency, measure, and weight will not be considered statements regarding the place of production of the goods. That another language than that of the country in which the goods have been produced, or whence they have been imported, is being used, does not in itself constitute an incorrect designation, but the decision in this respect is contingent upon the contents and the external form of the designation.

A designation which in itself is to be considered an incorrect statement regarding the place of production of the goods shall not be so considered when a plain and tangible additional statement, giving information as to the actual place of production, has been made.

Sec. 4. In this country it is forbidden to sell, or offer for sale, goods upon which or upon whose labels or wrappers has been placed the red cross in white field described in the Geneva Convention of July 6, 1906, of Announcement No. 174 of July 24, 1907, as an emblem and badge of the sanitary service of the army; this emblem has been formed by exchanging the colors of the arms of the Swiss Federation; it is likewise forbidden to use the designation "Red Cross," "Geneva Cross," or other designation or names having the significance of this emblem.

Violations of this rule are punishable by fines not more than 100 kroner.

The party who, without permission, uses the said emblem, designation, or name upon signs, in advertisements, on billheads, invoices, and other business literature is liable to the same penalty.

Sec. 5. If a stock belonging to a bankrupt or compromise estate or to an estate of a deceased person is being sold, no other goods may be added, provided that the sale takes place for the purpose of dissolving the business. A list of the goods, attested to by the executors of the estate, must be submitted to the local police authorities before the beginning of the sale, and is subject to the inspection of the officers or their authorized representatives of those local commercial and industrial associations which, according to the judgment of the authorities, are rightfully interested in such inspection.

At a sale of merchandise, lots that have been purchased from bankrupt or compromise estates or from the estate of a deceased person, it is forbidden to refer in adver-

tisements, announcements, etc., to the fact that the articles originated in such estate, provided that the sale comprises other articles than those originating in the estate.

SEC. 6. If a sale is to take place for the purpose of disposing of damaged goods, or for other alleged reasons, such as going out of business, removal, etc., a duly attested specified invoice is to be submitted to the local police authorities before the beginning of the sale, and this invoice is subject to inspection in the manner aforementioned in section 5. Thereafter no goods must be added to the sale.

SEC. 7. No merchant is permitted to hold more than two annual season sales, and none of these may last more than a month.

Exceptions may, however, be granted, according to circumstances, by the local police authorities.

SEC. 8. At auctions, where the sales articles belong to various estates or persons mentioned by name, the announcements and catalogues must plainly indicate to which estate or person the sales articles belong or have belonged.

If the sales articles have been manufactured or obtained for the purpose of being sold at auction, it must be expressly announced whether they are sold on account of the party demanding the auction, or of some one else.

SEC. 9. Violations of the rules contained in sections 5–8 are furnished by fines of not more than 600 kroner.

SEC. 10. In commercial relations it is forbidden everyone to use a name, firm, business emblem, etc., belonging to some other party; it is likewise forbidden to use legitimate designations in a way calculated to cause confusion with legitimate designations carried by another business house.

Violations are punished by fines of not more than 600 kroner.

SEC. 11. The party who in order to attract another party's customer circulates erroneous rumors about the business of said other party, of such a character as to be damaging to the business, whether the rumors concern the owner of the business, his goods, or rather factors related to the business, is to be fined not more than 4,000 kroner, the punishment being, under aggravating circumstances, ordinary imprisonment for not more than six months.

SEC. 12. The party who, either intentionally or by gross carelessness, circulates or uses information about business secrets acquired in the course of confidential relations as per contract, is to be fined not more than 4,000 kroner; the punishment being, under aggravating circumstances, ordinary imprisonment for not more than 6 months.

SEC. 13. In the retail trade, the so-called "good measure" is forbidden, provided that it does not exist in accordance with custom and usage, and that it consists of mere trifles which have no intention of attracting other merchant's customers.

Violations are punished by fines of not more than 100 kroner.

It is also forbidden to sell or offer for sale goods in original wrappers from producers or jobbers, upon which their fixed prices for the retail trade have been indicated, at a lower price, unless the sale is of the kind mentioned in section 6, or unless the permission of the producer or jobber, or other sanction equal thereto, has been granted.

Violations may, according to circumstances, be punished by fines of not more than 2,000 kroner.

SEC. 14. The minister of commerce and navigation is authorized to stipulate, in conjunction with the chief organizations of Danish commerce, industry, and trade, that certain articles in the retail sale may be sold or offered for sale only in prescribed unities in number, measure, and weight, or with an indication, placed upon the article or its wrapper, of number, measure, and weight, and a statement as to the place of the article's production.

Violations are punished by fines of not more than 600 kroner.

SEC. 15. Where violations of the rules of this law have taken place, and any individual person or business has suffered thereby, the courts are, while prosecuting the case originating in the violations, warranted in awarding an indemnity of not more than 1,000 kroner to the person or business injured, without regard to the fact that proof as to the extent of the damage can not be produced. During the prosecution demands as to fines by agreement may also be made. In such a case the fine agreed to will be considered indemnity.

SEC. 16. Prosecution is undertaken by the Government for violations of the laws section 3, part 2; sections 4 and 14. Violations of the laws section 1, of sections 2, 5, 6, 7, 8, and 13 are prosecuted either upon demand of the directly injured party or upon petition from the chief organizations mentioned in section 13 in the various parts of the country authorized by the minister of commerce and navigation for the promotion of business interests. Said organizations are also warranted in issuing injunctions against the violation simultaneously with reporting such violation. This injunction will be treated according to ordinary rules of justice.

The party who considers himself directly injured (for instance, by purchase of goods incorrectly designated, and sold with the incorrect designation), is, during the prosecution, entitled to recover damages.

Violations of the laws sections 10, 11, and 12 are prosecuted by the injured party.

The cases are treated like municipal court cases, in Copenhagen, before the maritime and commerce court.

SEC. 17. This law, whose rules of penalties are to be applied only where harder punishment has not been provided for by other regulations, goes into effect October 1, 1912.

At the same time law No. 70 of April 27, 1894, is repealed.

By royal proclamation the Government is authorized to enforce this law in the Faroe Islands with such modifications as may be practical.

SEC. 18. This law is to be submitted for revision to the ordinary session of the Rigsdag in the year 1916 at the latest.

(Thereupon at 5.35 o'clock p. m., the committee adjourned until 10.30 o'clock a. m., on Friday, March 13, 1914.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
ROBERT Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
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JACK BEALL, Texas.	LEONIDAS C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. STRIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 30.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, March 6, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. We have quite a number of gentlemen here to-day to be heard, and as our time is somewhat limited I will ask them to be as brief as possible and to come directly to the discussion of the tentative bills which are pending before the committee.

The first speaker on the list is Mr. F. P. Fish, of Boston, Mass.

You may proceed, Mr. Fish, and without in the least desiring to suggest the line of your argument or anything of that sort, I desire to again call your attention to the fact that we have this large number of gentlemen here to-day to be heard, and they would all like to get away to-day. I will ask you to make your statement as concise as possible.

STATEMENT OF F. P. FISH, ESQ., OF BOSTON, MASS.

Mr. FISH. Mr. Chairman and gentlemen of the committee, when a man goes on a stand in court to express opinions he qualifies himself, and as I propose to express opinions, and as I do not happen to be known to the committee, I would like to say a word as to why I think that I am justified in trespassing upon the time of this committee.

Thirty-five years ago I began to practice law. Almost immediately I drifted into the patent law. From that time to this I have been in close touch with many of the varied industries in this country. I have had occasion to find out their methods of doing business; I have had occasion to watch their growth and development, and I know something about their factory methods and their selling methods. During all that time I have endeavored to observe and to think about the great questions which are before you at this time.

Thirty-five years ago we were just about at the beginning of what may be said to be the era of modern business development. I think that the date of the beginning of modern times in the industries was about 1868, the time of the completion of the Union Pacific Railroad.

I propose to talk to you as a citizen, and I shall avoid absolutely everything that touches my professional relations or my obligations as a lawyer, and for that reason I shall say nothing on the subject of patents, that has been touched upon during these hearings, except one thing, and that is that I am firmly convinced that the patent system of the United States is our mainstay, and almost our only mainstay, against an innumerable number of influences which adversely affect our industrial development and our industrial prosperity. I urge you to give full consideration to that question before injecting into this situation any attempt to modify the substance of the patent law. That requires special investigation. I have prepared an inadequate pamphlet which sets out at some length my views on that subject. That pamphlet has been printed by the Senate, and I wish it were possible for Members of Congress to read it in order to understand thoroughly what I mean by that proposition.

I want to say just a word first with reference to the record of the proceedings before this committee, which I have read hastily, to be sure, but with the greatest possible interest. Some things in that record are striking. One is the very great patience of your committee and the interest which the members of the committee have taken in the great questions before you. I shall tax the patience of the committee to-day, if I may, by the general way in which I am going to deal with the subject, but I regard it as distinctly worth while to review the underlying principles of the situation.

Another thing has been impressed upon me by the reading of this record, and that is the very large number of cases in which those who come before this committee in favor of this legislation are obviously influenced purely by selfish considerations of their own affairs and sometimes evidently by a supposed grievance. That is an inevitable difficulty in such a situation; but the committee will undoubtedly be on its guard and recognize where a specific case is put before you that there may be another side to it, and that at any rate general legislation should not be based on an isolated case.

Most of all, I have been impressed by the tremendous complexity of the problems with which the committee is dealing.

Moreover, it seems to me that these proposed bills are all aimed at a situation that is not shown to exist now to anything like the extent to which it did at the time there was a public clamor for legislation of this character. If it does not now exist, such legislation may not be required, particularly if it can be shown that it will disorganize our industries.

I can not help feeling that the committee should carefully consider whether at the present time there is, to anything like the extent there was 10 years ago, the occasion for drastic legislation of this character.

Now, gentlemen, to justify my suggestion as to the existing situation, I must go back almost to the fundamentals. I have nothing to say in hostility to the Sherman antitrust law as a law, but I do ask the committee to consider whether at the present moment it should be touched or amended by way of strengthening it to meet conditions that I do not think exist to a harmful extent in this country to-day. I believe that conditions as to trade relations have changed, conditions as to alleged monopolies have changed, and conditions as to unfair practices such as may have existed and undoubtedly did exist have largely changed, so that the committee might well ask whether at the present time there is any occasion for legislation of this sort.

The general proposition I want to advance——

Mr. VOLSTEAD. Do you mean to say that the present law is sufficient to deal with those matters?

Mr. FISH. I think the present law needs clearing up in just one particular and nothing else. And that particular is this:

All these methods of business which are the subject of attack, those methods which have led to alleged monopolies—and at the present time there is hardly any such thing as an offensive monopoly in my judgment—those that have led to restraints of trade that may justly be complained of, are, as has been said so many times to this committee, the results of an inevitable, necessary, and automatic growth due to the conditions of the day.

They are here because a generation or so ago there came upon the industries the necessity for dealing with a radically new set of conditions brought about by the new methods of transportation and the scientific achievements and inventions of our time, and they are here because men found no other way to deal with the problem. Up to this time these methods that have been open to criticism, and very likely justly, were chiefly those of big business.

To-day I see indications that small business also is to be dealt with in something of the same hostile fashion, and I would like to ask the committee to give full weight to the consideration that it is very dangerous to attempt by legislation to change established methods of business. We should not try to do it unless we have studied the subject from the ground up in all its aspects and know that we are right.

I believe that the Sherman antitrust law as construed by the courts at the present time, while I am not sure it has done much of any good, reflects a phase of public sentiment that has brought about improved conditions. Our business methods have been improved rather as a result of a sound public sentiment than by the enforcement of the law.

This committee is dealing with the most serious problem ever put before a legislative body.

The CHAIRMAN. We realize that.

Mr. NELSON. What is your immediate thesis?

Mr. FISH. My immediate thesis is this, that after all the most serious element of our business situation to-day is the tendency to-

ward extravagant and destructive competition; that business men have instinctively tried to meet this evil, and in doing so have, through want of adequate experience, fallen into ways that were not consistent with the public interest; that public sentiment revolted against these methods, a phase of that revolt being reflected in the Sherman law; that wrongly construed that law would have been capable of bringing about the utmost harm, because it would have prevented perfectly legitimate ways of correcting the evils of unfair and destructive competition; that as it now stands, as construed by the courts, the good in it may be saved and its harmful tendencies eliminated; that if any legislation is wise, it is legislation that will make it clear that the Sherman law does not embarrass large enterprises so that they can not develop and work on normal and sound lines nor forbid in business, large and small, a great number of acts, straightforward and honorable in themselves and really in the public interest, because restraint of trade, not unreasonable or harmful, is involved in them; that many of the bills before this committee, if they became law, would force upon the Sherman law a construction that would embarrass business large and small to an extent that might be most detrimental to the public interest and establish a purely arbitrary and artificial rule as to acts in restraint of trade that would be distinctly unreasonable and harmful; that some of these bills, by reason of their vagueness and the general language employed, go far beyond any alleged evils and would make unlawful many common ordinary practices of a great number of small enterprises as well as of the comparatively few large business units of the country, which have always prevailed and which no one regards as objectionable; that the variety of business methods is infinite and the language of a bill which is only intended to meet some specific evil method may prove to extend so far as to forbid practices to which no one objects; and that in view of the complication of the situation, nothing should be done by way of legislation unless, first, it is clear that some evil now exists, not occasional or sporadic, but so general and so substantial that it must be checked, and unless, second, it is also clear that the consequences of the legislation will not be to unsettle and disturb business to the great detriment of the public. I should like to see the whole matter thoroughly studied by a strong commission before there is further legislation.

The whole matter is so complicated and the present situation so delicate that, in my opinion, any new legislation may well be ill-advised; nor do I think any necessary at the present time.

Mr. NELSON. Then your advice is to do nothing?

Mr. FISH. My advice is to do nothing, although, if anything were to be done, I should like to have the Sherman law amended so that it would clearly mean what the Supreme Court, as I understand it, construes it as meaning, which is, to quote from the Australian law (which was based upon our Sherman law) that no agreement in restraint of trade is unlawful and punishable unless it is to "the detriment of the public." I believe that many acts that may be said to be "in restraint of trade" are fair and honorable and distinctly in the public interest. There should be no law against such acts and the public should know that they are not prohibited.

Sound and reasonable cooperation has always been of advantage in all human efforts. It has from the beginning been continuously

practiced in business. As never before, cooperation is a definite feature of all activities of the present time. All cooperation involves understandings and agreements. I believe that it should not be unlawful for workmen to cooperate to better their condition, although I abhor many of the methods employed by them and think that such methods should be checked by law. I believe that farmers and tobacco growers should have the right to cooperate to secure reasonable and proper prices for their products but, of course, not on lines that are immoral or contrary to principles of fairness in trade. In like manner I believe that it is perfectly proper for retailers, wholesalers, and manufacturers to have trade understandings provided that they are not contrary to sound morals. In every one of these cases, the right to such cooperation and to make such agreements might well be qualified by the proposition of the Australian law that cooperation in all its aspects must not be to the "detriment of the public," taking into account the interests of the whole community and every portion of it.

It is sometimes suggested that some of the classes above named should be excepted from the Sherman law and other laws of like character. Any such exception or discrimination seems to me absolutely wrong. If any class in the community is to be burdened by restrictions against what might well seem to be normal and proper efforts for self-protection, all should be burdened in the same way. My contention is that all should be free within the limits of the public interest and right action.

There seems to me to be a most serious danger that the bills which are before the committee, because of their general character and the extent to which they go in declaring illegal many usual business practices which are ordinarily employed and which seem quite unobjectionable might, if they were enacted, demoralize business, large and small, and bring into the situation such difficulties and uncertainties as to cause great harm.

I believe to-day that the efficiency of those who handle large business is greatly reduced because of the cloud hanging over them on account of the fear of a more drastic interpretation of the existing law and of this proposed legislation, and that we are suffering, as a Nation, for that reason.

If any substantial portion of the proposed legislation is passed, the small man will suffer just as much as the large man, and a condition of demoralization may follow which will be of the most serious character.

Take, for instance, this matter of definitions in the definitions bill. Almost for the first time there is in this bill talk about "restraint of competition" instead of "restraint of trade." "Restraint of trade" has a legal meaning, and the Supreme Court has now construed the phrase. If that construction is left or made clear there will be the opportunity for flexibility that is absolutely necessary. All restraint of trade will not be forbidden, but, on the contrary, as I think should be the situation, it would be permitted, when reasonable, as the only way to destroy cut-throat competition. This bill as drawn is most rigid. There is no proof that its extreme positions are necessary. It would surely demoralize business and do great harm.

Take the next bill, the trade-relations bill; I think it might well be entitled "A bill to stifle legitimate competition," for that seems to be the scope of it.

I want competition of the natural kind, where every competitor is free to try to get the better of others in the same business by exercising intelligence, skill, and ingenuity in finding out how to improve the quality of his goods, to reduce their cost, and to market them to the best advantage. This trade-relations bill will interfere with this kind of legitimate competition. Quite consistent with this freedom of competition which this bill would stifle would be a recognition which I think should be in the law, that the tendency to cutthroat competition, which is ruinous to business and destructive to national prosperity and to the interests of wage earners, consumers, and everyone, might lawfully be checked by such understandings as to what is fair and decent as have always existed and exist to-day among professional men, tradesmen, workmen, and all other classes in the community, that charges made for services and for goods should, generally speaking, not be on a cutthroat basis; that they should be such as to give a proper return and allow a proper return to competitors. Full competition on the merits should be encouraged in every way. Cutthroat competition should not be encouraged. It should be discouraged. If it exists and reasonable agreements among business men are essential that it may not run riot, such agreements should be permitted, for they will not operate to the detriment of the public, but to its interest.

In modern business there is a great tendency to overproduction, which is a public calamity, for it means waste and the manufacture of goods for which there is no legitimate market; proper and reasonable agreements to steady production and thus prevent extravagance and loss, with a reduction of wages and a high cost of living as inevitable incidents, should be encouraged rather than forbidden.

Mr. NELSON. You want trade agreements?

Mr. FISH. I want the opportunity for proper trade agreements. They can be defined in such a way that there would be no insuperable difficulty in determining what was proper. The definition should be general and not undertake to go into details. Competition could then be promoted on sound lines. and if there is once introduced into this situation the element of flexibility you will find all business men responding to the conditions and inclined to obey the law instinctively. As it is to-day, they can not obey the law without what seems to them an arbitrary and unreasonable departure from natural and at the same time honorable ways of doing business, the necessity of which they can not understand.

Mr. NELSON. You say proper trade agreements can be defined, but you would not define them by legislation, but would have the courts define them?

Mr. FISH. I should say that the legislation should say something similar to what the Australian law states: Agreements not "to the detriment of the public" should be allowed even if some restraint of trade was involved; and there might well be in the law the further statement from the Australian act that in determining whether any such agreement was or was not "to the detriment of the public" due regard shall be paid "to the interests of producers, workers, and consumers." The courts could then fix standards, as they are always doing in all branches of the law and as is done under the Australian antitrust law, under which they will establish precedents and work out principles, as they have done under the Sherman law. The public

will be ready to obey the law in the form I am suggesting. While there is a sweeping prohibition against doing things which business men instinctively regard, from their experience, as essential to the proper conduct of business, the law can not be enforced and a tremendously bad situation follows. Business men desire to obey the law, but where it seems to them entirely inconsistent with common sense and sound, honorable, and long-established business practices they can not understand it. They naturally try to evade its letter, believing that its spirit must be consistent with what they regard as entirely legitimate methods. When business men are in this frame of mind, their efficiency is enormously reduced.

The Australian law to which I refer was before the English privy council in the case of the Attorney General of Australia *v.* The Adelaide Steamship Co., which is reported in the Law Reports of 1913, Appeal Cases, at page 781.

In that case, the privy council, affirming the highest court of Australia, held that a very comprehensive set of agreements among coal miners and steamship companies was not to the "detriment of the public," although the agreements fixed prices and output and generally restrained competition, because the situation was such that the relations established benefitted the public, workmen and consumers as well as producers. That case, the reasoning of it and the analysis in it of the Australian law and the economic principles upon which it is based, is well worth careful study.

Mr. McCOY. Who is permitted to start the operation of that law?

Mr. FISH. The attorney general of Australia, the law department and also individuals, if I remember rightly. It is a very instructive law. You will find an abstract of the law in the volume which has been published by your committee.

The CHAIRMAN. You mean the committee compilation?

Mr. FISH. Yes, sir; you will find it at page 363, but it is not all there. In the original law of 1906, the burden was on the Government to prove that the acts complained of were to the detriment of the public or were injurious, but later a law shifted the burden on this point to the defendants

Mr. NELSON. Are you in favor of amending the Sherman law in order to shift the burden?

Mr. FISH. I do not care much about that. All that I want is something which will say in effect that where there is destructive competition with the ruinous results which follow to producers, workmen, consumers and the public generally, it is not a crime, it is not wrong for men to get together in a reasonable way and say that they will not cut each other's throats; that they will not sell continuously at a loss or produce more goods than are really needed, so that the whole industry is demoralized and there is no return on capital invested, no chance for good wages and a real detriment to the public, including the consumer. Such destructive competition is almost a normal condition of business to-day for reasons which I should be very glad to go into if there were time.

That is the normal condition to-day because of forces which nobody can control.

Mr. TAGGART. Would you suggest any limit? If men can get together and agree on prices, would you put any restraints whatever on them?

Mr. FISH. If it please the committee, I should say that the court is just as competent to deal with that question as to deal with the questions that now come up under the Sherman law.

Mr. TAGGART. You have come down, then, to the question of reasonable or unreasonable restraint.

Mr. FISH. I want to have it clearly in the law that some such arrangements are not detrimental and are therefore lawful, leaving to the courts in each particular case to say whether they are or are not detrimental to the public interest.

Mr. TAGGART. Does not the provision of the Constitution guarantee free speech and the freedom of the press allow people to engage in any kind of business to meet together and to publish and to print and circulate information as to what things cost, what they are worth, and what they ought to be worth? Do you not think that provision of the Constitution fully protects the individual in doing that?

Mr. FISH. Yes; that ought to be so. I can not help feeling that perhaps that provision is not always thought of in that way, but I should be inclined to think that it does give them that protection.

Mr. TAGGART. The provision providing for the freedom of speech and the freedom of the press?

Mr. FISH. Yes. Now, gentlemen, taking up this same bill, which as I have said, might be called a "bill to stifle legitimate competition," I should like to call attention to the first clause, to which attention has been called so many times, and which reads as follows: "That it shall be deemed an attempt to monopolize trade and commerce among the several States or with foreign nations, or a part thereof, for any person in interstate or foreign commerce to discriminate as between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller." That is on the first page of bill No. 1, beginning at line 7.

Now, gentlemen, if you will study the existing business situation of to-day, I doubt if you will find that there is now a situation that requires such legislation. Is not that provision aimed at old grievances of the times when the Standard Oil Co., rightly or wrongly (because I do not know anything about its methods) was charged with such vicious forms of unfair competition in its efforts to kill off its competitors? If such things are done to-day to any such extent as to require legislative action, I believe that they are done in an inconspicuous way by the small men and not by the big men, because the whole atmosphere has changed.

Mr. NELSON. What is your authority for that?

Mr. FISH. Only observation.

Mr. NELSON. What kind of observation have you had?

Mr. FISH. I have been following the situation as far as I could—meeting men who are in business large and small, finding out how they talk, knowing something about the methods of a great many concerns, and getting information which would come to a man who is on watch for those things. I would like to ask what information you have to the contrary? Has there been any testimony before this committee that there is now any crying evil of the character dealt with by this bill?

Mr. NELSON. You are here to enlighten us.

Mr. FISH. And I can not do it with any real authority, because I am working for my living as hard as I can work and only incidentally thinking and trying to learn about these things. But the truth should be known before any action is taken, for this legislation would clearly work great harm in many ways and can only be justified by exact and certain knowledge that now (and not 20 years ago) there are evils in the situation so grievous that for the sake of curing them, the country can stand the harm which will follow in other directions.

After that question is answered, and it should be answered in the affirmative before such a law is enacted, there would be the further question as to whether such legislation would be effective. I do not believe that it would be effective or that it is required because of any substantial evils at the present time.

Mr. NELSON. If that is true, then you are right and there is no need for legislation. What business man had told you that these practices have ceased?

Mr. FISH. I am not talking about what they say. They talk little and think less as to such questions. To a large extent, they act instinctively in accordance with business laws that work automatically. It is what they do that is important.

Mr. NELSON. You believe that there are no more monopolies and trusts and that there is no need of any further legislation?

Mr. FISH. When it comes to the question of monopolies, my definition of a monopoly is this: It is an organization that controls an industry. There are few, if any, such to-day outside of temporary lawful monopolies of patented inventions and of some small industries that have for one reason or another escaped competition.

Mr. NELSON. Do you approve of the dissolution of the Tobacco Trust and the Standard Oil Trust?

Mr. FISH. I think that the dissolution of the Tobacco Trust and of the Standard Oil Trust can be justified, to a great extent, on other than economic grounds; but I think that an inevitable result of their dissolution was to increase the price to the consumer on oil and tobacco.

Mr. NELSON. Is that the cause for justification?

Mr. FISH. No, sir; that is not the cause. The justification is this——

The CHAIRMAN (interposing). Then you believe private monopoly is a good thing?

Mr. FISH. No, sir; I am not saying that. I think that there should be a clean-cut distinction in the minds of everybody who discusses it between the economic conditions and the social and political conditions which must always be borne in mind. I do not believe that from an economic point of view there can be any question that the Standard Oil Co. gave us oil cheaper than we could get in any other way. I do not think that the dissolution of that combination can fail to result in an increase of price.

But I do think there are social and political questions——

The CHAIRMAN (interposing). You think the dissolution of the Standard Oil Co. was a public calamity?

Mr. FISH. No, sir; for I think that there are social and political questions that must not be overlooked in connection with the economic issues which might justify its dissolution.

The CHAIRMAN. Will you tell us what you would do? Would you repeal the Sherman law in toto?

Mr. FISH. No, sir; I would not. I would put in an element of flexibility, so that the construction of the law by the Supreme Court shall be so recognized that there will be no longer any question that the "restraint of trade" referred to and which is forbidden is one that is harmful to our industries and to our people. That is a question the courts are able to deal with, just as they are able to deal with practical questions in every other branch of the law.

Mr. FLOYD. Let me ask you one question in connection with that section. You say that they have been applied to a condition alleged to have been had by the Standard Oil Co. rightfully or wrongfully years ago and no such things are being done now?

Mr. FISH. I do not think that there is any proof that they are being done now to such an extent as to require new laws on the subject.

Mr. FLOYD. What I was going to ask you is this, assuming that that was what you say, What harm would it do to prohibit a thing which is not being done?

Mr. FISH. The harm comes in the attack on perfectly legitimate business, perfectly legitimate methods of doing business that is involved in the phraseology of the proposed law, and I do not believe phraseology could be devised that would prevent such harm. It is the far-reaching character of the proposed law which goes far and away beyond the evils which it aims to check, which makes it, in my opinion, most dangerous to the public interest.

Mr. FLOYD. If the thing prohibited is where it is done with intent to injure or destroy a competitor, how does that infringe upon legitimate business if it is wrong for a party to deliberately set out to destroy a competitor?

Mr. FISH. Of course, intention may be inferred from acts. A man is supposed to intend the necessary consequences of his acts, and there is not a thing done in business that is not partly with the intent to injure a competitor. If this clause aimed only at a deliberate, persistent attack upon a competitor (and such things have been done) and would be effective to prevent that form of unfair competition, it might be a good law. But you would always come up against the difficulty that in attempting to meet an evil, you destroy and injure things that are absolutely without blemish. The language of the clause is general. It goes far beyond the conditions it is intended to meet.

If that clause had in it the words "without lawful and adequate reason," then it would be less harmful than it is in its present form, because there are any number of cases in which, for perfectly legitimate purposes, discrimination exactly within the language employed is practiced in legitimate business. I might call your attention to a few cases of that kind.

In the first place, the exceptions made do not touch the financial standing of the customer, and that often and properly determines the price at which he gets his goods. The man who is ready to pay cash is not recognized as entitled to favorable discrimination. But such men always have and always should be able to secure better prices. Here is a legitimate effort which promotes sound competition. Take this case: A man, say, is in business in New York or San Francisco,

doing business all over the country. In St. Louis some one starts a factory to compete with him and does business only in the St. Louis territory. To get business in that territory he puts his price below the price of the man in the East or the far West who can hold his trade near St. Louis only by meeting the cut price.

Now, under this proposed law the man in the East or the far West could not meet that price in St. Louis unless he would cut his price throughout the whole country; that is to say, the normal, healthy competition which will arise under such circumstances is forbidden.

Mr. FLOYD. Under every illustration you have given, how could a man act for the purpose of destroying a competitor?

Mr. FISH. Because the act leads in every case to the injury of a competitor and I object absolutely to legislation where there is danger that the business man who is affected by that legislation and who wants to obey the law may have to say: "Of course, if I go in there and reduce my prices in St. Louis to meet this competition, I shall injure that competitor and therefore my act may be criminal. I do want to injure him. I want to prevent his selling goods to my customers or to anyone else where I can get the trade. Under these circumstances what shall I do? Shall I take my chances under the law and meet this competition or shall I ruin myself by cutting prices everywhere, or shall I abandon the St. Louis territory?" If all this is in a man's mind, he becomes inefficient. More than that, he may do the wrong thing. He may be held to have violated the law.

Mr. FLOYD. If it is a case where he is charging a different price because of the long term of credit, how can you say that is either to injure or destroy a competitor; if he is charging a higher price, it seems to me the creditor gets the advantage.

Mr. FISH. The bill as drawn must be construed according to its language. It forbids "discrimination" if the intent is to injure a competitor. Any favor by which business is secured takes it away from a competitor and injures him. The intent is to injure him in this sense. There should be no such ambiguous and doubtful legislation on the statute books. If it, the act, were drawn so as to deal only with the deliberate effort to ruin a competitor and it could be so drawn, the legislation would be justifiable. But where it is in such phraseology that no man knows what is going to be the construction given to it, it is a most serious matter and it should not be left in that way.

Mr. TAGGART. What would happen to the St. Louis man if he started now?

Mr. FISH. You mean at the present moment?

Mr. TAGGART. Yes.

Mr. FISH. At the present time he would go in as business men have gone in from the beginning; try to get business. He would probably have to sell low to start with. Then his competitors, wherever they may be, will undoubtedly meet his prices and if this man has the right stuff in him, if he has the requisite capital to go into the business, if he is a man who ought to succeed, he will get his foothold, and he will build up his business and ultimately sell at proper prices.

Then there is another thing you must not forget. This St. Louis man may have located where the labor conditions are particularly favorable; he may have found some method or process in connection

with his business that is better than that used by his competitors, all of which will give him an advantage which will count for him if he is allowed to go on meeting competition and building up his trade as millions of men have done. He should have free play. But it would be unjustifiable to hamper the other man who finds his business established in that territory attacked and who is willing to meet the local competition on the spot in the old-fashioned business way. His underlying thought is not in any degree to injure this new competitor except as such injury is inevitable in trade. There should be no law to hamper either in the natural fight for business. The rest of the country is not affected by this local contest and there is no reason why it should affect prices elsewhere.

Mr. TAGGART. While he is doing all that, suppose some day some nice gentleman comes in and says: "You are tired; you have been working very hard and we will take over your business and put you on for so much stock; you shut up your house and quit." Do you not know that that is the thing which many times is at the root of the trouble?

Mr. FISH. I do not think so; it does not often happen. I think that was a temporary expedient adopted, many times foolishly, to meet conditions that seemed intolerable. Sometimes such a purchase and combination might well be in the public interest.

Mr. MORGAN. Would that not be covered by the existing law because that would be tending to create monopoly?

Mr. FISH. I think so. If such purchases are to be gotten at at all, they should be gotten at directly. If you want to say that no man shall buy out another, why not say so?

Mr. NELSON. Are you for or against cutthroat competition?

Mr. FISH. I am against it.

Mr. NELSON. Is that not intended to stop it?

Mr. FISH. I think the effect of this bill is to stop legitimate competition.

Mr. NELSON. How would you reach cutthroat competition?

Mr. FISH. I do not know. I fear that it can not be reached by legislation. This bill does not seem to me to touch cutthroat competition except, perhaps, in a few special cases; but it touches the every-day legitimate competition that you do not want to touch, in my judgment.

Mr. NELSON. You think the Sherman law reaches cutthroat competition?

Mr. FISH. I do not know whether it does or not. I do not think that it attacks it from the right standpoint.

Mr. NELSON. What would you suggest by way of a phrase or a provision that would prohibit cutthroat competition?

Mr. FISH. I do not think there is anything possible except a general phrase, and I am not sure that you can find one that would fit that case. I think it is impossible to prevent, by legislation, cutthroat competition in a nation of 100,000,000 people. It is a phase of our industrial development which has to be worked out by experience. Cutthroat competition is a deadly thing. If it exists generally, and our new business conditions definitely encourage it, our industries and our people can not prosper. I believe that in time we shall learn our lesson and largely eliminate it on the basis of intelligence and common sense.

Mr. NELSON. Do you stand for the competitive system?

Mr. FISH. I do, decidedly. I want competition to be just as free as the air, and also as a part and parcel of that competition that where the conditions are such that there comes in cutthroat competition which can be met in only one way, and that way is by understandings, that, provided they are not to the detriment of the public and provided they do not tend to be harmful to the public, such reasonable, proper, and beneficient understandings should be lawful.

Mr. NELSON. But the moment you start to let people agree on prices, human nature will tend to make that price too high, will it not?

Mr. FISH. Not in the face of modern competition. I do not think there is any danger on that point. There was a time 20 years ago when, as a temporary matter and for a time only, there might have been that danger. The time for it is now past, in my opinion.

Mr. NELSON. What is to hinder them?

Mr. FISH. Because they can never all get together——

Mr. NELSON (interposing). That is the very thing they are doing—getting together all the time.

Mr. FISH. It may be that within the last five years some small people have gotten together, but the general movement has been checked, partly by public sentiment and partly because experience showed that it could be and had been carried too far.

Mr. MORGAN. What would you think of the International Harvester Co.?

Mr. FISH. That is all ancient history.

Mr. MORGAN. But they exist to-day.

Mr. FISH. What I might say as to any particular large business now existing would not help the committee. I think that that company is now a benefit rather than an injury to the public. The administration is trying to break it up. More harm than good would come from so doing, in my opinion. I do not want to go into that question. I want to deal with the situation as of to-day.

Mr. NELSON. But you must know that public sentiment is one thing one day and another thing on another day?

Mr. FISH. I am not talking about public sentiment.

Mr. NELSON. But we have got to legislate with the view of preventing a thing which has happened, because what has happened once may happen again.

Mr. FISH. Slavery happened once. So did persecution for religious beliefs. We should not legislate now on the theory that they are present-day dangers. If a thing happened long ago, it may not be a real evil to-day. It does not seem to me that legislation is needed because we lost our heads in business 20 years ago. What is the situation to-day? There is no proof before this committee that there are now evils so great and far reaching as to require this legislation. If proof exists, this committee should have it before acting. My proposition is that we have lived through an era which developed extraordinary evils side by side with the most extraordinary good that ever came into the industries; that those evils were of a temporary character; and that there is no occasion for dealing further with those evils unless you have proof that they are existing to-day to such an extent as to require attention, which I do not think you can get. But the great point is that no step should be taken to meet them which involves so great a demoralization of legitimate

business and sound business methods as might follow this proposed legislation.

The CHAIRMAN. You filed a brief in the case of Bauer v. O'Donnell, which is reported in volume 229 of the United States Supreme Court Reports, which case was known as the Sanatogen case, did you not?

Mr. FISH. I did.

The CHAIRMAN. You represented the Gillette Razor Co.?

Mr. FISH. Yes, sir.

The CHAIRMAN. You wanted the court to declare the right of your client to fix the resale price?

Mr. FISH. Yes, sir.

The CHAIRMAN. And that is what you want this committee to do to-day, to legislate along the lines of your contention before the Supreme Court of the United States, is it not?

Mr. FISH. I want the committee to let business alone as far as it can and at any rate to be sure that no legislation is recommended that will do more harm than good.

The CHAIRMAN. Whom do you represent here to-day?

Mr. FISH. Absolutely no one but myself. I do not propose to touch a question in which I have any professional or personal interest except as a citizen.

The CHAIRMAN. You made the contention in the Supreme Court which I have referred to?

Mr. FISH. Yes, sir; I did not argue the case.

The CHAIRMAN. The court held that neither the Sanatogen people nor the Gillette Razor people could fix a resale price?

Mr. FISH. Yes, sir; and I want to be perfectly frank in saying that I think it was unfortunate that the court was obliged to come to that conclusion and that this will be so recognized later. It seems to me unfortunate for the manufacturers of specialties, unfortunate for the consumers, and particularly unfortunate for the retailers that such methods of sale as were condemned in the Sanatogen case should not be recognized as lawful and effective. At the present moment a drastic change in our industrial relations and methods of distribution seems imminent, which may lead to the elimination of the retailer and which is leading now to the elimination of the country store. Mail-order houses and other like distributing agencies are threatening to take the place of our jobbers and retailers. Now, if the legitimate development of business leads to the elimination of the jobbers and the retailers and the substitution of the mail-order houses, no one can have anything to say. The natural trend of events will and should be controlling. But it seems to me too bad to force the abandonment, either by judicial decisions or by legislation, of trade methods that have helped the retailers to maintain their position. Therefore I regret the Sanatogen decision as I should regret the passage of the bills before this committee, many of which I think will hurt the retailers. I fear that, to some extent, the Government is to-day giving these mail-order houses and other like distributors an unfair advantage, in part financing them, by affording a parcel-post service at too low rates, just as it may be helping the great advertisers unduly by the low rate at which it carries second-class mail matter.

The retailers who have come before you——

Mr. NELSON (interposing). Have you got the cause located in those two things that you mentioned? Is not the real difficulty due to the fact that certain business concerns have excessive capital, extraordinary capital, in regard to which the small man can not compete with them?

Mr. FISH. I do not think so. The small retailers have been a necessity to distribution. The changed conditions have affected them unfavorably, but I think that their condition will be still more precarious if there is too much interference with standard methods of doing business that are not in themselves reprehensible.

Mr. FLOYD. You spoke about the retail business falling off, the country merchants going out of business. This decision of the Supreme Court you refer to was only rendered last year. Had not that condition been going on for 10 or 15 years?

Mr. FISH. That decision is not the reason for the falling off up to date. It may be a type of incidents that have worked to their disadvantage.

Mr. FLOYD. Is not the reason for it the very system that you are trying to get us to permit to be reinstated under some legal authority?

Mr. FISH. I am not at all sure but that the mail-order houses are going to supplant the present methods of distribution. If they supplant them because of the natural development of business or because they can do the work more economically, nothing should be allowed to stand in the way of their doing it.

I think socially it would be an unfortunate thing to kill the retailer or the country store. And I do not think the Government ought unnecessarily to embarrass them by giving an unfair advantage to the mail-order houses.

Mr. FLOYD. That is a matter that is not before this committee.

Mr. FISH. I understand that.

Mr. FLOYD. Let me pursue your suggestions a little further. Now, you made the statement that the retail houses, and especially the country stores, have been declining and going out of business, and I concede that that has been true for 10 or 15 years. And is not the real cause of that the fact that the big manufacturers in leading lines of business fixed not only the resale prices and the jobbers' prices but the retail price to the consumer?

Mr. FISH. They sometimes sell direct to the consumers.

Mr. FLOYD. The jobbers fix the price at which the retailer might sell to the consumer, and is that artificial condition not the result of the decline in the retail business throughout the country and the direct cause of making the mail-order houses profitable, because they are the only institutions that are able to compete with those arbitrary prices?

Mr. FISH. Selling direct to the consumer inevitably affects the retailers and the country stores.

Mr. FLOYD. You are evading my question.

Mr. FISH. No, sir. I do not think the method of carrying on distribution which was practiced by a relatively few makers of specialties and which resulted in a fixed price for the retailer to the consumer. I do not think that that has worked to the disadvantage of the retail store. I do not believe that the retailer would so state. On the contrary, I think that they will say and do say, that the system has

worked to their advantage and that they want it continued as much as does the manufacturer.

Mr. FLOYD. Let me take the illustration of the Gillette Safety Razor Co.

The CHAIRMAN. Your clients?

Mr. FLOYD. We have had a number of people before this committee other than those who have been advocating and we had one man who gave some interesting detailed facts in regard to the sale of this Gillette razor. It was sold by the manufacturer——

The CHAIRMAN (interposing). What is the cost to the manufacturer of the Gillette safety razor?

Mr. FISH. I have not the slightest idea.

The CHAIRMAN. I have been told it is 75 cents.

Mr. FISH. I never have had any means of knowing.

The CHAIRMAN. And that they require a contract of the retailer that he will sell it to the consumer at $5. It is sold to the jobber for $3, and the retailer is required by contract to sell it to the consumer for $5.

Mr. FISH. That I do not know anything about.

The CHAIRMAN. You stand for that proposition to-day?

Mr. FISH. Absolutely; in the interest of the retailer and in the interest of business generally.

Mr. FLOYD. I had in mind another instance, in regard to the frames for eyeglasses. We had testimony presented to this committee that these eyeglasses cost $1.25, and the manufacturer sold them at $1.25, and the jobber sold them at $2 to the retailer, and the retailer was required to sell them to the consumer at $5, and was given the exclusive right to sell those eyeglasses at $5. I want to ask you to state if you think the effect of that would not be to drive out all competition and to put every retail dealer in a position of having to try to sell the article with the enormous profit.

Mr. FISH. I do not think so. There is any quantity of competition in that business, and I think the effect is simply this, that the retailers become interested in the goods of the manufacturer and will push them. One retailer is interested in the goods of one manufacturer, and another retailer is interested in the goods of another manufacturer, and the public can have their choice and can go to one place or the other.

Mr. FLOYD. Let me ask you this question, which involves the question of right: When a manufacturer makes an article and sells it to a retail dealer for cash, what moral right—you have no legal right under the decision of the Supreme Court—what moral right has the manufacturer to exercise control over the property of the man who has bought and paid for it, even though he did manufacture it?

Mr. FISH. Simply because it is part of the agreement.

Mr. FLOYD. What right has he to make any such agreement?

Mr. FISH. Why should he not have the right? It is merely an incident of the scheme of distribution which this man has devised.

Mr. FLOYD. In answer to my question you asked me one, and you ask why should they not have the right.

I will illustrate that by an incident that occurred in my experience. I was talking to a jeweler who is a resident in my own district, and he said if these manufacturers would turn over their goods to me

and allow me to sell them on commission I would not object to their fixing the price, but he said they sell them to me for cash and make me pay cash for them, and then they fix the retail price at which they allow me to sell them to my customers.

He showed me a card from one of his houses which fixed the retail price and the wholesale price to the jobber, and the price at which they should be retailed, and at the bottom of the card was this statement, "We will pay a reward of $10 to anyone who will furnish us with reliable information as to any of our customers who have been guilty of cutting prices." They bound him to that agreement, and the punishment, so he told me, for the violation of that agreement was that he could not buy another watch in the United States.

Now, he said to me, "This is the way it works. I have been in business here for a number of years. This property is mine. I have bought and paid for it; but if, in order to improve my condition, I decide to go to a larger town where this stock of jewelry would be entirely unsuitable to the trade in that place and I should undertake to put these watches up at auction and sell them to my neighbors and give them the benefit of the reduced price, I could not buy another watch in the United States, and I would be put out of business." Do you approve of that?

Mr. FISH. You are looking at it from the point of view of the retailer. I am not approving of any specific contract because I have not seen the contract, but I am approving of that system of doing business because experience has shown that the retailer is glad to deal on that basis. He makes money out of it, and the consumer gets fair treatment. The retailers all over the country would be, to a large extent, disturbed if there were not some way in which the prices to the consumer of these special articles could be fixed, because unless the prices are fixed, they can not carry the goods and they will not make the profits.

Mr. FLOYD. I think you are—I beg your pardon. This man of whom I am speaking was not glad to deal in that way. He was complaining of having to deal under that system.

Mr. FISH. That is one. You have had a lot of men before you, but, as far as I recall, few retailers who complained of this system of sale which was condemned in the Sanatogen case.

Mr. FLOYD. Let me give you an instance of rising prices. This also occurred in my district. Those in control of the price of cotton thread served a notice on all the merchants of the town of Bentonville to raise the price of cotton thread one cent a spool above the former price. It was then selling at 5 cents. One firm refused to do that. Then they sent an agent hundreds of miles to confer with this firm of merchants in order to try to persuade them to raise the price of cotton thread 1 cent a spool. They still refused.

After they returned, that dry goods company received a notice stating that unless they raised the price of that cotton thread to 6 cents a spool, the thread which had been selling at 5, no more spool-cotton thread would be shipped to that house.

They wrote the manufacturers a sharp letter in reply, stating they bought their goods for cash; that they had never had any dealings with the person writing them; that they bought their entire outfit and supplies from Hoffman & Co., a wholesale dry goods house doing business in their own town.

Thereupon this agent notified Hoffman & Co. that if they sold any more spool cotton thread to this dry goods company of which I have been speaking that no more spool cotton thread would be shipped to Hoffman & Co. Do you approve of such business of that?

Mr. FISH. As you state that I should say it was extremely absurd and almost disreputable.

Mr. FLOYD. Fortunately for us we had an antitrust law in our State, and the wholesale house of Hoffman & Co. referred the communication to the attorney general of the State, and that was the last that was ever heard of that transaction.

Mr. MORGAN. That had nothing to do with price fixing?

Mr. FLOYD. Absolutely; it did have to do with price fixing. They demanded a raise.

Mr. FISH. Not the price fixing we are dealing with?

Mr. FLOYD. Just exactly. They were proposing to raise the price already fixed.

Mr. FISH. The price fixing I was talking about was that of the Sanatogen case, and the point involved in the case which you described seems to be different from the point in the Sanatogen case.

Mr. FLOYD. But if you can do the one you can do the other; if you can fix it and keep it stationary, you can raise it and keep it stationary.

Mr. FISH. There is an old saying that hard cases make bad law, and in the infinite number of commercial transactions which are carried on to-day, I doubt if there is a substantial number which go over the line.

Mr. MCCOY. The instance which Judge Floyd gives appears to be the case of a combination among the manufacturers of spool cotton to keep up the price of the product of all of them, whereas the so-called price-fixing cases refer to the desire on the part of the manufacturer of a well-known article to fix the price at which his article shall be sold and the other manufacturers can do what they please.

Mr. NELSON. As I understand it, you want not only the individual manufacturer to have the right to fix the price but you want an agreement.

Mr. FISH. I do not want an unnecessarily drastic intereference with business practices that are not in themselves unfair or dishonest. I believe that proper and reasonable understandings between those engaged in business, which will in a reasonable way check cutthroat competition and which are not to the detriment of the public, should be permissible.

Mr. NELSON. If the American Congress ever permits trade agreements, human nature will make those agreements so high, I mean the prices will be at such a point that we will have to have a commission to pass upon those prices, and the moment we have a commission passing upon prices we have ceased from private ownership and have embarked upon public ownership.

Mr. FISH. I appreciate the point of that; but I am satisfied that agreements of that sort in a country like ours and under modern conditions will never be a matter of such danger and never can result in excessively high prices. I do not think there would be the slightest danger if there was the element of flexibility in our law that there is in the Canadian law or the Australian law.

Mr. VOLSTEAD. Would not this be a necessary addition to the law, that you would have to compel publicity of what these corporations are making?

Mr. FISH. I think that is highly probable, but individuals would make them as well as corporations.

Mr. VOLSTEAD. So that in case they were permitted to make these agreements the public would know by means of publicity whether they were being robbed.

Mr. FISH. I think that would be reasonable and not objectionable, and that some way of doing it might be found.

Mr. FLOYD. Let us take the case of the eyeglass again. That eyeglass is manufactured for $1.25 and sold to the jobber for $2, and sold to the retailer for $3, and sold to the consumer for $5. Do you not think if you gave those facts to the public it would be more detrimental to the trade than cutthroat competition?

Mr. FISH. No, sir. Do you happen to know how much money the manufacturer made on the capital he has invested?

Mr. FLOYD. He would not tell us.

Mr. FISH. The question of cost is not the only determining consideration.

The CHAIRMAN. I think he said his business was capitalized at about $400,000. He said he had some 2,000 men working in his factory, and he seemed to be a very prosperous man.

Mr. FISH. I think probably you would find he was not making an unreasonable profit in that business.

The CHAIRMAN. He manufactured that attachment, among other things, and sold it at a price of $1.25 to the jobber, and required the jobber to sell it at $2 to the retailer, and required the retailer to sell it at $5 to the consumer. In all your argument what regard are you having for the consumer, the man who must ultimately use the article? You forget him entirely.

Mr. FISH. Oh, no; not at all. The Congress of the United States, of course, is legislating in the interest of everybody, and not in the interest of any one particular person. It has to legislate in the interest of the workman, in the interest of the consumer, in the interest of all classes of people. It has to take everything into account, and it has got to find the kind of compromise legislation that is best suited to the situation. It can not do what every man would like to have done for himself.

On this question of resale prices the situation is this: A substantial number—several hundred enterprises, perhaps—have found they could not get into business or succeed in business except by that system of distribution. By means of it they have built up a business to the benefit of the retailer and the jobber and to their own benefit and to the benefit of the public generally; they have found that that system of distribution has been satisfactory to everybody concerned.

Mr. NELSON. You would not want the Gillette Razor Co. to have the exclusive price-fixing privilege, excluding other manfuacturers in the same line?

Mr. FISH. No.

Mr. NELSON. Let us take the case of the farmer who uses the name "Sunnyside" on his goods. Would you want him to go to the retailer and say, "I want you to charge such and such a price to the consumer for my products."

Mr. FISH. I do not want a thing done that is not in the line of sound business advancement.

Mr. NELSON. Would you accord that privilege to him?

Mr. FISH. Yes; if a man can persuade the public that there is nothing like the Sunnyside potatoes or Sunnyside butter; if he has built up a reputation for the products which go by that name, and built it up solely on their merit, so that the public are bound to have the Sunnyside goods, and he finds it a simple and adequate system of distribution by which he can attract the retailer and attract the interest of the jobber, and if that system involves the fixing of prices, I should say there is no objection to it.

Mr. NELSON. But suppose there is also a trade agreement by which the farmer fixes the prices to the consumer, what would you say as to the effect of that on the cost of living throughout the country?

Mr. FISH. I should say that it is impossible that any substantial harm can be done in that direction.

I think one very marked cause of the high cost of living in this country is the fact that business is too much hampered by interference, well-intentioned interference, and I think that if that interference is going to be increased in small as well as in large business, the high cost of living will increase with it.

Mr. NELSON. Up to this year, what hampering of business have we done?

Mr. FISH. The decision in the Sanatogen case was a hampering of business.

Mr. NELSON. The cost of living was high before that decision was rendered.

Mr. FISH. That is only one case. The fact that the Sherman antitrust law was uncertain, and it was not known what men could do under it until the decision in the Standard Oil case, and even that did not clear up the situation.

Mr. NELSON (interposing). Up to a few years ago, was not the Sherman antitrust law a dead letter, after the Knight case?

Mr. FISH. I think it was. But its very existence and the fear of it was interfering with business.

Mr. NELSON. In what line of industries did it prevent combinations?

Mr. FISH. I do not believe that it prevented combinations; I think it promoted combinations. I think that one of the results of the Sherman law that was inevitable was the organization of the great corporations.

Mr. NELSON. Then what becomes of your argument that it hampered business?

Mr. FISH. Because the fear of it was there; I do not think that it was only a question of forming big corporations. It has been during the last 10 years that we have had the high cost of living emphasized among us. I think that one of the elements leading to that has been the uncertainty of business men in relation to the future. It is not so much what has been done but what they feared might be done and I think that fear of possible interference with prevailing business methods has brought about a feeling that has hampered business and rendered it inefficeint to a marked degree.

Mr. TAGGART. Do you not fail to have in mind the man who is capable of doing something, who is a genius, the fellow who, perhaps,

has something of use and benefit and who wants to make something, and who can put into it a degree of excellence that has not been put into it before, and who wants to put it on the market, whose great ambition is to work out his own capacity—the American citizen who starts his little work, his business of making something that has great excellence to it, and that will attract the public? Will you let the great big concern, which is willing to take a part of its capital and sacrifice that in order to destroy this man, will you let that concern be protected or will you protect him in his ambition? Has he not as much right as the fellow who has power to destroy him? Who has the right, the destroyer or the destroyed?

Mr. FISH. There are quite a number of questions there. There is no man in the community for whom I have so much sympathy as that man, because we have had him with us always and he has played a great part in our development and it would be a detriment if he did not succeed. But that man is succeeding to-day.

Mr. TAGGART. At the salary of $15 a week.

Mr. FISH. No, sir. He is building up his business and making it into a larger one. I am ready to admit that the several conditions which have come automatically and which are not at all confined to the supposed evils at which the Sherman law was aimed have brought about a situation that is detrimental to that man, exactly as conditions that are not affected by any legislation have brought about a situation detrimental to the retailer, and there is no way in which legislation can touch that question.

What difference does it make what my theory is on the subject? These conditions are here and they have come largely by the law of development, based upon the scientific discoveries and the inventions and the changes in transportation methods of the past 50 years, and they can not be controlled. To the extent to which he is embarrassed, I am sorry for the man, but legislation can not control the laws or the conditions of industrial development. We have got to go back and wipe out the big steamship lines, the railroads and all the achievements in machinery, in chemistry, electricity, and ten thousand other things before we can reach the point where that man can have the comparatively easy path that was before him 50 years ago.

Mr. TAGGART. Will you suggest a middle course, under the act, that will require them to lower their price throughout the Union to meet him in one town? That is one extreme. The other extreme is that an American citizen undertakes to do something in the way of manufacturing and he is destroyed by another American citizen simply because the other citizen has the power to do so.

Mr. FISH. Is there any proof before the committee that that is going on?

Mr. TAGGART. I have seen proof of it with my own eyes.

Mr. FISH. Not in the last few years.

Mr. TAGGART. In the last 10 or 15 years. I do not know of anybody trying it recently. But I saw that very thing done with a paper mill which had a flourishing business, and one day they gathered the former owner of the mill, they gathered him like the son of the prophet of old, to his fathers, and his paper mill is now a bat-haunted old structure in Kansas.

Mr. FISH. I see industries started all the time and going on, and nobody asking them to sell out.

Mr. TAGGART. He is getting 10 per cent on his stock now.

Mr. FISH. I have seen men succeed after they have started——

Mr. TAGGART. When you get one set of people doing it all, you have socialism.

Mr. FISH. You are never going to get that. There is not any tendency that way.

Mr. MCCOY. There is one statement you made which I would like to call attention to. You speak of this development going on in this country as being a perfectly natural development.

I do not know that I have the facts clearly in mind, but it was supposed at the time, I think, when the Federal Steel Co. was organized that the reason—the inciting motive—for its organization was the fact that Mr. Carnegie was going to build a wire mill, and they became afraid of his competition.

Mr. FISH. You mean the present steel company?

Mr. MCCOY. I think it must have been the present United States Steel Corporation. Was not that rather an interference with the ordinary, natural course of events, rather than its being in the natural course of events?

Mr. FISH. When I spoke of that, what I referred to was first the fact that in the old days there was a local barrier against competition due to the fact that transportation difficulties were so great. That local barrier has all disappeared and does not control in the selection of the location of a plant. It is now a question as to convenient access to the source of supply of the raw materials and the most advantageous labor market. Men now get into the most advantageous situations, often in the same neighborhood, and, taking advantage of our wonderful facilities for transportation, compete all over the country. That is one of the reasons for cutthroat competition.

The next reason is this: Everybody knows that the fundamental proposition of manufacturing is that the larger the output the less will be the cost per unit of output. Every one tried to increase his output that he might reduce his cost and so have an advantage over his competitors; but all sought to do this at the same time in the only way in which it could be done—by underselling. The result was cutthroat competition which threatened ruin to all.

Mr. MCCOY. In the late nineties, I think people got to the point where they considered that all these floatations of large enterprises were based on necessary economic conditions. My point is that they were based on the fear of ordinary economic conditions, namely, that the development of competition was going to hurt somebody already in the business.

Mr. FISH. They were largely based on the fear of cutthroat competition.

Mr. MCCOY. Then the organization of the large corporations, that is the thing that has gotten us into this trouble to-day, was because they were trying to do something unnatural to prevent something which was natural. That is the same thing in the case of the New Haven Railroad. Everybody thought when all those consolidations were going on, on account of Mr. Morgan's reputation, that that was the natural course of competitive business. Now we know better and we know that they were trying to create something artificial.

Mr. FISH. They were trying to find some way to prevent cut throat competition. They found this way because they did not have brains

enough to find another way. But that would not be done to-day, to anything like the same extent, at least in big enterprises.

But there came another element, and that was the promoter.

Mr. McCoy. When they found that Mr. Carnegie was going to build a wire mill, why did they prevent him doing so?

Mr. Fish. Because they did not want that competition.

Mr. McCoy. That is very true, but it was not on the basis of the fact that they recognized that only big business could handle these goods, because that was simply big business coming into another enterprise.

Mr. Fish. There were various reasons that seemed good, and that were not so good as they seemed, and then there came in this other element, the element of the promoter.

Mr. Volstead. Does the consolidation still exist?

Mr. Fish. To some extent, yes; but in my judgment it is harmless.

Mr. Volstead. If there is no remedy against that, if it is an injury to the public——

Mr. Fish (interposing). I do not think there is any proof that it is an injury to the public.

Mr. Volstead. Of course, there is in the public mind generally the feeling that any combination of that kind which begets a monopoly becomes an injury to the public.

Mr. Fish. I do not think there is a real monopoly of any moment, in the offensive sense. Let me say one thing which I firmly believe. I think the public sentiment to which you refer is not against large business. It is not against the big concern. I think that that sentiment is due to two main facts and doubtless to some others that are germane to those two. The first is that these great enterprises under the stress and strain of their work and their opportunities for power abused their power and did a great many things they had no right to do. Some of their business methods were bad. They went outside of business and exercised their power in politics and society generally in a way that was intolerable and that had to be stopped.

Mr. Volstead. Do you mean to say that they are not combining any more?

Mr. Fish. I am not talking about that. I am talking about the origin of this public sentiment. I do not think they are combining or much inclined to combine at the present time.

Mr. Volstead. They probably can not get much money on which to combine.

Mr. Fish. They have not been doing it for some time. I think public sentiment was not against big business, against big corporations. It was against the evils of the situation that were real evils and that the public was competent to judge as such. I think also that on account of the accidents of the situation, certain men in this country got richer than any man has a right to be; but that is a temporary matter. That also excited hostile public sentiment. I do not think public sentiment has been against big business except so far as it confused large enterprises with the matters to which I have referred, associating them with the enterprises out of which the supposed evils grew.

Mr. Volstead. I can not see why, in the future, when times revive again as they will revive, why the same practices will not be carried out as much as those consolidations in the past.

Mr. FISH. I do not think so. Fifty years ago when this great industrial movement began, there were not many people in this country. We had vast but undeveloped territory with enormous resources that had hardly been touched. We adopted industrial expansion as our ideal. We started to build railroads to cover the country. We encouraged every effort towards industrial expansion. The National Government and almost every State and county was putting up money to finance railroads. Commercial and industrial enterprises were everywhere cordially supported by popular enthusiasm and financial assistance. Corporation laws were everywhere modified in order to make it easy to bring together the large amounts of capital that were needed for great single enterprises. At the same time there came along wonderful inventions and discoveries, which have led to the greatest change in the methods of production and distribution that ever occurred in the history of the world and which produced an absolute revolution in business and business methods. That job is practically done. Our results are to a great extent achieved. We are utilizing the railroads and the water powers and have built huge electric plants and factory plants of a size that was not thought of 50 years ago before these opportunities came to us. From this time on we may expect to advance normally and there will not be again the opportunities or the inducements for expansion that existed forty or thirty or twenty years ago. Those opportunities and inducements do not exist to-day and, in my judgment, they will never exist again. I believe that we have again passed into a new era. We made mistakes enough in the one through which we have just passed. Is it not safe to assume that there will not be a return of the conditions of a few years ago which excited so much public hostility? In any event, can we not defer further legislation of a drastic character until there is some sign of the return of the fever of a former time? But if we must have legislation, it should surely be based on exact knowledge of existing conditions that need correction and on foresight, based on knowledge and thought, as to the effect which any proposed legislation will have on our business and our industries, the sound prosperity of which is of such vital importance to our well being. I do not think that we have now either exact knowledge of the existing business situation or adequate foresight to insure sound legislation.

It seems an occasion in which definite study and investigation is essential. If I were asked what legislation is appropriate, I can give but one answer. Great good has come from special commissions investigating a complicated subject thoroughly for the purpose of finding out the facts, studying the theories, and forecasting the results of changes in the law. It seems certain that the recent currency legislation would have been impossible except for the work of such a commission.

Is it not well worth while that the subject of business in all its relations should be studied by an independent commission of the highest character before new laws are placed upon the statute book? A delay of a year or even of two years is of small importance. What is essential is that the right things be done. Unacceptable as may be the suggestion, I can not help feeling that the best course would be the establishment of such a commission to study and report as preliminary to any more legislation affecting business.

Just a word as to the other bills now pending before this committee. I should make the same general criticisms as to the bill with reference to interlocking directors. It seems to me that the evils complained of, while real, are of relatively small importance and that they can be gotten at directly by forbidding the specific things that are objectionable. The bill now pending would go so far as to make it impossible for the small corporations throughout the country to find directors at all suited to the work, and even the larger corporations might be unable to secure a sufficient number of men of the right quality and caliber.

While it is undoubtedly true that some men have served on too many boards, many of the men whose services have been sought to such an extent are of the utmost value even if they do not give a substantial portion of their time to any one concern.

If there must be legislation on this subject, could it not be directed to specific evils that require correction? For example, it would be relatively harmless if there were a prohibition against the same man serving on the boards of two competing companies, or even if he were forbidden to serve under conditions where there was a conflict of interests between the two concerns of which he was a director. The bill now before the committee seems to me to go altogether too far.

There would be the same danger in any form of legislation forbidding holding companies. Holding companies play a great part to-day as a mere convenience for administrative purposes or to meet special local conditions. It would be a distinct embarrassment to business if they were generally forbidden.

If there must be legislation on the subject, it should be carefully drawn to meet real evils and with full recognition of the necessity and advantage of holding companies under certain conditions.

The trade commission bill is not, but should be, before this committee. In my opinion, it is an impossible measure, among other reasons because no small number of men could begin to handle the many varied and important problems that are sure to come within its range. No two businesses are alike. There is an infinite variety of methods, some fitted for one enterprise and some for another; and to be effective there should be a trade commission for almost every one of our industries, for each differs from the others in substantial particulars. Complicated as is the railway business, it is of the same general character; but a commission that was qualified to deal with one line of commercial and manufacturing industries would find itself unable to apply to the others standards or methods which it had devised for the one with which it was familiar.

The suggestion is made as to several of these bills that they should be amended so as to apply only to large enterprises. I do not think that any such classification is wise or reasonable.

While I can not prove it, I believe that to-day there are far more unfair practices and far greater employment of methods that this set of bills is intended to check or control among the very large number of smaller business enterprises than among those that are of great size. By proper investigation, it could be determined whether or not this is true.

In any event, I feel very sure that as far as unreasonable price cutting is concerned the smaller industries in the aggregate are more

dangerous than the large ones. A single concern with a few hundred thousand dollars output can fix an unreasonably low price for many times its own product by competing everywhere on an unprofitable basis. Under present conditions many of the smaller concerns, unwisely and unintelligently, have adopted just this course. As far as concerns the interests of those who desire to enter into a field in which they have not formerly worked, there can be no doubt that the difficulties in their way are due far more to relentless opposition of relatively small concerns than to the large ones.

It seems to me that if such legislation is necessary, it should be based upon underlying principles which should be uniformly applied without discrimination on account of size.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, March 13, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. We will be very glad to hear first this morning from Dr. Galloway, of New York University.

STATEMENT OF DR. LEE GALLOWAY, OF NEW YORK UNIVERSITY.

Dr. GALLOWAY. Mr. Chairman, I wish to speak in reference to section 9 of tentative bill No. 1, and also in reference to section 1 of tentative bill No. 2, beginning at line 9, in which it refers to the quantity of the commodities sold, and in bill No. 2, line 15, in which it refers to the prevention of competition in selling, and it was particularly the word "selling" which I had in mind. You are undoubtedly familiar with it. Then, also in line 21 of the same section, it refers to the sale of drugs in connection with the restriction of competition.

I presume it is in order to speak to you gentlemen in regard to my purpose in coming here to-day, so that you may have a ground for judging the basis for what I may have to say to you.

I have been drawn into the relationship of this subject in connection with my economic researches and in attempting to investigate this matter from the practical point of view, as well as from the theoretical, economic viewpoint. In that way I had introduced in one of my books which I have written some reference to the question of resale prices, and I found that I was in harmony with the proposition as it was being presented by a number of manufacturers, who felt that they were being injured in regard to the recent decisions in the Supreme Court of the United States which permitted the making of a contract for the resale price.

I felt that in this connection I was peculiarly fortunate, because it is not always the case that a man, in connection with his academic studies, has an opportunity to see his theories worked out in practice. So I was drawn into this particular connection with the American Fair Trade League because I saw there an opportunity to push forward into the practical business world an economic theory and a social question that have emphasis, to the point where it would help commerce in the way that students of economics should like to see

it done. So that drew me into it from a purely scientific point of view.

Now, the big idea in this to me is the point of dependableness, and I wish that I might impress that upon you, if you have not given it that particular slant in your consideration. I would like to impress that particular point of view of dependableness in commerce upon you. Anything that will put into our commercial relations more dependableness ought to have the sanction of our business men and of all other members of society, but especially business men.

I do not think it will be amiss if I refer to one or two instances of this sort, so that I may throw into bolder contrast the idea I have in relation to the marketing of goods and the introduction of dependableness in merchandising.

It was the growth of confidence in the financial world that made banking and exchange, in fact, all of those businesses connected with the interchange of property, more economical, because people had confidence in each other. It took ages to put that idea of dependableness into exchange. Of course, we have not yet reached the millennium in business and financial matters by any means.

The same idea had to be introduced into the question of transportation. So long as steamships were announced to depart at about a certain hour or arrive in two or three weeks within a certain time set, you could not expect to get much economy in transportation. There was no certainty about the departure or arrival of the steamships and there was consequently a great waste of time. A man who had to arrive at a depot an hour or two or three hours before the time for taking a train, or who would have to get into town one or two or three days or perhaps longer to await the arrival or departure of a ship, in order to be sure that he would meet the ship, at some time, lost a great deal of time, and that brought about an economic waste. There is no field which has needed the development of this idea so much as merchandizing. It has grown out of a natural economic growth of enormous complexity, both in production and in the marketing of goods.

There has, perhaps, been no greater opportunity in the history of the world for cheating to go on, and subtle methods to be practiced upon the consumer and others as much as in the field of merchandizing, because the producer was separated from the consumer by enormous distances and by immense complexities. There have been opportunities there for all sorts of skullduggeries. Whenever we have an opportunity for strengthening the dependableness in any branch of merchandizing, I think we ought to take advantage of it.

During the last century I think we all agree that the adaptation of machinery to the making of goods changed the whole economic aspect of the world, and thus produced the situation in which we have produced more rapidly than we could dispose of the product. The natural way to dispose of the product was to build up railroads, but we built the railroads and then we discovered that we did not have the consumers raised to the point where they wanted the goods. They had been brought to the early levels of consumption of the early days of the nineteenth century. They were used to the peculiar kinds of goods made during the first part of the century. All the refinements of manufacture had not been brought in upon the mind of the consumer, but along in the latter part of the century we began

to have enormous advertising. Now, advertising is just as much an economic force in the world as transportation. The giving of information to the consumer about goods and about the methods of manufacture was, in a sense, the introduction of a new element of dependableness in merchandising. That had grown to a point where a second step was considered necessary. Much of the advertising began with the advertising of patent medicines, and the early advertising, at least a good deal of it, was of a nature not to inspire the confidence of the readers after they had fallen victims to some of the allurements. But that has been eliminated to some extent, and is still in process of elimination now.

And in the minds of all those came the idea that if a manufacturer could put upon his goods a certain stamp showing his individuality, showing that he stood back of those goods, that he would guarantee them—that there would be developed a big trade opportunity.

That was probably done with the same business selfishness—and I use that word in the highest sense—that all business is done, which is done for the advantage of the merchant.

But that does not relieve any responsibility from our shoulders if we find in the actions of the business man a great social benefit to be gained, to help it. The standardized good is perhaps the highest form of guaranty which has yet entered into merchandizing, and it is bringing the uncertainties which surrounded early production to a state of guaranty, to a state of dependableness, and that is the reason why anything which will mar the trade market will hurt society, because the consumer, in looking upon the trade-mark feels that he has somebody back of it, that he can go directly to the person back of the trade-mark and receive his money back, as the storekeeper would say.

That has been a great economic factor and it is a great saving, both in economic energy and in mental energy, and you have no doubt heard that subject taken up from so many points of view that I will not go further into it except to lead up to this particular thought and give it its particular setting, because I believe that this point has enormous social significance; that is, in the increasing of the dependableness in commerce.

Now, I wish to speak for a moment upon the confusion which has arisen in the term "fixed prices" and "price maintenance" and "monopoly price." Perhaps you do not need to be enlightened upon those terms, but I found in discussing this matter with hundreds of men that the first opposition that arises is due to the fact that they considered that price maintenance is monopoly price, and that any man who has the right to name his price must be in a position to fix his price, and I would like to say a few words in explanation of the difference between price maintenance and monopoly price.

Let us look for a moment at the position of the manufacturer. When he names his price—and I wish you would note the word "names," because in reality that is all he does, to name his price—he first must study his market—that is, the probable demand. He next must study his competitors; he must look at their product and study its quality as well as the quality of his own product; he must study their service in comparison with the service he may be able to render, and he must look at the prices which his competitor is going to put upon his goods, as well as the prices he himself is contemplat-

ing putting upon his goods; and thirdly, he must study the cost of production. He has two great costs to keep in mind—the variable expenses and the fixed charges—and both of those he must study closely.

You can see, therefore, that when he names his price he has done it in a field where competition is rife. There is no restriction. He has hundreds of competitors, both as to commodities and as to price and as to men. What does he do? He finds the particular price that he feels can compete with the other prices in the market, and he stamps that price upon trade-marked goods, and then he is ready to go into the market. He then goes to the retail merchant or the wholesaler and he asks to be permitted to make a contract with him to have him resell that commodity at his named price. Up to that point there is not the slightest bit of restriction—that is, he has not any peculiar advantage, none whatever.

. I would like to take these three words and contrast them for your benefit. It seems to me if you have had any confusion in the matter, it will clear it up. It did to me. In the first place, the price is fixed by competition. The price is named by the manufacturer; the price is maintained by the dealer.

Mr. FLOYD. Will you permit a question there?

Dr. GALLOWAY. Certainly.

Mr. FLOYD. We have had evidence before this committee showing that a certain concern had an absolute monopoly upon the entire product, with only one competing concern fighting. Under your definition, with your assistance, you could not say that there was any competition in that business. I refer to the matter of films used in motion-picture shows.

Dr. GALLOWAY. I presume I ought to have stated that I was taking up a condition here in which I considered there was no patent.

Mr. FLOYD. It was claimed before this committee that while there were some patents in connection with these films, that the film itself was not patented, and the courts had held the patent which they claimed they had invalid.

Dr. GALLOWAY. I should have gone further and stated that I was assuming—I believe there is another bill, the Stevens bill, which eliminates the idea of monopoly—that is, eliminates monopolies from taking advantage of this.

Mr. VOLSTEAD. How would you establish, as a practical proposition, that that business was not controlled by monopoly? I am just looking at the book by John Moody on The Truth About Trusts, and a great majority of these interests are controlled to an extent of 70, 80, or even as high as 90 per cent of the total industry. How can you prevent practical monopoly if you permit a concern that controls 80 or 90 per cent to fix the price absolutely to the consumer? These large concerns have factories not only at one place, but practically all over the country; wherever there is any occasion for a factory they will put it in, and from the headquarters in New York or Chicago or some other big city they will control practically the wholesale price, and if you now give them in addition to that the power to control the resale price, where are you going to end? If you will tell us how you can get rid of the practical consolidation of these industries so that we can have actual competition between factories, I think there might be a great deal more force in your logic.

Mr. MORGAN. Is it not a fact that the control of 90 per cent is a monopoly, and that they do not need what you are asking that they be given?

Dr. GALLOWAY. Assuming that in its wisdom Congress was going to define what a monopoly was, and I presume that that was what these bills in a large measure were introduced to effect.

Mr. VOLSTEAD. Witnesses come here and tell us that no matter how large an organization is, it is still not in violation of the Sherman antitrust act, when there is some sort of an arrangement to restrain trade.

Now then, if the size of the concern is of no consequence, under the Sherman antitrust act, and there is not any question but what that has been contended before this committee and in a great many writings on the subject, how are you going to avoid the necessary consequences for the proposition you have advanced?

Dr. GALLOWAY. That is, you are assuming that business is virtually monopolized now.

Mr. VOLSTEAD. In many lines.

Dr. GALLOWAY. In many lines. Then I assume that the purpose of these bills is to check that growth.

Mr. VOLSTEAD. I am afraid that the purpose of the bills is not, as they are drawn, very clear along those lines. I do not know just how far we can go. It is also a question of constitutional right.

Dr. GALLOWAY. I have allowed your assumption to go against what I considered to be the main facts, that is, so far as the trade-mark goods are concerned in this country, the majority of trade-mark goods, that so far as the capital concerned is involved in it, the majority of these are not what you and I would probably consider, by the only standard we have to-day, the general feeling of what constitutes monopoly, are not in that class.

Mr. NELSON. Therefore you would not permit monopolies or those concerns which approximate monopolies to have this privilege.

Dr. GALLOWAY. No.

Mr. NELSON. There is the difficulty. Who is going to determine at what particular stage they are or are not monopolies?

Dr. GALLOWAY. That brings in another question that should be determined, and I presumed they were trying to determine what are monopolies.

Mr. VOLSTEAD. If these people are right, these people who are contending that the size of the concern does not tend to prove a monopoly, or at least does not establish monopoly, how are you going to reach them, especially if they are right in contending that we have no power under the Constitution to prevent the conduct as mere big business?

Dr. GALLOWAY. Then it will make no difference, gentlemen, whether you have price maintenance or do not have price maintenance. If a man has an absolute monopoly, he can control the resale as well as the production.

Mr. NELSON. You do not give every business the right to fix the resale price until the question as to whether or not it is a monopoly has been decided.

Dr. GALLOWAY. Yes; I can only conceive that the monopoly would have to be proven to be a monopoly before you can consider it as such.

Mr. FLOYD. Your argument is based upon the standard quality of the product. Do you know of any concern that produces a better quality of a thing than a big combination producing the same thing? Do you know of any small industrial concern that produces a better quality of oil, for instance, than the Standard Oil Co., or any small manufacturer of shoe machinery which produces any better quality of shoe machinery than the United Shoe Machinery Co., or do you know of any small manufacturers of farm implements who manufacture a better quality of farm implements or farm machinery than the International Harvester Co.?

Dr. GALLOWAY. No.

Mr. FLOYD. If your fundamental proposition is sound——

Mr. NELSON. I would like to add to that list which you have given the Beef Trust. Would you have them fix the resale price on standard articles to the consumer? And you might also add the Sugar Trust to that list.

Dr. GALLOWAY. No; they would not need to have the resale control if they are monopolies. The price is fixed; they fix the price.

Mr. NELSON. I want to know, as a practical legislator, how I may draft a bill which will give you what you want without giving these gentlemen what they want until they have been proven monopolies, and that takes a long time.

Dr. GALLOWAY. Yes; it will. If you are going to make no distinction as between those which are and those which are not monopolies there might be some danger--I do not know as there would be, either, because if the price is fixed by the monopoly I do not see any particular reason why the monopoly would want to fix the resale price.

Mr. NELSON. Your scheme is predicated upon a condition of things in which we have abolished monopolies, and they will no longer interfere, and your proposition is one according to which this system can come in without reference to monopolies.

Dr. GALLOWAY. I would not want to say without reference to monopolies, but it would give the smaller businesses, those in which there would be no doubt as to whether there would be monopolies or not, a chance.

Mr. NELSON. Perhaps you can show us how to separate the goats from the sheep. Perhaps you would propose to take that up later in your argument and show us where we can make a distinction, so as not to give further rights to those who have nearly reached the point of monopoly, if they have not quite reached it.

Dr. GALLOWAY. I may say right here, Mr. Nelson, that I doubt if any statement can be drawn so that we may distinguish in a dogmatic manner between the point at which an industry leaves off being a competitive industry and when it goes to a monopoly, and I think that a great deal of the confusion which arises has to do in not being able to determine what the monopoly is. I think if we were to analyze the whole question of monopoly, we would find that theoretically, at least, there were no monopolies; that monopolies are only monopolies in the same sense that truth is truth; that it is relative, and that the biggest monopoly we have to-day—and I say monopoly because it is so closely associated with Standard Oil in this term—nevertheless that still is in competition with all other materials of that kind.

Mr. NELSON. Then we are to draw the conclusion from that statement that you want us to give this right to all business concerns, irrespective of whether they have reached the stage of monopoly or not?

Dr. GALLOWAY. No.

Mr. NELSON. Where are you going to draw the line?

Dr. GALLOWAY. As I said before, I was assuming it would need considerable study on the part of somebody.

Mr. NELSON. You are expert on the subject; you have written books on the subject.

Dr. GALLOWAY. Yes.

Mr. NELSON. You have given it such scientific study that you are here to tell us about it. We are very busy men, and we would like to have you give us the benefit of your study of the subject. We have not the opportunity to make as detailed a study of the subject as you have made, and we would like to get the benefit of your views in regard to this particular point. How are we going to draw the line?

Dr. GALLOWAY. I did not pretend to come here and in my humble way decide as between a monopoly and an industry which is not a monopoly.

Mr. NELSON. Can you suggest anybody who can show us where we can draw the line, so that we will not give this privilege to those concerns that verge toward monopoly, and may give it to the smaller men?

Dr. GALLOWAY. That would have to be worked out on this particular line. If you discovered an industry that had the power of fixing the price—controlling the price—then you would have the test of monopoly.

Mr. VOLSTEAD. Is it not true that almost any one of these large concerns that controls 75 or 80 or 90 per cent of the total output of an industry practically has a monopoly in many localities in this country, and perhaps in several States? While they may not have an entire monopoly of the whole country, has not the tendency been among these large concerns, if they had any competitors at all, to provide for territory in which the independents might operate, so that there would be practically a monopoly, even if it was not a total control or a control of the entire field?

Dr. GALLOWAY. I might state here another thing: That any committee or any body of legislators who would take it up as a study at all would have to emphasize this, that the greater the territory covered by any monopoly, as you have suggested, the more significant becomes the monopoly, and there has practically been no study yet made along that line in regard to the distribution of the territory covered by a monopoly and its effect and force. That is a study that ought to be carried on. It has not yet been done.

Mr. NELSON. Would you suggest that your scheme be adopted until we had clarified the field a little more?

Dr. GALLOWAY. My scheme would only suggest that you go to the permitting of the manufacturer to set a resale price.

Mr. NELSON. But these combinations are manufacturers; many of them are manufacturers of their own products.

Dr. GALLOWAY. Then if you considered that you would have—that would not in any way affect their price. The price is fixed before they hand it to the retail merchant, and they have control of it, anyway.

Mr. NELSON. If we made a law giving them the right to do it, how are we going to arrange it afterwards, if they should become a practical monopoly?

Dr. GALLOWAY. I do not know, unless you put in a provision that a monopoly would not be permitted to come under the provisions of the law. Then you would have to determine the monopolistic condition.

Mr. FLOYD. Do you not think it would exclude nearly all the people who have been before us? The company which manufactures the motion-picture films, as I understand it, has entirely put out of business 150 other concerns, and there is only one selling company, and that has been in litigation with the manufacturers of the moving-picture films since 1909. It is trying to compete with them, and they have to buy their films from this Edison company. If you adopt this principle, would that not give them a complete monopoly, so far as the manufacturers of motion-picture films is concerned? You would give them the right by law to fix the price. The Government is now proceeding against them as being in violation of the Sherman law. We would give them the right to do what it claimed they are doing, and what the proof before us shows conclusively they are doing—and it has never been disputed—exercising an absolute monopoly over the manufacture of that particular product, films used in motion pictures.

Dr. GALLOWAY. What is there now to prevent them getting the price they ask?

Mr. FLOYD. Under the Sherman law they have been proceeded against by the Government, but if we adopted your idea and enacted it into law, giving them the right to fix the price and make legal what they have been doing, what remedy would the public have for that?

Mr. BEALL. They can get what they please for their product now, but they can not compel a man to sell that product at a particular price; they can not enforce that sort of a contract. You would legalize that kind of a contract.

Mr. FLOYD. You would give them the authority under the law to enforce a resale price.

Dr. GALLOWAY. In fact, I do not see, if we recognize them as a business unit, a legitimate business unit, I do not see that you are giving them any special privilege in permitting them to name the resale price to the retail merchant. You are simply acknowledging that all men who have standard goods can go to the merchant and say, "This is my price. You sell it for that price." If he has the monopoly of it, he can compel them to do it anyway. But this provision brings in all others who are attempting to compete under the law.

Mr. FLOYD. It was proven before this committee that there were 150 concerns that this moving-picture-film manufacturer put out of business before it got to that state.

Dr. GALLOWAY. They could not do it any more if they had the privilege of fixing the resale price.

Mr. FLOYD. I beg to differ with you there. Some people think, and I am one of the number, that the most effective instrument of monopoly is this practice that they have had of fixing the resale price to the consumer, charging the enormous profits to the consumer, and driving their competitors out of business on these prices they have made. That is my view of it.

Dr. GALLOWAY. Do you mean that a monopoly can fix the price at any place it wishes?

Mr. FLOYD. No. I mean that the system that has been in vogue pretty generally in many lines of business, for the manufacturer to fix the resale price to the consumer, is one of the most effective means of acquiring a monopoly that has ever been devised in the business world. The Supreme Court of the United States has held that it is unlawful now.

Dr. GALLOWAY. That is what I wish to try to bring out in my discussion, that I advocate the first condition where I presume there is no monopoly, and in the second place where there was a monopoly, and to show that price-fixing was done before the element of price-maintenance entered at all, and that when a monopoly has fixed upon a price it has done so under conditions where there was no competition. If it does that, it does it in accordance with the law of monopoly price, which is the price which will bring to them the highest net profits.

Under the law of monopoly price, the manufacturer who is a monopolist must take into consideration the elasticity of the demand. He wishes to turn out as many units of product as he possibly can at that price which will net him the biggest profit. If he finds he can turn out 500 units of product at 10 cents and have them consumed by the public, and again that he can turn out, if he charges 5 cents, he can put out double the amount of that quantity and have them consumed by the public, it would be to his advantage, other things being equal, to turn out the latter quantity.

Mr. VOLSTEAD. Would it not be to his advantage not to do that, because he would not have as much overhead expense?

Dr. GALLOWAY. You must take into consideration the fact that the overhead charge is the very thing which permits him to charge his price without losing his profit.

Mr. VOLSTEAD. Let us suppose that instead of making double that number he made half at three times the price; he would be making more money, would he not, by taking three times the price?

Dr. GALLOWAY. If he can get the demand.

Mr. VOLSTEAD. But he will not need as much of a demand for a third or a fourth of the total output.

Dr. GALLOWAY. If you assume that, and he finds that is the place to put it, he will put it there. That is not under his control at all.

Mr. VOLSTEAD. Well, it seems to me if he can simply raise his price he does not have to increase his plant and the risks of his business. If he has a monopoly, all he has to do to get an additional amount of profit is to raise the price.

Dr. GALLOWAY. But who is going to buy it?

Mr. VOLSTEAD. If it is a necessary of life.

Dr. GALLOWAY. Who is going to buy it?

Mr. VOLSTEAD. If it is a necessary article, people will buy it anyway. Even if it is a monopoly, they will have to get the stuff in all probability.

Dr. GALLOWAY. If you are going to put it on the basis of a man having an absolute monopoly of an absolute every-day necessity of life, he can raise the price on that until you will get to the point where you are willing to give anything but your life to get it. If you consider it in that light and if you take a monopoly, as, for instance,

under the condition of the Standard Oil Co., why does the Standard Oil Co. not raise the price of oil to $1 a gallon?

Mr. VOLSTEAD. We have had here this explanation in regard to the Standard Oil price, that the independents follow the price of the Standard Oil Co.

I have been told that the United States Steel Corporation, although it does not control much more than a majority of the total steel business, that in the case of that corporation the independents are very careful not to cut below the price of the United States Steel Corporation, because if they did, the United States Steel Corporation could put them out of business any time it saw fit.

Dr. GALLOWAY. I will assume that the Standard Oil Co. has every drop of oil on the face of the earth, and that they control it; still, why would not the Standard Oil Co. charge $1 a gallon for it?

Mr. VOLSTEAD. They would charge as much as the traffic would bear.

Dr. GALLOWAY. That is just the point. They will do that, so far as it comes in contact with the principle of the greatest net returns. When it gets to 35 cents a gallon, refined oil will come in competition with denatured alcohol. Why would not the Standard Oil Co. put it at 50 cents a gallon? That is bringing in this potential competition, and as I said a while ago, theoretically, there can hardly be any monopoly because it is only a relative condition. That is the proposition that legislators are up against; that is, to determine where monopoly begins and where competition leaves off, because when you get off from the practical competition you are speaking of then you are into the field of potential competition.

Mr. NELSON. That is theoretical; but practically there is a field which is covered by the use of oil. Of course, when you get above that you can get in competition with other things outside of oil. A monopoly would be that thing which substantially covers and controls that practical field, would it not?

Dr. GALLOWAY. If any monopolist was so shortsighted as to wish to confine his produce to a narrow field, that might be so, but a business man wants to enlarge his market if he can do so, for instance, in the case of the oil business, by putting the oil into a market, and by a lower price increase his output without increasing his overhead charges; if he can do that, he will increase his output, because it makes the net income much larger.

Mr. NELSON. Is it not always human nature to try to conserve his capital? If he wants out a large quantity of oil, that tends to exhaust his resources, and therefore it is better to limit the output and get a larger price.

Mr. VOLSTEAD. And then they may not be able to do that without seriously cutting down the amount consumed.

Dr. GALLOWAY. That is true, but it is their option to set the price. They study the market conditions and they find that the market will take it at a certain price, and they put it at that price, but if they put it at another level it will come back to them. It is the elasticity of demand which determines the monopolistic price.

Mr. VOLSTEAD. Let me give you an illustration which has been brought before the committee, and that is in connection with the safety razor.

The safety razor—that is, the Gillette safety razor—has sold for $5. If there had not been some sort of a monopoly when that thing started, do you suppose they could have maintained that price at $5, if they had not fixed the price? Suppose they had sold it at a certain price and given it to the jobber and allowed the jobber and the retailer to sell it at any figure they chose; do you think that price would have stood at $5 continuously?

Dr. GALLOWAY. No; of course not.

Mr. VOLSTEAD. Now take the typewriter.

Dr. GALLOWAY. Let us stick to the safety razor, if you please, because I like that illustration. That is the best one. If I can take simply one illustration, I can follow your argument better than if I took one or two others. If you will permit me to take that as an illustration, I will appreciate it, because that involves what you want to get at.

I will ask a question and answer it myself. What special privilege did price maintenance in the case of the Gillette safety razor give the manufacturers? I say it gave him none.

Mr. VOLSTEAD. It made him rich.

Dr. GALLOWAY. I will tell you what made him rich. The thing that made him rich was the difference between the cost of production and the price the public was willing to pay for the razor.

Where did the monopoly come in? You and I gave him the right to put a monopoly on it, because we gave him the right to a patent. If we do not want to give monopolists any patents, that is another question. But let us not consider that at this time.

Mr. WEBB. That is only a temporary monopoly.

Dr. GALLOWAY. Yes; that is only a temporary monopoly.

Mr. WEBB. You do not give him the permanent right to fix the price.

Dr. GALLOWAY. Yes; you do not give him the permanent right to fix the price, because he does not fix the price; all he does is to name the price.

Mr. NELSON. If nobody could sell it at any other price, what is the difference between fixing the price and naming the price?

Dr. GALLOWAY. That price was fixed by Gillette when he studied the market conditions. I think I understand the inside of that proposition.

The razor that was put on the market for $5, when it was first invented and the patent first obtained, the question was discussed in the committee as to what price they would put upon it, and it was decided that 75 cents—I think that was the amount—would do. Then the advertising man got hold of that and he said: "Why, you can get $5 just as easy as you can get 75 cents for that razor." They said: "If you can do that, why not get the $5?"

Has he exercised one bit of special privilege of monopolistic control when he said: "Let us put the price on that at $5 instead of 75 cents," except that he controlled his razor by virtue of a patent right?

He studied the market conditions. Would it not have been business suicide for him to have put that razor on the market at $5 if nobody would buy it at that price? The fact that people would buy it and pay $5 for it gave him the reason for keeping it at that price, and thousands of men are still willing to do that.

Mr. NELSON. I think you are mistaken about your assumption. People are not willing to do that. They have to do it.

Dr. GALLOWAY. Why?

Mr. NELSON. Because it is advertised at $5, and you can not get it at any other price.

Dr. GALLOWAY. I can shave with a case knife, if necessary.

Mr. NELSON. It seems to me the fundamental fallacy of your position is that you are assuming that the people desire to pay these prices. Take the case of the Gillette safety razor. It is an excellent razor, and I used it for a number of years. A year ago, in order to meet some agitation with reference to patents, the Gillette people caused to be sent to Members of Congress a little razor called the Mark Cross razor, and that safety razor with two blades was sold for 25 cents, and that razor is equal to the Gillette, as they pointed out.

Why is it that you can not get that razor anywhere in the market? It is because the retailer can make so little out of it that he does not care to push that, but he pushes the $5 razor and makes many times the profit he can make out of the 25-cent razor. The people would like to know about this Mark Cross razor, but you want to bring about a status whereby they have to get the Gillette razor because it is the only one that is advertised, and it is advertised because they make such enormous profits out of it. Is that not the outcome of the thing you desire?

Dr. GALLOWAY. No; I do not think so, Mr. Nelson. The thing you have stated is true, but the result obtained has been through advertising; and if you wish to put it as between the man who has little money to spend and the man who has millions to spend, then it will always, so far as advertising is concerned, be that the influence is going with the man who puts the most economic energy into the product.

Mr. NELSON. But what has advertising put into an article in the way of an advantage to the consumer? You are arguing for a right that follows advertising.

Dr. GALLOWAY. Yes.

Mr. NELSON. What is the principle back of that that should give a man the right to get more out of the people because he has advertised?

Dr. GALLOWAY. If you wish me to state what is the economic importance of advertising which is involved in that, I would say that by advertising and spending millions of dollars, which the razor people did in advertising their products, they advertised not only a special brand, but they advertised the desirability of shaving, and the necessity of shaving, and if you put that in connection with soap, where we could, perhaps, see a little closer analogy between the personal hygiene than you get with the razor, it has advertised all the things which come from the benefit of using a razor and using soap.

Mr. NELSON. So that the difference between a 25-cent razor which does its work just as well as the $5 razor is this benefit the Gillette people give the people in advertising the necessity for shaving?

Dr. GALLOWAY. No, I do not say that. I say the Gillette people had exactly the same right to ask $5 for their product as the Mark Cross people have to charge 25 cents for their product. Gillette can not get $5 for his product unless the people want it and will pay that for it. He advertises the quality of his razor, safety, and the social prestige that goes with that particular razor.

The CHAIRMAN. Granting for the sake of argument that he has the right to ask $5 for his razor, if he wants to, do you think he ought to be given the right by law to compel another man to whom he sells that razor to also charge $5 for it? That is the point.

Dr. GALLOWAY. Yes, I considered that, too. That was the last point I was going to touch upon, and that is the relationship between the wholesale merchant and this problem of price maintenance.

He has a right, in my opinion, to ask the resale merchant to maintain his price. According to the epitomized statement which I gave as to the economics of advertising, the manufacturer has put into his product a standard of measurement and a standard of values. That is extremely valuable to the consumer. I consider it one of the most important things that has been contributed and it is right along the same line of dependableness again. It has placed in that a right, I will say a property right of good will. If there is any question, any particular subject which has distressed business men, it has been the question of coming to some idea as to what constituted good will, but simply because it is one of those fluid assets, it none the less becomes a property right. A man who spends his money for advertising—and I shall assume that advertising is an economic factor and is as legitimate as is transportation—a man who establishes his trademark and spends his money upon it has a property right in that.

Mr. VOLSTEAD. And ought not to be bothered by competition?

Dr. GALLOWAY. Indeed it should be, if he can not maintain it.

Mr. VOLSTEAD. That is what you are asking for.

Dr. GALLOWAY. This does not cut off competition. That is what I am talking about. It does not cut off competition. It is not concerned with the stopping of competition.

Mr. VOLSTEAD. It cuts off competition in prices; that is the thing you are seeking.

Dr. GALLOWAY. Yes; it cuts off the competition in cutting prices. Price cutting is not necessarily competition.

The property right being established in good will, when he disposes of this physical article to the resale merchant, he does not necessarily give him the right to handle his reputation, which is his good will, in any way he sees fit. If he sells the goods at a certain price which involves his good will, he has still some control over them, and he should be protected in that right, just as I am protected in my right if I own a piece of property to cut it up into building lots and then put into the contract of sale a provision that only houses of certain value shall be built upon it, or if I say that they shall not raise goats or chickens in that section, I still have the same sort of right.

The thing that makes it most difficult for men to see that there is a property right there, is because this is a new relationship. It is a new property relationship which has arisen and which needs recognition and this does recognize it, and that is the only thing I see in that whole proposition—that is, the maintaining of a property right and allowing a man to stand by it, and receive damages if he is injured in any way.

The CHAIRMAN. Did I understand you to say that a man could sell another a farm and say that he could not raise goats and chickens on that farm? He can raise what he pleases on it.

Mr. MORGAN. Is it not a fact that men quite often sell property with the requirement that a man shall not build a house on that property of less value than $10,000?

Dr. GALLOWAY. Yes. I was referring—I went to look at some property the other day, and they said I would be restricted in the purchase of it from the doing of certain things, and I ran across that so many times that I assumed there was a legal basis for it.

Mr. GRAHAM. There is no doubt that a sale of real estate can be made with a restriction on it.

The CHAIRMAN. Do you not think there is a fundamental distinction between the sale or disposition of real property and the sale and disposition of personal property?

Mr. GRAHAM. No, I do not think so.

Mr. MORGAN. The restrictions are put on real property to maintain the price.

Mr. VOLSTEAD. Is that not done because a man has some interest in the locality in which he desires to protect. I have run across one or more cases where they have based it upon that ground.

Mr. GRAHAM. It is a covenant running with the land.

Mr. VOLSTEAD. My impression is that you can not impose everything you see fit in a deed, because then you would practically be administering the police regulations of that locality, and the courts put a limit on that. Just where the limit is, to what extent it goes, I am not prepared to say, but I know that in quite a number of cases it rests upon the ground that you have other interests in that locality which you desire to protect. If there were no restrictions on that you could practically establish the police regulations for a whole town site, for instance. You may provide that the man who buys your property may not sell any liquor on the place. I know the courts have supported some of those provisions.

Dr. GALLOWAY. I had in mind the idea of the division of property rights that you can not dispose of part of your rights and not the whole right.

Mr. VOLSTEAD. It seems to me your proposition ought to be to show there is an economic or some other reason why we should change the law. The Supreme Court has held what the law is on this question.

Dr. GALLOWAY. I did not know whether there had been any general decision which would prohibit the manufacturer from making a contract with a merchant even now. I presumed that was still in the air.

Mr. FLOYD. They have expressly held it to be an unlawful transaction.

Now let us take it on the economic side of the question. We have been talking about oil. Let us take it in regard to tobacco.

I am a tobacco user, and the Tobacco Trust has sought on practically that same principle to maintain the price. You can take a particular brand of tobacco and you can buy it at the same uniform price all over the country. I can buy that particular brand anywhere at the same price.

Who pays the freight, if the factory is in Massachusetts and they ship a lot of that tobacco to my town, 3,000 miles from the factory? Who pays the freight?

Dr. GALLOWAY. I do not know that I quite catch your idea.

Mr. FLOYD. Somebody has to pay the freight on that tobacco from the factory in Massachusetts to Yellville, Ark., my home town; who pays the freight? Does the local merchant pay it or does the tobacco company pay it?

Dr. GALLOWAY. You are asking merely who pays the transportation charges?

Mr. FLOYD. I am asking you a practical question in regard to this system of uniform price, and I am taking tobacco as an illustration. It is shipped 3,000 miles from the factory and it is sold at the factory door at the same price at which it is retailed 3,000 miles from the factory door. Who pays the freight on the tobacco in transporting it from the factory to the town of Yellville, Ark., 3,000 miles away? Does the American Tobacco Company pay it, or does the local merchant at Yellville, Ark.?

Dr. GALLOWAY. As a practical proposition I do not know how it will be embodied in the contract between the tobacco company and the retail merchant.

Mr. FLOYD. What is the practice, if you know?

Dr. GALLOWAY. No, I do not know what the practice is.

Mr. FLOYD. Now, as a practical proposition I am citing this instance. Somebody pays the freight. Of course, the manufacturer does not lose it. Somebody pays it. Now, is not the result of your whole system this, that the price fixed at the remotest point in the United States must be fixed sufficiently high so that the merchant controlling that product will not lose anything, and if you do that, do you not give that concern enormous profits which they are not entitled to at all the intermediate points, and is not the result of that system wholly against the consumer and in the interest of the manufacturer, the jobber, and the retailer exclusively, and not in the interest of the general public?

Dr. GALLOWAY. You are again assuming that the man has an absolute monopoly.

Mr. FLOYD. No, I am not; I am talking about an individual commodity. I am assuming the contrary.

Dr. GALLOWAY. All right, then, that would help me in my answer. I believe that price maintenance helps competition rather than cuts it off. You will see my reasons for that in just a moment. If the profits are cut in California, by having to allow for the cost of the extra freight rate, and you have competition in that country, where does the price maintenance proposition affect that? That gives the man in that territory a knowledge of the competition he has to meet right there, and he knows the price is not going to be cut to drive him out, and so it will breed competition within his own territory, and the effect would be to distribute the industries around the country rather than put them in one place.

Mr. FLOYD. What do you think about the justness of the proposition? I am asking you about whether that is a just system, whether it is right that any manufacturer should fix the price to the consumer at the remotest point from his factory, the remotest point in the United States; that he should fix his price so high at that remotest point that that man would still sell it and make a profit, and whether the necessary result is not that the company gets back the difference between the freight rate to a nearer point and that point as a profit, and this is above their price, which is sufficiently high to give them a profit already.

Dr. GALLOWAY. Yes, sir, I would say he has a right to fix the price any place he puts it, as long as he has no monopoly.

Mr. FLOYD. Is he not pretending to do a thing he is not doing, and is it not a deception upon the public for him to insist upon the uniform price upon a basis of any such claim, when he is constantly getting excessive profits from those who are nearer to him at the expense of those who live farther away from his factory?

Dr. GALLOWAY. I do not think there is any question of honesty or ethics involved in it at all. It is a matter of expediency. If a man does a thing which is inexpedient in his business, without deception, if he uses no deception in the matter at all——

Mr. FLOYD. That is the point I am making. Is not the deception in the very contention?

Mr. NELSON. Would not the trouble come in in this, that we would give this man a special privilege to get a price for his goods far beyond the merits of his goods.

Dr. GALLOWAY. No, I do not think so. I think the mere fact of permitting him to fix a resale price in no way determines the height of that price, nor the lowness of the price. That is all fixed by the competitive conditions.

Mr. NELSON. The competitive conditions—as far as that is concerned, I believe there are 24 different safety razors, but the Gillette razor is selling at $5 and will remain so to the end of time, if we will give them the right to fix the price.

Dr. GALLOWAY. Why not leave it there?

Mr. NELSON. You are talking about competition.

Dr. GALLOWAY. The competition is in the Mark Cross razor. They had over a million razors sold before they put any on the market, and they had them sold for 25 cents apiece. The competition is rife in the razor business.

Mr. NELSON. Is not this your assumption, that if by advertising extensively you can gull the people into paying more for a thing than it is really worth—and surely the Gillette razor is not worth the relative proportion between the cost of it and the cost of the Mark Cross razor, because, as a matter of fact, I prefer the Mark Cross razor in many ways. The whole argument is founded upon the fact that you can gull the people, by advertising, into paying $5 for an article which is no better than the one you can get for 25 cents, and you want to legalize that.

Dr. GALLOWAY. I do not want to legalize anything that leads to skullduggery.

Mr. NELSON. You are talking about advertising. Can I not go out as a candidate for Congress, with a bad record, and fool the people into believing that I am a No. 1 Congressman, and it is all based upon advertising, and just because I advertised extensively, therefore it is right. That seems to be the logic of your argument.

Dr. GALLOWAY. No.

Mr. NELSON. Then please tell me what it is. What is the basis of the right that is back of advertising?

Dr. GALLOWAY. The basis of advertising rests upon gaining a wider distribution of goods. Advertising, like all business relations, involves opportunities and foresight and consideration, as well as other things. A man who has an article and does not advertise it deprives the community of a desirable commodity. If we let him go into the market with the ordinary business basis of selling for what he can get, without using deception, and if any safety razor manufacturer

uses deception, then he is practicing something which is not honorable.

Mr. VOLSTEAD. Does not your theory amount to this, that a man who advertises is entitled to a certain amount of protection and ought not to be compelled to compete? Is it not true that while a man is doing that advertising he is getting from the public, in the larger sale, all the legitimate profit which he is entitled to?

Mr. WEBB. And making the public pay for the advertising, too.

Dr. GALLOWAY. Why should you not pay for the advertising?

Mr. VOLSTEAD. I am objecting to the idea that you insist upon, that we should protect him in his advertising. I do not see why a man who advertises should stand upon a better footing than the man who does not advertise. If he is willing to put his money into advertising, with the expectation of getting a return, that is good and well. You insist that we should protect that advertising. What morality is there back of that sort of a proposition?

Dr. GALLOWAY. Based upon public expediency, that it is a good thing to advertise.

Mr. NELSON. A good thing for whom?

Dr. GALLOWAY. For the public.

Mr. NELSON. A good thing for the advertiser.

Dr. GALLOWAY. I am taking the public's point of view, not the business point of view, at all. If you are in business at all, if it is justified at all, it is justified on the basis of public benefit. If a business hurts the public, we stop it. Advertising is a legitimate, a desirable, and an economic thing. It is highly expedient for the public that we permit and encourage advertising, but we should discourage rotten advertising. We should have some method whereby we can control the comparison of prices that are false.

Mr. VOLSTEAD. That is an entirely different problem.

Dr. GALLOWAY. It is the only question that involves this broad test of advertising, except that you must assume that advertising is an economic necessity.

Mr. NELSON. Let me follow you right there to the logical consequences of that. You then would have us not only protect advertising, but you would have Congress, by law, or by creating some kind of a commission to pass upon the matter, discriminate between the degrees of falsehood in advertising?

D. GALLOWAY. I would not be surprised but that at some time we will have to come to that.

Mr. NELSON. That logically follows, if you are going to protect it by law; if you are going to do that you will have to discriminate.

Dr. GALLOWAY. I would not like to put it that way; we are protecting a property right based upon advertising.

Mr. NELSON. We have got to look at the thing without those fine-spun discriminations. It is really founded upon advertising.

Dr. GALLOWAY. If I get a property right which is founded in land or in my books, or if I have a house, and some man attempts to put a barn next to it, I claim I have certain rights which should be protected, and if I put my reputation out into the market for the benefit of the public, and if I had that right and worked in harmony with the public expediency, and that property right is a just one, it should be protected, and price maintenance does give that protection, and does not give the slightest bit of control anywhere

If I could talk it out on individual lines instead of having to stand before you and answer questions in the way in which I have answered them, sometimes in the midst of confusion, I am sure I could convince you of that.

Mr. NELSON. Up in my State there has been a great deal of agitation over the subject of patent medicines and public sentiment has driven them out of the newspapers. But according to your theory and your advocacy of this scheme, if those fellows could get into the newspapers and advertise these things very extensively, they have a right in which they must be protected, and they should have the right even of fixing resale prices to the consumers; is that so?

Dr. GALLOWAY. Certainly they give them the right to carry on their business, provided they do not violate any of the laws or do not deal unjustly.

Mr. NELSON. Suppose he is mixed up in whisky and alcohol and other things?

Dr. GALLOWAY. Put him out of business by another means. But if we except him——

Mr. NELSON (interposing). How can we get that regulation when we start your system; how are we going to deal with such fellows?

Dr. GALLOWAY. Just as we always would. He does not get any special privilege in the market. Just because a man advertises dope and sells it, the thing for us to do is to check his advertising. If we accept it, he advertises it as being all right.

Mr. NELSON. Your fundamental assumption there is fatal, because it assumes that somebody somewhere is going to pass upon that article. You assume that some Government official is going to be so wise that he can determine which is meritorious and which is not; whether some patent medicine has two much alcohol or not, or something of that sort.

Dr. GALLOWAY. No, that is not the basis for the assumption at all. I do not want it the basis of the assumption that we need a Government to make us to say what the prices should be. I only said if we attack it on the basis of public inexpediency, we should do it along that line, because price maintenance will not affect that one way or the other. It will not protect that man in any property right which he has. It simply says, "I have a drug, I advertise it to the public. I lie about it, but I want a dollar for the drug."

Mr. NELSON. And nobody shall sell it for less than a dollar.

Dr. GALLOWAY. And nobody shall sell it for less than a dollar. Now, then, is the public injured any by holding it at a dollar any more than if the druggist advertised it at a cut rate and said, "Here is a dollar medicine for 50 cents; come in and get it, and get a drug along with it." The public is not protected at all. The more you took of it, the worse off you would be. All goods get their value in the public mind.

Mr. VOLSTEAD. Take the typewriter, for instance. Almost as far back as I can remember they have been sold practically at $100. Do you suppose they could have maintained that price unless they had a fixed price in some fashion? I do not imagine that a typewriter costs the manufacturer anything like $100. There is no reason which I can see why it should. But they have succeeded in maintaining that price all these years; they have succeeded in keeping typewriters at a fixed sum. Do you think it is a desirable condition?

Dr. GALLOWAY. Certainly it is; just as desirable as any other business condition. Does the cost of production fix the price?

Mr. VOLSTEAD. It ought to.

Dr. GALLOWAY. Then you are up against the proposition of changing the whole industrial system.

Mr. VOLSTEAD. If your theory is that it does not make any difference how much the retailer charges, provided he can get it out of the community, then you and I do not need to argue.

Dr. GALLOWAY. There is this difference between us, that you are looking for the value of it in the costs and I look for the value of it in what a man can get for it, so long as he does not use deception.

Mr. VOLSTEAD. It seems to me that if we are here for any purpose, it is with a view of securing to the public goods at a reasonable profit above the cost. If you come with the proposition that that is absolutely immaterial, and the only question is how much the public will stand, there is no basis for your argument, so far as I am concerned.

Dr. GALLOWAY. I would not say I disagree with all your propositions there. I think the closer we can get to what the costs are, all information leading to the cause is very desirable. But that does not determine the value.

Mr. NELSON. Take the case of typewriters. Is it not very much to the benefit of the masses of the people to get this very handy and useful piece of machinery at a price of $50?

Dr. GALLOWAY. Yes.

Mr. NELSON. Would not probably many times more people be using it and having the advantage of it if the price were at that figure? Would they not learn a great deal; would there not be more production, more learning, more of everything that is good, if they could get a machine like that into more common and general use? You argue, do you not, that if the manufacturer can succeed in maintaining the price at $100, it is good for the public, notwithstanding the fact that millions of people may be deprived of it because they can not pay the price.

Dr. GALLOWAY. If there are no competitive price conditions——

Mr. NELSON. We have had all kinds, and some of the typewriters are held at $100 because they have fixed the price and you and I and nobody else who sells them is permitted to cut more than $5 or less. Do you think that would be good for the public to permit them or to make them charge $100 for the machine and thus deprive millions of people of the use of it?

Dr. GALLOWAY. Unless there is some combination back of it they can not maintain that price forever. There are 35 different typewriters on the market; there are all grades of typewriters on the market, and the question as to whether one is worth $37 and another is worth $100 is largely dependent upon the service.

Mr. NELSON. Yes; but your whole assumption is that we ought not to grant the right to a combination. I agree, if you can show us, so far as I am concerned, how we can offer a special privilege or encouragement to people who are not in a combination, give them a privilege that would be withdrawn to a combination, because it would not have that special privilege. You are arguing for a sweeping privilege that would go to anything in the form of monopoly or otherwise because you have no machinery to differentiate.

Dr. GALLOWAY. Assuming that the difference between monopoly and those things which are not monopolies had at least in some rough way been distinguished, then we are in no position to argue against monopoly.

Mr. FLOYD. Suppose we apply it to bread and the actual necessities of life. Would you be in favor of the manufacturer fixing the resale price of these commodities?

Dr. GALLOWAY. If he had no monopoly.

Mr. FLOYD. Would you give the farmer the right to fix the price of potatoes?

Dr. GALLOWAY. If he had no monopoly, and had some special brand of potatoes which he had developed and advertised and established in the public mind; if he had established in the public mind the special quality of a certain brand of potatoes, there would be no objection to his putting a price on them.

Mr. NELSON. Following Mr. Floyd's question, suppose a farmer started that. Suppose a farmer began to get a trade-mark on everything and started to put everything upon the market and fix the price on it. Would not the natural tendency be for the farmers to watch the leader and fix their price, and then, without any getting together, simply follow the leader? Would not the result be that you would have a price for beefsteak and a price for bread fixed for the consumer, and it would be a price that this particular leader started and those other men followed. Would not human nature see to it that they did not cut below the leader?

Dr. GALLOWAY. It has not worked out that way in ordinary business. A standard price is offered, a target at which all competitors do aim, but they all aim to get just beneath it, so that instead of discouraging competition it is encouraging competition.

Mr. NELSON. Is that true with reference to razors and other things?

Dr. GALLOWAY. Razors. I was talking the other day with Mr. Hershey in reference to things of that sort, and he told me that he put out a brand of Hershey's bar chocolate some time ago, and he now has 150 competitors who make chocolate in almost the same shape, and as nearly like his as they dare get.

Mr. FLOYD. And as near his price, too?

Dr. GALLOWAY. They are 5-cent bars.

Mr. FLOYD. That illustrates what Mr. Nelson was talking about.

Mr. NELSON. They get as near to the other fellow as they possibly can. That works both ways. Is not the motive in human nature such that instead of trying to cut under, he is trying to get as much as possible?

Dr. GALLOWAY. That is human nature in all business.

Mr. NELSON. If you give this privilege of fixing the price to the farmer, would not human nature there tend to raise the price to the highest point?

Dr. GALLOWAY. He can not raise it higher than the conditions in the market will permit him to do.

Mr. NELSON. Well, you would let him soak the consumer to the extent of what the market would bear?

Dr. GALLOWAY. All business is doing that, and always will do that unless you get a Government by commission. I do not think that we need that so long as we have competition.

Mr. NELSON. But you are trying to get away from it?

Dr. GALLOWAY. No.

Mr. NELSON. You are not willing that the man who has a trade-marked article shall stand competition, but you want the law to come in and limit the competition that he is up against.

Dr. GALLOWAY. I want him to meet competition, all he can get, and force him to meet more competition. The fact that he has a fixed price encourages competition. It encourages men to come in, because they know what they have got to meet. Price cutting does not cause competition. I might say, without attempting to draw it all to its final conclusion, that this is a very vital term in which price maintenance is giving us much of the benefit of the trusts without the difficulties.

Mr. NELSON. Do you know of a single manufacturer of a copyrighted or a patented article who is not in favor of the right to fix the price? I mean take the people like the Gillette Safety Razor people and the B. V. D. Company, and the other leaders; they are all in favor of this, are they not, as far as you know?

Dr. GALLOWAY. Yes, as far as I know; I know some others who are not?

Mr. NELSON. Do you think they are doing this in order to encourage competition?

Dr. GALLOWAY. No, I do not.

Mr. NELSON. On the contrary, is it not very probable that they are doing it to maintain a field for themselves that would not be subject to competition?

Dr. GALLOWAY. No.

Mr. NELSON. Human nature would dictate that method of procedure?

Dr. GALLOWAY. It would if it existed, but I do not think it exists.

Mr. NELSON. You are arguing there that their motive in asking for this is wholly altruistic?

Dr. GALLOWAY. No, sir; I am not.

Mr. NELSON. You are telling us then that they do not really affect us, and that the real result is to bring about competition?

Dr. GALLOWAY. No, I do not know. I presume that nine-tenths of the men do not know the social or the business consequences of price maintenance, and that was my only justification for coming down here.

Mr. MORGAN. I would like to know if you have finished your general statement, or have you a good deal of other matter which you want to present?

Dr. GALLOWAY. I had prepared to discuss the question of how price maintenance is fixed under nonpatented goods, and its relationship to the resale price. If I might state the nature of price maintenance under a situation in which an article is patented, I would say that the manufacturer in such conditions in contrast with the condition where there is no patent—and after a study of the market, that is, in the proper demand, that is the essential thing which will determine for him the point at which he must fix his price.

Secondly, he does not need to take into consideration what the man does who is not working under a patent, that is, his competitor, because we assume that under a patent he has no competitors.

Thirdly, he must keep in consideration his cost of production, and that will in a way, when it is explained, give information as to what one of the gentlemen asked for in consideration of the variable and fixed expenses.

This man wishes to contract with his dealer to maintain his price, and under those conditions the seller is under no obligation to buy, nor under any obligation to sell that article. In other words, he has no monopolistic control over him, but he has the competition of other stores, but he has not the competition in that like article.

We should not say that there is no competition present in the marketing of goods. Therefore, on what basis is price fixed? The price is fixed on the basis of monopoly price, which is the price that will give the manufacturer the highest net profits. The price is fixed, we should also note, not by competition, but at that point which will net the manufacturer most. This price will, in one sense of the term, always seem "high price," while the competitive price will always tend to be the marginal price.

We should also note, therefore, that a patented article having a monopoly will tend to get the highest price possible consistent with the greatest net returns.

Is this fair? If not, why do we grant patents? In answer to that I might say we grant patents to encourage invention, and we offer a bonus in the shape of monopoly profits. Then we might properly ask what effect has the maintenance of price on monopoly profits? And in answer to that we might say that having given the manufacturer the right to monopoly profit, a law supporting price maintenance would simply protect that right. Price maintenance in itself would constitute no special privilege or added privilege.

Why, then, should the manufacturer of a patented article ask for price maintenance? When a man patents an article he has still to sell it. To sell it he must necessarily create a market. He, therefore, advertises its virtues, puts a brand upon it, and offers it for sale at a stated price. As a consequence it becomes well known, the public demands it, and the dealers are willing to handle it.

We will agree that the price is very high, but the manufacturer is not responsible for that. The Government of the United States is responsible for that because it gave him a patent right. Relying on the Government protection he spends thousands of dollars to create a market for his article, to build up a good will, which is a property right, and to establish a trade-mark; that is, to build up a reputation. He bases all this upon the association in the public mind of a certain price with certain qualities of goods and services; all of which he is willing to guarantee and stand sponsor for. Any act reflecting upon the value of his goods would therefore hurt the sale of his goods and impair the advantages which the Government gave him under a patent monopoly.

Therefore the right to maintain the resale price is in no wise related to the monopoly price. The Government created the monopoly. The manufacturer created his reputation. He asks to be protected in the latter, as any property owner would do if his possessions were being stolen.

In conclusion I might say that under free competition the manufacturer's price is fixed by ordinary business conditions, the conditions which we admit are normal and natural.

Under patented conditions the price of the manufacturer is fixed by monopoly conditions and encouraged by the Government. Therefore when the manufacturer maintains his price under free competitive conditions he is entirely free of a monopoly price. And when the price is maintained on a patented article the manufacturer is asking for no special privilege.

Hence we can free the term "price maintenance" from any tinge of meaning indicating a monopolistic origin.

Then I might say just a few words on the question as to whether price maintenance infringes on the rights of the resale merchant. And to that proposition I would answer no. The manufacturer sells goods plus reputation, plus service. He parts with no control over his individual physical product, but he still has some property rights in his trademark and in his reputation. The resale merchant buys goods; but the reputation, the guaranty, and the service are still closely associated with the manufacturer.

I thank you very much, gentlemen, for having given me the opportunity of presenting my views to you on this subject.

The CHAIRMAN. We are very much obliged to you for having given us the benefit of your views, Dr. Galloway.

We will now hear for just a few minutes from Representative Smith of Minnesota.

STATEMENT OF HON. GEORGE R. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA.

Mr. SMITH. Mr. Chairman and gentlemen of the committee, I will be very brief.

I want to call attention for just a few moments to the provisions of the bill prohibiting interlocking directorates.

The question comes up in our State in a way that our people are very much interested in. They are very much in favor of the proposed legislation. In no way do they desire to retard its being enacted into law at an early date. But they do feel that there is one phase that ought to be taken into consideration by the committee, and that is the matter of prohibiting the directors of a national bank from being directors of a trust company.

In our State there is no such thing as competition between the trust companies and the national banks. They are more of mutual aid to each other than competitors with one another. In no sense can we say that there is any competition. I can see, in a larger sense, that they may grow to such a point where a monopoly of credit might be reached. The history of the trust companies in our State is practically this:

Thirty years ago we enacted a trust-company law and under that law some 15 trust companies have been organized. Nine years ago we had 11 trust companies, and 7 of the 11 disappeared. Some went into bankruptcy and some found that it was not profitable and withdrew from the field, leaving only four in existence. Three years ago we had in Minnesota only four trust companies, two in St. Paul and two in Minneapolis. The two in St. Paul were incorporated, one for $500,000 and the other for $250,000 capital, and the two in Minneapolis were each incorporated for a million dollars capital.

It was the theory throughout the country that the trust companies could be assisted by being affiliated with either State or national banks, so that the directorates of the State and national banks and and the affiliated trust companies became in most all cases practically the same.

The result in our State has been this: Since that time four additional trust companies have been organized, not in out large cities but in such places as Red Wing, Rochester, and Mankato. When these small trust companies are operated in connection with State or national banks they become self-sustaining. Without the aid of the national or State banks they could not exist.

In the two cities of Minneapolis and St. Paul, within the last three years our trust companies, aided by their combinations with the national banks, have grown to such proportions that they have been able to take care of all bonds issued within the State. During this period there has not been one estate that has been trusted outside the State of Minnesota. We have been able to take care of every local demand. Prior to that time a large portion of the wealth of the State went to the outside States or cities to be trusted; they went to New York, Philadelphia, or Chicago, because we did not have a financial institution large and substantial enough to warrant our people in placing their trust funds with that institution.

Just the other day we had a citizen of our State die who left $3,000,000 to public purposes in our city, and under the old régime that $3,000,000 would have been trusted either in Philadelphia, Chicago, or New York City, but to-day it is placed in trust with one of our trust companies. That has been the history of it, so that by this mutual aid which the banks can give to the trust companies and the trust companies can give to the banks they can take care of the local conditions without any injury or harm that we can see.

The trust companies render a service that neither State nor national banks can perform. A bank can not buy or sell bonds. That is not a part of its business. A bank can not buy or sell mortgages; it can not place mortgages on city real estate; that is the business of a trust company. It can not act as trustee for trust deeds. In our community, which is a manufacturing city, at the present time half a dozen large buildings are being erected, involving from one to two million dollars in their construction. In some cases this money is obtained by making a trust deed to a trust company and the trust company in turn issues bonds in small denominations covering the amount of the loan and sells them to the local investors in such amounts as they desire. A national bank could not do that. The trust company serves a local want. It gives the borrower an opportunity to get his money at home, and it gives our own local people who have some money saved up an opportunity to invest in these bonds, secured by as good security as can be had. In that way they are a helpful local institution.

One of the trust companies in Minneapolis has a million dollars capital. It is affiliated with a national bank which has $3,000,000 of capital, and the same amount of surplus, and deposits of something like $27,000,000. In all you have a $35,000,000 institution that can finance any local business proposition. If you separate these institutions the trust company with a million dollars capital

will not inspire such confidence as to be in a position to successfully bid for large estates in competition with the great financial institutions of New York, Chicago, and Philadelphia

If it is possible that they may grow so large that they will have an effect upon the control of credit, then I say that an amendment could be added to the bill whereby the Federal Reserve Board, under the Federal reserve act, could determine whether or not a trust company and a bank should have coordinate directors. That would put the power in the hands of the Federal Reserve Board, and that would eliminate that one possibility, which I believe to be remote.

In the State of Minnesota, and in any other State, eliminating the cities of Chicago and New York and possibly Philadelphia and St. Louis, you could not conceive——

Mr. NELSON (interposing). In my State we have exactly the same conditions that you have pictured in Minnesota, where a trust company is not in competition with the banks, and that is helpful there, as you state.

Mr. SMITH. This plan of affiliating trust companies with banks has been operating in your State during the last 3 years, and it is a fact that during this period this idea of connecting trust companies with responsible banks has grown up and has been put into practice all over the Union.

In our Minnesota bond sales we have not gone outside of the State of Minnesota to sell a bond within recent years. Heretofore in the case of every bond of practically any size, that bond would first go to some bank in the East and be approved there, and after it had passed through their hands and they had received their percentage, it was returned to our banks and parcelled out to our people. Now the local people get all the benefit of it.

Mr. VOLSTEAD. How would a trust company get from that bank the money upon those bonds? Suppose we have a city issuing a million dollars worth of bonds, they could not get that from a bank, could they?

Mr. SMITH. Not from the bank directly but from its customers.

Mr. VOLSTEAD. Why could not the bank take that up without the trust company?

Mr. SMITH. They can not do it because it is unlawful for them to do it. The banks can not buy and sell bonds as a business proposition, receiving commission, etc., therefor.

Mr. VOLSTEAD (interposing). A bank can buy the bonds, can it not?

Mr. SMITH. No; it can not buy bonds. The bank is expressly prohibited from doing that in the Federal reserve act.

Mr. VOLSTEAD. The national banks?

Mr. SMITH. The national banks are expressly prohibited from buying bonds.

Mr. VOLSTEAD. That is in the last Federal reserve act?

Mr. SMITH. Yes; that is one of the things which is prohibited. Section 13 of the reserve act says:

> But such definition shall not include notes, drafts, or bills covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other invested securities, except bonds and notes of the Government of the United States.

Mr. VOLSTEAD. That is the Federal reserve bank?

Mr. SMITH. That refers to all member banks. It applies to all of them.

Mr. VOLSTEAD. It does not prohibit that class of securities from being used to obtain currency from the central bank, the Federal reserve bank. It does not prohibit the bank from buying those bonds.

Mr. SMITH. It does. This class of securities can not be used to obtain money from the Federal reserve bank. No national bank from this time on will attempt to buy bonds which they can not take to the Federal reserve bank and there have discounted.

Mr. VOLSTEAD. I think you are going to find that you are mistaken about that. They will continue, unless prohibited by law, because they will not depend absolutely upon the Federal reserve bank to get currency, and they are going to hold the bonds as a sort of secondary reserve. But I am trying to get at the question of competition. Do the trust companies take checking deposits?

Mr. SMITH. Yes, a few of them do, but it is only a small part of their business and can be easily discontinued.

Mr. VOLSTEAD. Do the statutes of the State of Minnesota say anything about that; do they prohibit a trust company from doing that?

Mr. SMITH. No; they do not say anything about that.

Mr. VOLSTEAD. There is no express grant of power to do it?

Mr. SMITH. No.

Mr. VOLSTEAD. But it is customary to do it, with some of them.

Mr. SMITH. I am heartily in favor of the interlocking directorate bill and am only anxious that it be as perfect as it is possible to make it.

Referring to the company of which I first spoke: The funds of that company have never been distributed, for two reasons, and the first is that a certain per cent of the trust funds have to be deposited with the bank examiner of our State, and besides that every trust fund that reaches a trust company under a given amount has to be kept separate; and so when the bank fails all you have to do is to go to the receiver, if you represent the party whose funds are in trust, and ask for the money or bonds or stock or other securities belonging to them, and he hands them over to you; and if the banks do not keep their books in that way, so this may be done, its officers are subject to a heavy fine or other penalty. Any provision requiring trust companies to turn over the trust funds to national banks of deposit and discount them is not wise in my estimation. I think it is wise to provide in this bill for these banks that could act as trustees and thus serve the public in a limited way; that is what we want and are trying to do, but we want safety first, and you can not have safety with national banks handling trust funds, pure and simple, as trust funds. The only place for such funds may be found in the many trust companies such as we have throughout the country, institutions which are operated under similar laws all over the country and which are well able to safeguard such funds.

Mr. SMITH. Mr. Chairman, I have here a letter from Mr. J. M. Martin, general counsel of the Minnesota Loan & Trust Co., of Minneapolis, which I desire to have incorporated in the hearings as a part of my remarks.

The CHAIRMAN. That may be done.
(The letter referred to is as follows:)

MINNEAPOLIS, MINN., *March 4, 1914.*

Hon. GEORGE R. SMITH, *Congressman,*
House of Representatives, Washington, D. C.

DEAR SIR: Re a bill to prohibit certain persons from being or becoming directors, officers, or employees of national banks or of certain corporations:

This tentative bill I understand is now before a committee of the House, and we desire to express our views upon the effect of the same should it become a law in its present form.

To that end I beg your indulgence, and ask you to seriously consider this statement as to trust companies and national banks in Minnesota, and the probable injury to the business of the State which will result. I will endeavor to make this statement as concise and accurate as I am able.

THE BILL.

As the tentative bill now stands, in its second section it provides that from and after two years from the date of the approval of the act—

"No person shall at the same time be a director or other officer or employee of two or more Federal reserve banks, national banks, or banking associations, or other banks or trust companies which are members of any reserve bank."

And further that—

"A person who is a director in any State bank or trust company, not operating under the provisions of the said act [the Federal reserve act] shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid act."

Section 3 prescribes the penalties, and section 4 declares that the having of a "common" director or directors shall be "conclusive evidence that there exists no real competition between such corporations," and if such corporations shall have been "natural competitors," "such elimination of competition thus conclusively presumed shall constitute a combination," and subject the parties to all the remedies and penalties of the Sherman Antitrust Act.

The bill is short, sharp, concise, specific, direct, as unelastic as a stiletto, and if it becomes an act without amendment it will, in my opinion, strike down business in Minnesota.

The only words in the act evidently open to any construction, or any broadening or softening, are the two words "natural competitors."

HISTORY.

Please consider a brief history of the financial institutions of Minnesota. All is now prosperous, and the banks and trust companies are, I believe, all legitimately successful.

The State law authorizing the organization of trust companies was passed 31 years ago. There have been 15 trust companies organized and doing business in the State of Minnesota. Nine years ago there had been 11, each independent. Seven had faded away by failure or dry rot, and only 4 remained actively and independently doing business, 2 in St. Paul and 2 in Minneapolis; and thus the situation remained until about a year ago.

The State law for the organization of trust companies was and is a good one, requiring a guaranty fund of authorized securities to be assigned to, deposited with, and held by the superintendent of banks, to secure the obligations of the company, not permitting the ownership of stocks or real estate except for its own use or when taken for indebtedness, and granting broad, proper, legitimate authority for all fiduciary transactions, and every other proper and legitimate financial exercise, and requiring all trust investments, securities, and properties to be kept absolutely separate.

As I have said, each of these four trust companies were independent, not only each from the other, but each from every other financial institution, bank, or banking association. One of them, which was the strongest, had continued practically from the passage of the act—May, 1883—but none of them was able to occupy the field and to supply the needs of trust company business in the State; none of them had the funds; none of them was able to command the funds necessary to assist their clients in the financing of the legitimate enterprises of the State. They could not finance or handle large bond issues when the same became necessary for the building and development of our flouring mills, elevators, sawmills, and lumber enterprises,

railroads, street railways, and other public utilities and lawful enterprises, iron and steel foundries, or even the necessary municipal bond issues of county, city, school district, etc. Whenever, therefore, a large bond issue was necessary for any of these legitimate enterprises, a trust company in New York City, or one of the eastern cities, was selected, and the business was thus driven away from the State, although again and again the bonds, after being certified by the eastern trust company, were brought back and sold to our citizens, our own clients and customers.

When any citizen of Minnesota, having an estate exceeding $1,000,000, was looking for a trustee under his will, he was forced or deemed it necessary to select a trust company in one of the eastern cities, and the business was thus lost to Minnesota, with all that word means. It would not be proper for me to enumerate the instances or name the Minnesota estates or trusts that are now being thus handled by the trust companies of New York and other eastern cities. I know that you personally know of some of them, and can specifically recall many on the long list, that have accumulated to the disadvantage of the financial institutions of Minnesota.

As I have said, the trust companies and the banks were in every case independent, but there was no competition between them. Each had its legitimate field and sphere. The trust companies loaned upon real estate—both city and farm—took such trust deeds upon flour mills, sawmills, timber, electric, gas, water power, and other enterprises, buildings, and property, as they were able to finance or handle, bought and sold municipal and other legitimate bonds, acted as executor, administrator, trustee, and guardian of the estates of minors and others, and loaned millions of dollars at low rates of interest to the farmers of the six States in their territory.

The national banks had their own legitimate field, and acted within it. Not being authorized to make loans upon real estate, to act as trustees or fiduciaries, or to buy or sell bonds upon commission or otherwise, there was neither conflict nor competition between the banks and the trust companies, for both were limited and both were restricted in growth and legitimate prosperity. The banks could not supply the wants of many of their customers, and the trust companies lost many clients. As there was no competition, so there was no monopoly sought, or desired, or possible by their affiliation, nor would there be any competition accomplished by their now being separated.

And about three years ago a chance began, and the oldest, largest, and strongest trust company in the State deliberately affiliated with the strongest national bank. They came together, not to eliminate any competition, for there was none; not to obtain a monopoly; but for the legitimate purpose of creating two strong institutions, so that the business of the community could be handled, and assistance properly granted to their clients and customers. The trust company with a capital of $1,000,000, the national bank with a capital of $3,000,000, made affiliated institutions that could offer facilities for financing and handling the business of the community and the estates of their deceased clients and customers, and handling the financial affairs of the citizens and municipalities of the State. Since this affiliation no trust deed or will has, to my knowledge, gone to a trust company of New York City or other eastern city.

The board of directors of the trust company consists of 27 members, and the majority of the members are "common" with the bank. What wrong has been done, threatened, or feared?

Since that time—about three years ago—all of the trust companies of Minnesota have affiliated with national banks, or have been organized in connection with national banks. There are now eight trust companies in Minnesota; two in St. Paul, with capitals of $500,000 and $250,000, respectively; two in Minneapolis, each with a capital of $1,000,000; and four comparatively small ones organized recently, but all in connection with national banks, in four other cities—Winona, Rochester, Red Wing, and Owatonna—in every case because each national bank felt that they required the aid of a trust company to enable it to serve the community.

RESULTS.

Now the question is, What will be the necessary result of the enactment of this bill now before the committee of the House into a law, without amendment?

It of course will mean one of two things: Either the banks will be forced to endeavor to absorb the trust companies, or a divorce of the trust companies from the banks. Both must necessarily be failures, at least in Minnesota.

First: An attempt by the national banks to absorb the trust companies must be futile, because—

The national banks are not authorized and should not be authorized to do the business that a trust company can and legitimately does do. It can not and should

not be authorized to go into the business of buying and selling bonds, which is not part of a banking business. The Federal reserve act of December 23, 1913, emphasizes this prohibition.

"SEC. 13. * * * But such definition shall not include notes, drafts, or bills covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other invested securities, except bonds and notes of the Government of the United States."

National banks can not loan upon urban real estate, stores, mills, factories, or the like. This is one of the great needs of every growing community. The trust powers which the Federal reserve act authorizes the Federal Reserve Board to grant to national banks (if authorized by State law), are limited and restricted, and not sufficiently complete to take the place of a legitimate trust company's powers. The State law of Minnesota until amended would not permit the exercise of any of these trust powers by a national bank (sec. 2978, R. L. 1905), but nevertheless an attempt by the national banks to absorb the trust companies (even if the State law is amended) will, in my opinion, result in failure and in great injury to the business of the State, as the national banks will not be able to do the trust, bond, or mortgage business required.

Second: The other alternative—the separation of the trust companies from the banks and the necessary loss of the mutual aid—while not restoring any competition that never was eliminated, will result probably in great loss, if not disaster, to the business of the State. The trust companies can not so live and flourish. They must shrink, fail to serve their community, lose business from the State, and at least half of them go out of existence at once.

Experience is a good teacher. The 11 trust companies of the first 25 years of our law were not lacking in official integrity or ability, but were unable to grow to such financial strength as would enable them to retain the business in the State. What will be their chance when a hundred or more quasi national bank trust companies are scattered over the State to take the small business, and at the same time the large municipal bond sales and industrial bond issues, as well as the wills of our prosperous citizens, are again driven to the trust companies of New York City?

REMEDY.

That the object and purpose of this proposed act is good, I concede most heartily. The legitimate, upright, honest, and true should not suffer with the dangerous or guilty. The business of the State or community should not be made to suffer, or legitimate, proper affiliations for mutual aid, and strictly for the benefit of the customers and clients of the banks and trust companies, should not be prohibited.

I suggest three possible amendments to the bill. Although there may be objections to one or more, and some differences between the amendments, yet the adoption of any one of them will, I believe, be satisfactory to the banks and trust companies of the United States, will save the business of Minnesota, and not materially change or in any way injure or lessen the remedial force of the proposed act.

Amend the bill by:

(1) Defining "competition," and limiting the prohibition of "common" directors to the banks or trust companies coming within the definition; or

(2) Excepting from the operation of the act any bank and any trust company that, instead of being "competitors," are in fact supplemental the one to the other, and when acting each within its own legal sphere, only aid or reenforce the other in serving their community or respective communities; or

(3) Providing that the Federal reserve board may determine whether a given national bank and a specific trust company, or class of banks and trust companies, are not competitors, and thus authorize certain affiliations, giving to the act something of the elasticity of the Federal reserve act.

It is probably unnecessary to elaborate upon any one of these, or to suggest the form of the proposed amendment, but the adoption of one of the three seems to be imperative and necessary to save the legitimate business to the State of Minnesota.

I most earnestly and sincerely urge that this matter have full and careful consideration, and that the bill, if it becomes an act, shall be amended so as not to injure and destroy our institutions and our business.

Very sincerely, yours,

J. M. MARTIN.

STATEMENT OF MR. WHITNEY LYON, NEW YORK CITY.

The CHAIRMAN. What is it you wish to speak about, Mr. Lyon?

Mr. LYON. The tooth-powder business—Dr. Lyon's tooth powder. Mr. Strauss made a statement here that our business had been improved by the privilege of price cutting, or rather the lack of maintenance of prices, but I would like to say we have not found that to be the case. In all the large cities where our goods are sold, where the chain drug stores, and the large department stores are handling our goods, we have suffered a loss. These are actual facts from the man who sells the goods. In the smaller places where the price can be maintained, and which shows the retailer and jobber a fair, living profit, our business has held its own.

These are the facts I wanted to present to you, which show that price cutting is destroying the business of the small retailer in sections where they have these chain drug stores; they are killing off the business of the small retailer by cutting the price down so they can not afford to handle the business they could if it was maintained, and this, of course, injures us.

That is all I care to say, Mr. Chairman; but those are the actual facts.

STATEMENT OF MR. M. B. DEITERS, CINCINNATI, OHIO.

Mr. DEITERS. I haven't a very lengthy statement to make, Mr. Chairman; I just want to give you a few facts that occur in our business, for price cutting means a lot to the small grocer.

There are times in season when we have to buy quite a bulk of goods, and, of course, as the season goes on we are supposed to get rid of them; and frequently when we stock up with a good, standard, substantial, well-advertised article, some of these price cutters will take it up and use it as a "feeder," as it has been expressed here, and then the small dealer has to keep his goods on his shelf, and such a practice is therefore not only destructive to him but to the business of the manufacturer, for I am bound to quit handling his goods when that is liable to happen to me. I have no means, as my business is but a small one, of using such a bait, as you might call it; I can not afford to do it. I only serve a small community and my business isn't large enough for that; I don't have to do a large advertising business; but that little stock of goods on which this price cutting occurs represents probably an investment of $100, and it just stays there on my shelf, and there I am. Now, if you allow the manufacturer—I am not saying compel him—if you allow him to fix a price and provide that it shall be maintained, then all that will be done away with. We are here asking this committee to kindly help us out; that is my view of the situation; we think you should study these questions in a good, moral, sensible way, and believe you will come to some conclusion to do so.

That is about all I had to say, and I thank you very much.

STATEMENT OF MR. JOHN A. LAKE.

Mr. LAKE. I am a retail grocer and meat dealer. We have two stores in northern Michigan. I am vice president of the State Retail Grocers and General Merchants' Association of Michigan, and am down here by their orders.

In regard to the Clayton bill I wish to say that I believe it has some good provisions. I am not in favor of any trust or monopolies, or of anything that will build up business along that line at the expense of the consumer. I am in favor of any law that will increase business from the standpoint of the retail grocer, and I believe that where a manufacturer has put his brains and executive power and ability into making a standard article and he wants to fix a certain price to the consumer he should have that privilege. I think competition should be along the lines of good service, good goods, and right price, rather than poor service, low quality, and low price, and any law that will help to bring about this condition will have a tendency to bring better men into business, and better men can conduct a better business at a lower price than poor men under poor business conditions.

Those are the particular points I wished to cover. I am in favor of a law that would enable the manufacturer, under the closest Government supervision, to place his article before the public at a fixed price, and I believe the consumer would get better value under such conditions.

STATEMENT OF MR. W. A. NASH, CLEVELAND, OHIO.

Mr. NASH. I am in the retail grocery business in Cleveland, Mr. Chairman, and the only thing I wanted to say was that I am in favor, and the men I represent are in favor, of any law that will prevent undue cutting of prices; that will give to the manufacturer, who has placed his energy and his knowledge of the business, and his advertising and money behind a particular product, the right to put his name on the article and fix the price; we think he should be protected against anybody taking away the reputation he has earned for his product, and causing a waste of all the money and time he has put in it. We believe this can be done if you will give him the right to maintain a selling price to the consumer of his product. Statements have been made here by some that they believed that would foster monopoly. My belief is that instead of fostering monopoly it would create competition, in this way: I believe that competition would then consist in the effort to give the best quality in the greatest quantity for a given price, and the field would be open to any manufacturer; there would then be no reason why other manufacturers could not get into the field and endeavor to get the trade of the consumer, and to sell their goods to the consumer in competition with any other trade-mark goods.

That is all, Mr. Chairman. I thank you.

STATEMENT OF MR. ALONZO H. STEWART, OF WASHINGTON, D. C., COUNSEL FOR THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS.

Mr. STEWART. Mr. Chairman and gentlemen of the committee, when the president and members of the National Association of Retail Druggists were here they were asked to frame and submit a suggestion applying to tentative bill No. 1. They have sent me that provision and I am going to ask permission to insert it in the record. They propose, on page 2, line 6, after the word "that" an amendment in this language: (Reading)——

when such person files with the Bureau of Corporations and furnishes for public inspection lists showing the prices on all commodities together with all discounts, of any nature whatsoever, then * * *

And, on page 2, line 10, after the word "transportation" and before the colon, insert a period and then the following language: (Reading)——

* * * and the sale of any such commodity at a price or rebate, discount, or commission of any nature whatsoever different from that contained in the public list herein described shall be prima facie evidence of an intent to injure or destroy competition,

so that the section would then read:

SEC. 9. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller: *Provided:* That when such person files with the Bureau of Corporations and furnishes for public inspection lists showing the prices on all commodities, together with all discounts, rebates, or commissions of any nature whatsoever, then nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of difference in the grade, quality, or quantity of the commodity sold, or that makes only due allowances for differences in the cost of transportation. And the sale of any such commodity at a price or rebate, discount or commission of any nature whatsoever different from that contained in the public lists herein described shall be prima facie evidence of an intent to injure or destroy competition. *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

This amendment is in perfect harmony with your bill. Its purpose is merely to compel gentlemen who wish to take advantage of the provision to make public those price lists; and also, when any secret variation is made from those public price lists it shall be incumbent upon the men making the variation to show they were not with intent to destroy competition, which is in line, I believe, with the proposition of the committee in the bill itself.

What the gentlemen representing this association desire is that a person shall sell his goods at a uniform price to all consumers alike and play no favorites; and in order that the consumers may know just what the price is for different qualities or quantities, the price list should be made public. The filing it with the Bureau of Corporations (or the new Interstate Trade Commission) would assist the Govern-

ment in gathering much needed information. The two following instances show the great need for legislation of this sort:

Take the instance of the combination of the Riker-Hegeman chain of drug stores with the United Cigar Stores which was and some people think still is a part of the Tobacco Trust. This came after the bitterest kind of a cut-price war in certain trade-marked brands of cigarettes and similar articles. It was reported that the United Cigar Stores Co. had purchased the majority of stock of the Riker-Hegeman Co.

Inquiry made of the Secretary of State of Delaware discloses that a holding company was organized to control stock of the Riker-Hegeman Co. Here is the letter giving all the information I could gather on this subject from Dover, Del.:

OFFICE OF SECRETARY OF STATE,
Dover, Del.

ALONZO HOPKINS STEWART, Esq.,
Washington, D. C.

DEAR SIR: In reply to your favor of the 9th instant, beg to advise, according to the annual report filed in this office by the corporation for R. & H. stock, January 6, 1914, the following are the names of the officers and directors.

President, William J. Maloney, care of Corporation Trust Co. of America, Du Pont Building, Wilmington, Del.

Treasurer, Julian Wattley, care of Corporation Trust Co. of America, Du Pont Building, Wilmington, Del.

Secretary, Herbert E. Latter, care of Corporation Trust Co. of America, Du Pont Building, Wilmington, Del.

Directors, William J. Maloney, John F. Meaney, M. Monae-Lesser, Charles H. Dubois, Julian Wattley, Carl Schmidlap, Herbert S. Collins, Sidney S. Whelan, Frederick L. Becton, care of Corporation Trust Co. of America, Du Pont Building, Wilmington, Del.

Very truly, yours,

THOMAS W. MILLER,
Secretary of State.

Information has been furnished me showing something of the personnel of the officers and directors.

William J. Maloney, the president, is an officer of the Corporation Trust Co. of America, which company incorporated this holding company, and is the resident director required by the laws of Delaware.

Julian Wattley, the treasurer of the company, is a young man between 22 and 25 years of age; is a bookkeeper or office man on salary. No financial standing commercially. No knowledge of drugs. Formerly lived in St. Kitts, West Indies. Brother of Ralph Wattley, auditor of United Cigar Stores Co. Worked in secretary's office of United Cigar Stores Co. Probably acting as treasurer to sign checks and as dummy director.

Charles H. Dubois, director, is a man about 40 years of age who used to live in Bogota, N. J. Bookkeeper or office man on salary. No financial standing commercially. No knowledge of drugs. Worked in secretary's office of United Cigar Stores Co. No executive ability. Probably a dummy director.

Herbert S. Collins, director, is a man about 40 years of age; is a retail chain store specialist. Protégé of George Whelan, president of United Cigar Stores Co. Was once vice president of United Cigar Stores Co. Formerly lived in Syracuse, N. Y., where followed tobacco business for years. Has no knowledge of drugs.

Sidney S. Whelan, director, is a boy about 21, son of George Whelan, president of United Cigar Stores Co. Must be his first experience in business.

Frederick L. Becton, director, is a young man about 25 years of age. Bookkeeper or office man on a salary. No financial standing. No knowledge of drugs. Formerly lived in State of North Carolina. He was at one time assistant auditor of United Cigar Stores Co. and may be now. Has two brothers working for the United Cigar Stores Co. Is probably merely a dummy.

Of the secretary, Herbert E. Latter, and of Directors John F. Meaney, M. Monae-Lesser, and Carl Schmidlap no definite information has been furnished.

The other instance was one the details of which I personally learned while counsel for a manufacturing concern in New York City.

This company manufactured a trade-marked belting and sold direct to the consumer in most cases. The ultimate consumers were all classes of mills, from the little sawmill in the Ozark Mountains to the large mills owned by trusts, such as the Sugar Trust and the Smelting Trust.

This company had a printed price list for all sizes and weight of belting. But a different rate of discount was given to nearly every purchaser and the quantity purchased was not the controling factor in the amount of the secret rebate or discount given, for sometimes the larger consumer paid more than a small one. Again, the purchasing agents of large corporations often demanded and received a special discount or rebate not appearing in the bill, which went into their own pockets.

The losses on some orders were made up by overcharges on others. In other words, because of this secret price cutting indulged in not only by the concern which I was connected with but also by every concern making beltings in this country, the consumers of belting were unfairly treated. The special favor to one consumer was always paid for by the less favored consumer.

Now, referring again to the cut-price war in Boston between the Riker-Hegeman Drug Stores and the United Cigar Stores Co.: Besides creating a monopoly, that war injured the independent retailer, the manufacturers of those specially branded articles the prices of which were cut, and also the consumer as well.

The independent retailer was first injured because the price on these articles was cut so low that he could not meet the cut and at the same time make a profit; consequently he lost the trade of the customer not only in these articles, but also lost the general trade of these customers, for where a man buys cigars and cigarettes he generally buys other articles. Then the retailer finally has to give up handling these goods. When the price was restored to the normal, he had no trade in this line of goods whatever.

The manufacturer was injured because he lost the trade of the independent retailers and then was at the mercy of the trust because the trust was his only customer and could demand any discount it desired or could even refuse to handle the specially branded articles.

The consuming public was injured because even during the cut-price war all consumers were not treated alike, one consumer getting one price and another consumer a different price, depending on when and where the article was purchased. After the war was over the

consumer was compelled to purchase these articles at the trust stores and could be made to pay even a higher price than was charged in near-by cities where there were independent retailers. And this higher price could be charged in spite of anything the manufacturer could do to prevent it, although the increased price might make the article itself unpopular.

I have some data which these gentlemen request me to lay before the committee, and I ask permission to put them in the record. I don't believe there is anything else I have to say.

The CHAIRMAN. If there is no objection, the data referred to will be inserted in the record by the reporter.

THE HIGH COST OF PRICE CUTTING.

[By Lee Galloway Professor of Commerce and Industry, New York University

The Smith family—father, mother, and children—are fond of breakfast food. Properly garnished with sugar and cream, some one of two or three favorite varieties of corn, wheat, or oats appears on the family table every morning, and not uncommonly for Sunday-night supper. Mrs. Smith has been buying the familiar packages for 10 cents at Prouty's corner grocery ever since she introduced them into the family bill of fare.

One morning two months ago she came upon an advertisement in the newspapers in which a merchant, a mile farther down town, proclaimed the economy of shopping with him, and announced one brand of the Smith favorites at 8 cents. A 20 per cent reduction in the high cost of living made warm appeal to Mrs. Smith, and the next time she went down town she dropped into this merchant's store and bought one package. Mr. Smith said "Good!" when she told him about it.

A week later, when she asked Mr. Smith to repeat the errand, he did not care so much about it, but properly obeyed orders. The next time, a month later, it was not convenient for either of them to go a mile down town for breakfast food, and Mrs. Smith regretfully restored the item to the list of purchases at the neighborhood market.

That part of the order came back unfilled. Prouty said he didn't keep it, and the Smith family had something else the next morning.

Mr. Smith got provoked when his wife told him about it. "How ridiculous," he said, "that a live store in this part of the town should not keep such a standard product as that. I'll drop in and see Prouty about it on my way to the car."

Prouty admitted that he did not carry that brand any more and didn't intend to. He could not sell it at 8 cents at a profit; he could not sell it at 10 cents at all, with an 8-cent quotation from another store flaring in the newspapers. So he let the down-town store that had drawn his customers by unfair competition—baiting them with breakfast food sold at a loss—have his trade in that article.

When Mr. Smith found that the other neighborhood stores had also stopped carrying his breakfast food and that he must either buy it at the cut-rate store or go without, he was irritated. This looked like petty retaliation. He would rather pay 10 cents than go a mile down town when his supply of breakfast food gave out unexpectedly. Of course, he hated to be robbed, but the convenience of neighborhood shopping on such occasions was worth the extra 2 cents that he had formerly paid willingly for his article. Prouty ought to have more consideration for his customers.

"SOMETHING JUST AS GOOD."

Mr. Smith's irritation was increased when the down-town store, having exhausted the general trade-drawing possibilities of this sort of unfair competition, and being just as keen to do business at a profit as Prouty, raised the price to 9 cents, and finally to 10 cents, per package. To protesting customers the down-town store offered substitutes of some house brand at 8 cents, which it declared was "just as good," though the Smith family didn't think so. Finally the down-town store ceased to carry Smith's favorite.

Then Smith began to investigate. He asked Prouty why he didn't restore the brand. The answer was illuminating. His customers now assumed that 8 cents was a fair price for this article, and the extra 2 cents, which Prouty needed to keep his store going, appeared to them extortion. They would not pay it. They said Prouty had been cheating them for years on this article and they knew it.

The market for it at a fair price had been destroyed.

Smith learned a lot out of that little experience, the inquiries he made, and the thinking he did. He began to suspect that the old maxim, "Let the buyer beware," might be fairly expanded to read: "Let the buyer beware of price-cutting on his favorite trade-marked staples." He also discovered to his surprise that there was a difference between a bargain in potatoes and a bargain in a trade-marked article carrying with it the reputation of the manufacturer. He studied the ethics of selling, and made some discoveries that were new to him, and that upset some of his previous convictions on merchandizing.

He discovered that the consumer ultimately pays a high price for "price-cutting" in standard trade-marked articles.

"ONE PRICE TO ALL."

Over in Europe, in many shops, as in the Orient in every shop, a customer must haggle, waste time, and finally buy at a compromise price. And even then he knows that he has been cheated. When A. T. Stewart, three generations ago, revolutionized the retail business by marking the prices plainly on all goods in his store, he made the first great ethical advance in merchandizing. Smith hadn't thought about that. With one stroke this great merchant had abolished the demoralizing custom of haggling. This one price to all was heralded as a great moral as well as an economic advance. It cut down the time required for shopping, and reduced the number of salesmen needed in a store where customers could see the prices for themselves. This cheapened the expense of selling and thus ultimately reduced the price of the goods.

Business made another step forward when the salesman on the road was able to sell by sample, instead of carrying with him great quantities of goods for instant delivery. Back of sample buying must be commercial confidence on the part of the buyer that the seller will deliver according to representation. Society gained through the saving in the cost of distribution.

Smith found out why he couldn't get his favorite breakfast food after he had studied the latest advance in merchandizing; the advent of standardized staple goods, old friends that include breakfast foods, soaps, biscuits, soaps, shoes, hats, corsets, hosiery, toilet articles, musical instruments, and even automobiles. Each was sold everywhere at the same price. It was identified with its maker by trade-mark and carried with it his guarantee that the quality was uniform. The success of these staples in a competitive market assured Smith also that their price was fair.

Moreover, it was uniform in all stores.

This carried Stewart's one-price-to-all-in-one-store a step further. It established for the customer one price for the same standard article in all stores. The customer bought it wherever found with the assurance that the quality was what he had been accustomed to, and he paid no more than the price he expected.

This saved haggling from store to store on such goods.

The customer might now send a boy to buy his favorite staples at the nearest store without worrying about selection or cost. No storekeeper could successfully charge him more than the regular price.

This advance in the business of retailing, with its saving of time, and its insurance to the customer against extortion, is based on price maintenance. Here we have a term both misleading and popularly misconstrued.

ONE PRICE IN ALL STORES.

Before Smith thought out the breakfast-food episode, he would have cried down any kind of "price maintenance" as a restraint of trade. It would have suggested to him a combination of rival businesses to control the market and fix prices. This has always been uneconomic and it is now illegal. It is monopoly. But "price maintenance" is an entirely different thing.

"Price maintenance" is a term used to describe the business policy of a manufacturer who, to secure the widest possible market for his goods, stipulates in his own interest, that his products shall be offered to the public at not greater than a stated price, and, in the interest of the small dealer, at not less than the same price.

Smith was now ready to accept this latest ethical principle in merchandizing, still obscure to many of us: One price everywhere for trade-marked standardized articles benefits the consumer; one familiar price everywhere for our guaranteed quality favorites.

Because of the fact that several States have already passed laws forbidding contracts between the individual manufacturer and the retailer which specify a standard price to the consumer—laws drawn in the belief that the consumer would be benefited by any sort of price-cutting—Smith's deductions ought to interest every consumer.

The desire for bargains is as old as apples. Man's real intercourse with his fellow man began through bargaining. It is one of the fundamentals of barter. But price cutting of standardized trade-marked commodities does not offer a saving bargain, one that profits the buyer later when he wants to repeat the purchase. Such price cutting is merely a dishonest "puller-in" to tempt customers to buy other goods of unfamiliar values at high prices.

Perhaps you, the exceptional buyer, may be able to swallow the bait and avoid the hook. The article you want and have been buying for a dollar you get for 75 cents. You have saved 25 cents on this purchase. That price is now fixed in your mind as the fair price for this article. You feel that you have been cheated in the past. You expect to buy at the cut-rate price in the future.

You do not stop to consider that if this article, which has had a big sale in competition with other articles of like use, could be manufactured and sold at a reasonable profit for 75 cents, some active competitor would have taken its market away by offering an equal standard of value for that price.

The manufacturer of the successful standardized article has not made his price arbitrarily; but to secure the largest consumption he has fixed it at the lowest figure that will give him a profit. This was determined largely by influences beyond his control, such as active and potential competition, the public taste, and the buying powers of various social groups to which he might appeal.

Such standard goods in this day of national distribution are sold on the maker's reputation and under the maker's guaranty. This has cheapened the cost of distribution. Every sale that is made has its effect on other sales and on the market at large. The manufacturer of these goods, unlike the man who sells horses, sugar, or grain, has a permanent interest in them. He stakes his business reputation on every article that he turns out under his trade-mark, and he should have supervision of it all the way from the factory to the consumer.

It is as vital that his customers should have confidence in the fairness of his price, as that they should have confidence in the quality of his product. Unfair destruction of one or the other ruins his market, and that not only injures the manufacturer but reacts on the consumer.

Smith learned this lesson, and his conclusion was that price cutting sometimes adds to the cost of living.

The New Freedom and the Retail Market.

[Written by W. H. Ingersoll.]

President Wilson, in his recent writings and speeches, has laid emphasis upon the undefined fear he has observed among free-born American business men, who quail before some invisible power, to avoid offending which they yield up their independence of action and sometimes their convictions as to what is right and best to be done.

Whether or not his observations represent conditions generally, this power, to the extent that it does exist, must reside in the concentration of control within the same few hands over many industries with their ramifications. The recent congressional inquiry into the money-control situation showed that no enterprise involving over $10,000,000 has been launched in recent years except with funds supplied by two or three closely related financial institutions. All were dependent upon the same sources for their backing, and one of the heads of the financial power expressed the belief that the control had gone "far enough" for public safety.

But most of us have felt no direct concern in the trust question. It has not seemed to touch our personal affairs. We go on about the same after as before the consolidation of great railroad lines or the declared dissolution of the oil and tobacco combinations. These things are too distant and too gigantic to belong to us.

If, however, we witnessed in our own neighborhood the absorption or driving out of the familiar retail stores where we had traded from childhood, and in their stead stood the stores of one great company, managed from afar, upon which we must depend for our needs, paying whatever they exacted for their wares or doing without, we would then experience an immediate appreciation of the meaning of monopoly right at our own threshold.

Is it possible that we are headed toward such a monopoly of the retail market in this country? Certainly there is no ordinary community in which such a condition now exists or where one is presently threatened, and yet what is the significance of the rapid extension of the systems of multiple chain stores and what of the dominance of the department stores which are already being combined into a great chain system?

Is the independent retail store to disappear, and will we be better off if this is true?

Many questions crowd to our mind. Can the little store really compete? Can it deliver the values? Is there economy in the operation of the big institution? Is

not a change inevitable, due to economic law? Is there anything unfair in the competition of the big-store systems? Don't the big stores save us money? By what magic do they prosper so enormously, still seeming to confer a public benefit?

Whatever our opinions on these questions, there is no one who can answer all of them authoritatively. The necessary information has never been gathered.

Recently there was formed a national organization of business men under the name of The American Fair Trade League. Among its organizers are some of the most widely known and successful men in American commerce, though none is a monopolist in his field, and included in the membership are obscure retailers as well as prosperous wholesalers and manufacturers.

From the statement of objects set forth in the constitution of this new organization, it is clear that with their first-hand knowledge of trade conditions, the men comprising its membership were drawn together through recognition of abuses needing attention. For example, among its objects are these:

"To aid in the establishment and continuance of fair competitive commercial conditions.

"To promote intelligent public opinion regarding evils in merchandising methods which operate to the injury of society.

"To study wastes in merchandise distribution and their relation to the cost of living.

"To aid in the enactment and enforcement of laws that will:

"(*a*) Prohibit and penalize unfair competition.

"(*b*) Prohibit and penalize dishonest advertising.

"(*c*) Prevent the artificial elimination of the small business man by deceptive trade practices."

In other words, the "new freedom" demands that the small man shall have a fair opportunity to compete. He must not be stifled by the misuse of the power of his big competitor.

There is nothing of paternalism in this program. The little man is not to be supported at anyone's expense, but he must have his equal chance to succeed if he earns his way by ability and service.

Evidently these practical business men think his extinction is not a foregone conclusion. They consider it worth while to work to give him a fair field and no favors. Their experience inclines them to the belief that mere size is no guarantee of supremacy unless supported by some artificial crutch. And what a sorry outlook for America if it were otherwise.

Yet they all see that the way of the little fellow is improperly obstructed. The door is partially closed to the man who would start out for himself. Those who already possess have an unnaturally heavy advantage. And the members have taken off their coats to work for the reestablishment of equality of opportunity for big and little man alike, each to prosper according to his deserts and no artificial handicaps to any. That is the old American spirit striving for the "new freedom," which, after all, is but the old freedom, the age-long vision of all fundamental democrats who will never be content while some are deprived of the natural inheritance of humanity's birthright.

These men are not visionary. For the most part they have met the world on its own terms and won. But the manufacturer perceives that he must have retail outlets through which his goods may reach the people and that if the retail market is absorbed by a few great combinations his future is subject to the whims of those who stand between him and his public. He then has no alternative. The many small stores become as one. He must make what they will take and take what they will pay.

The retailer on his part feels the increasing pressure of his bigger rival's competition. It is not the average values given that he fears. On that ground he feels secure. The big store's operating expenses are high. Out of every dollar it takes in, it must pay out 25 to 28 cents for expenses. It exists to sell goods, yet its selling is often intrusted to indifferent, unskilled sales people who do not understand the public's needs or the goods which they are called upon to recommend.

It is entirely different issue which constitutes his problem. It is the unfair and deceptive trade-drawing devices which he can find no way to meet.

It is not that the big stores are maliciously plotting to undo their smaller rivals nor that little men are any better than big ones. But all are after business, and unless proper restraints are thrown around the contest the strong will trample upon the weak; and human experience has shown that too much power turns men's heads and makes them callous to the interests of others, whether competitors or consumers. If this were not true, the strongest argument against monopoly would be taken away.

The unfair practices which harass the small dealers are those in which the big ones can indulge simply because of their resources. They can buy full pages in newspapers

and fill them with exaggerated statements of values offered which make the ordinary dealer pale into the background. No one could object to unlimited advertising if it adhered to truthful statements; but just as it was respectable until recently for the corporation to contribute to the campaign fund of the political party from which it expected favors at the public expense, so to-day custom sanctions the misrepresentation of values in the printed word and puts too great a cross upon the shoulders of those whose purses do not allow the lavish purchase of white space.

And then the great corporation is financially able to sell certain standard trade-marked goods for limited periods at a loss for the purpose of drawing crowds who will buy other goods at a profit. This device has the further effect of spreading the notion that big stores have some overweening power to give values because we notice low prices on the goods that we know and unconsciously assume that the same condition prevails over their entire stocks.

Thus is our confidence in the power of the small store to serve us undermined and we pass it by. And in each community as one concern outstrips the rest and controls a large part of the trade, it becomes absorbed into the great chain. So the independent existence of the million small merchants becomes threatened. Gradually it seems that the many are destined to work for the few unless present tendencies can be checked.

To be sure, there are other factors. The large companies are ably managed; they have adequate systems; they are expert in their business-gathering methods. But these things are available to the small man. They are not dependent upon wealth. And to offset any other advantages which the big concern may have we must remember that the small merchant is a specialist. He knows his particular line. He knows his community and how to pick for it. There is the individual incentive to industry in the establishment which he owns and which can be kept within the purview of the proprietor.

So the American Fair Trade League says give big and little an unfettered field to show, by service to the public, which is fitted to survive.

"Who Filches My Good Name."

(By William H Ingersoll.)

In the following statement Mr. Ingersoll points out the motive that is back of "price cutting" and warns his readers of the "hook" that is so adroitly concealed in the alluring "bait."

Since the inception of trade the great struggle has been for the buyer to be sure of getting the quality he paid for. In the nature of things the seller knows more about the goods than the buyer. It is the tailor's business to know clothes, not the wearer's. The wearer is dependent upon the tailor.

And through the ages, custom and the law have licensed the seller to lie about his wares. "Let the buyer beware" runs the old legal maxim, saying in effect, "How can you expect the seller to confine himself to the truth about the thing he seeks to sell you?"

The day has only dawned when it is respectable to be in business at all. Trade has been the despised calling of the cheat and trickster. Nobility was restricted to idleness or statecraft or learning. Even the teacher, the lawyer, and the doctor of this day affect to look down upon the commerce which withal supplies their daily needs.

What an advance then in human affairs when men came to think enough of the products they wrought to mark their names upon them, that buyers might identify them for repeated purchase when, after trial, their quality had proven satisfactory.

What a saver of labor has the trade-mark become, sparing us the need of perpetual experimentation with strange and unknown qualities and economizing time spent in testing and examining what after all we are qualified to judge only after use.

With the help of the trade-mark a simple name has come to stand in place of lengthy specifications, and the littlest child can say "Ivory," "Uneeda," "Heinz," "Arrow," "1847" with the assurance of getting precisely the same as the seasoned grown-up.

How great a wealth it is to the people in modern life to have these familiar guide marks as signs of the maker's confidence in his handiwork and how great a wealth to the maker to have the public confidence in exchange.

But centuries of deceitfulness could not but have left their mark upon emerging business, and the wolf of the market place, feigning benevolent value giving, contrives to ply his trade under cover of the fair names of the country's commerce.

"Bargain" is his store cry; and to bolster up his claims on the myriad unknown values in his stock, he quotes the favorite, standard trade-marks at half price, suffering a temporary loss on the things we know, to cast a spell under which we may believe what he says of the worth of what we do not know.

A bargain! But at a double price! We buy our friendly trade-mark cheap only to pay back our momentary saving with usury on nondescript commodities, for the economic law is no respector of persons, and what is sacrificed in one place must needs be recouped in another.

But as we respond to the lure of the cut price on the known value, the important thing is not that, in the gamble for more than our money's worth, we lose on subsequent turns of the wheel what we were permitted to win on the first. That is only the old story, for if the novice could but stop while he's ahead, the gambler would go out of business.

It is the aftereffect that is important. A wrong has been perpetrated wherein the good names of the market's choicest brands are tossed into the pot for the exploitation of our cupidity. For a petty evanescent saving, we suffer hard-won reputations to be bled and permanently sacrificed. Unknowingly, our love of gain makes us accomplices in the device of the conjurer whereby, to serve his ends, we are led to deprive ourselves and neighbors of the future benefits of the markets' trusted brands. For the cut price on the standard article is a travesty on merchandising. It is not a bona fide bid for business. In incurs a loss on the one who offers it, and its purpose is to mislead.

How can we know that the reason for selling it without profit is to spread the erroneous impression that we suffer extortionate charges when we trade with our home merchant who may not indulge in the pea-and-shell game, but who exacts no greater profit on the goods that we don't know than on those that we do?

How can we be expected to reason that the artificial price reduction lowers the worth of the brand in public estimation, and makes business thereafter impossible at the true worth? And with the profit gone, who will keep on sale the trade-marks that have meant so much to us?

The cut price, emblem of the gilded emporium which underpays its salesgirls, fattens off the products of the sweatshop, grinds down the factory toiler and makes for the low levels of civilization and living! Its hour has struck. The light of day is dissipating its shadows and we are coming to learn that our safety lies in holding fast to the names that we have found good and, upon "bargain days," to take only the brands of proven worth, avoiding promiscuous strangers that seek an introduction on the strength of their companionship on the bargain counter with old acquaintances.

The CHAIRMAN. The committee will stand adjourned until next Tuesday, March 17, 1914.

(Thereupon, at 1.10 p. m., the committee adjourned.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
ROBERT Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	LEONIDAS C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 31.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, March 17, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The tentative trust bills upon which, with other bills, these hearings are being held, will be incorporated in the record at this point.

[NO. 1.—COMMITTEE PRINT. TENTATIVE BILL.]

By MR. CLAYTON.

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES

JANUARY —, 1914.

MR. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To supplement an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," is hereby supplemented and amended by adding thereto the following:

"SEC. 9. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with

foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

"SEC. 10. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to make a sale of goods, wares, or merchandise or fix a price charged therefor or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in

tue goods, wares, or merchandise of a competitor or competitors of the seller.

"SEC. 11. That nothing contained in section nine or section ten hereof shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of section two of this Act.

"SEC. 12. That whenever in any suit or proceeding, civil or criminal, brought by or on behalf of the Government under the provisions of this Act, a final judgment or decree shall have been rendered to the effect that a defendant, in violation of the provisions of this Act, has entered into a contract, combination in form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several States or with foreign nations, or has monopolized or attempted to monopolize, or combined with any person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, the existence of such illegal contract, combination, or conspiracy in restraint of trade, or of such attempt or conspiracy to monopolize, shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such person, constitute as against such defendant conclusive evidence of the same facts and be conclusive as to the same issues of law in favor of any other party in any other proceeding brought under

or involving the provisions of this Act. In all cases where any person who shall have been injured in his business or property by any person or corporation by reason of anything forbidden or declared to be unlawful under the provisions of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and who at the time or previous to the institution of any such suit by the United States as aforesaid has a cause of action under section seven of said Act or under section thirteen of this Act against any defendant in a suit wherein a decree or judgment has been obtained as aforesaid, the statutes of limitations applicable to such cases shall be suspended during the pendency of such suit and shall not again become operative until after the date of the final decree or judgment in such cause.

"SEC. 13. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of

proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue.

[NO. 2.—COMMITTEE PRINT. TENTATIVE BILL.]

By MR. CLAYTON.

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

JANUARY —, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To include within the meaning of every contract, combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce among the several States or with foreign nations, and within the meaning of the word "monopolize," certain definite offenses, and to prohibit the same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "every contract," "combination in the form of trust or otherwise," and "conspiracy in restraint of trade or commerce," and the word "monopolize," as used in the Act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and in any Acts supplementary thereto or amendatory thereof, shall be deemed to include

any combination or agreement between corporations, firms, or persons, or any two or more of them engaged in trade or business carried on in the United States between the States, or between any State or Territory and the District of Columbia, or between the District of Columbia and any Territory, or between any State, Territory, or the District of Columbia and our insular possessions, or with foreign countries for the following purposes:

First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

Second. To limit or reduce the production or increase the price of merchandise or of any commodity.

Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

Fourth. To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

SEC. 2. That any such contract, combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce, or monopoly, is hereby declared to be unlawful.

SEC. 3. That any person, firm, or corporation violating any of the provisions of this Act shall upon conviction be adjudged guilty of a misdemeanor and be punished by a fine not exceeding $5,000 or imprisonment not exceeding one year, or by both, said punishment in the discretion of the court.

SEC. 4. That whenever a corporation shall be guilty of the violation of any of the provisions of this Act the offense shall be deemed to be also that of the individual directors, officers, and agents of such corporation authorizing, ordering, or doing any of such prohibited acts, and upon conviction thereof they shall be deemed guilty of a misdemeanor and punished as provided in the preceding section.

SEC. 5. That nothing contained in this Act shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

MEMO.—Paragraph relating to holding companies to be added.

[NO. 3—COMMITTEE PRINT—TENTATIVE BILL.]

By MR CLAYTON.

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

JANUARY —, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To prohibit certain persons from being or becoming directors, officers, or employees of national banks, or of certain corporations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after two years from the date of approval of this Act no person who is engaged as an individual, or as a member of a partnership, or as a director or other officer of a corporation in the business, in whole or in part, of manufacturing or selling railroad cars or locomotives, or railroad rails, or structural steel, or mining or selling coal, or the conduct of a bank or trust company, shall act as a director or other

officer or employee of any railroad or other public service corporation which conducts an interstate business.

SEC. 2. That from and after two years from the date of approval of this Act, no person shall at the same time be a director or other officer or employee in two or more Federal reserve banks, national banks, or banking associations, or other banks or trust companies, which are members of any reserve bank, and are operating under the provisions of the Act approved December twenty-third, nineteen hundred and thirteen, entitled "An Act providing for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes," and a private banker, and a person who is a director in any State bank or trust company, not operating under the provisions of the said Act, shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid Act.

SEC. 3. That any person who shall violate section one or section two hereof shall be guilty of a misdemeanor, and shall be punished by a fine of $100 a day for each day of the continuance of such violation or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 4. That if, after two years from the date of the approval of this Act, any two or more corporations, engaged in whole or in part in interstate or foreign commerce, have a common director or directors, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations; and if such corporations shall have been theretofore, or are, or shall have been, by virtue of their business and location of operation, natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce under the provisions of and subject to all the remedies and penalties provided in an Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

[NO. 4.—COMMITTEE PRINT. TENTATIVE BILL.]

By MR. CLAYTON.

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

A BILL

To prohibit unlawful restraint of trade or monopolies in interstate or foreign commerce by corporations through the device of intercorporate stockholding.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That it shall be unlawful for one corporation engaged in interstate or foreign commerce to acquire directly or indirectly, the whole, or any part, of the stock or other share capital of another corporation engaged also in interstate or foreign commerce, where the effect of such acquisition is to eliminate or lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

SEC. 2. That it shall be unlawful for one corporation to acquire, directly or indirectly, the whole, or any part, of the stock or other share capital of two or more corporations engaged in interstate or foreign commerce, where the effect of such acquisition, or the use of such stock by the voting or granting of proxies, or otherwise, is to eliminate or lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

SEC. 3. That this Act shall not apply to corporations purchasing such stock solely for investment, and not using the same by voting, or otherwise, to bring about, or in attempting to bring about, the lessening of competition.

SEC. 4. That every violation of this Act shall constitute a misdemeanor punishable by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, such fine and imprisonment in the discretion of the court; and any individual, who as officer or director of a corporation, or otherwise,orders, takes action, or participates in carrying out any transaction herein forbidden, shall be held and deemed guilty of a misdemeanor under this section.

SEC. 5. That nothing contained in this Act shall prevent a corporation engaged in inserstate or foreign commerce from causing the formation of subsidiary corporations for the

actual carrying on of their immediate lawful business, or the natural and legitimate branches thereof, or from owning and holding all, or a part of, the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or lessen a preexisting competition.

SEC. 6. That nothing contained in this Act shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall make legal stockholding relations between corporations when, and under such circumstances that, such relations constitute violations of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

The CHAIRMAN. We will take pleasure in hearing first this morning from Representative Lathrop Brown, of New York.

STATEMENT OF HON. LATHROP BROWN, REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK.

Mr. BROWN. Mr. Chairman and gentlemen of the committee, the proposed interlocking directorate bill seems to be ambiguous to this extent, that the trustees of mutual savings banks in the State of New York can not tell, from the language of the bill, whether or not they will be included under the operation of the bill. They hope that they will not be affected by these requirements.

Under the law of the State of New York, no trustee of a mutual savings bank can serve as a trustee of more than one mutual savings bank. Under the law of the State of New York no trustee of a mutual savings bank can borrow money from the mutual savings bank of which he is trustee. Under the law of the State of New York no trustee of a mutual savings bank can deposit money in the bank of which he is a trustee, and no trustee of a mutual savings bank is permitted to receive compensation for his services as trustee.

Furthermore, it appears to them that the thrifty poor are entitled to the administration of their savings by men who are best qualified by training and experience to administer those funds and who are willing to give their time, without compensation, for that purpose.

In conclusion, Mr. Chairman, I would like to call the attention of the committee to the very able statement on this subject by Mr. Chas. A. Miller, who is counsel to the Mutual Savings Bank Association of the State of New York, which includes all but 13 of those banks in that State.

That statement has already been put in as a part of the record at these hearings.

The CHAIRMAN. On what page?

Mr. BROWN. Serial No. 7, part 27, page 1227.

That is all I care to say, Mr. Chairman, and I thank you very much for having given me the opportunity to express my opinion in regard to this subject.

The CHAIRMAN. We are very much obliged to you, Mr. Brown.

Mr. NELSON. Mr. Chairman, I have here a letter from Mr. M. W. Tubbs, secretary-treasurer of the Wisconsin State Union, American Society of Equity, together with some resolutions passed by the executive board of that organization, which I would like to have inserted in the record.

The CHAIRMAN. Mr. Nelson, a member of this comimttee asks that a letter dated Madison, Wis., February 2, 1914, and signed by Mr. M. Wes. Tubbs, secretary-treasurer of the Wisconsin State Union, American Society of Equity, togehter with the resolutions attached thereto, be put in as a part of to-day's proceedings.

Without objection, that will be done.

(The letter and resolution referred to are as follows:)

WISCONSIN STATE UNION, AMERICAN SOCIETY OF EQUITY,
Madison, Wis., February 2, 1914.

HON. JOHN M. NELSON,
Washington, D. C.

DEAR SIR: Inclosed resolutions re antitrust legislation will be self-explanatory.

Any attempt to define unfair practices of trade must necessarily include and put out of business all cooperative activities unless they be specifically exempted, and that such exemption would hold if made is questionable, as it could easily be declared class legislation.

It is unquestionably necessary for producers to organize and finance cooperative instrumentalities for the assembling, grading, sorting, holding, and marketing of their several products as a year's supply is harvested in a few months, whereas but about one-twelfth of the harvest is consumed during any single month. Therefore, a great portion must be held by somebody, and experience has proven that if it is allowed to go into the hands of the speculators, at and shortly following harvest, it goes there at the farmer's peril because they, the speculators, are able to pound down prices to below a remunerative price, just as a stock of merchandise is always sacrificed at forced sale, either public or private.

On the other hand, European distribution has demonstrated that the consumer must organize and get in shape to purchase many of their commodities in wholesale quantities and establish a means of distribution to get away from the extortions of the Food Trust in its different ramifications, which now practically controls the distribution of meats, vegetables, and the manufactured products constituting the grocery line.

For the above reasons and those set forth in the resolution inclosed, I hope you will use your strongest endeavor to work out a program which will not put out of business cooperative activities and which will not undo all the good work that has been done by various farmers' organizations and consumers' leagues in developing this modern method of protection for the great mass of people.

Very truly, yours,

M. WES. TUBBS,
Secretary-Treasurer.

RESOLUTION RE ANTITRUST LEGISLATION.

We, the executive board of the Wisconsin State Union of the American Society of Equity, at a special board meeting held in Madison on January 30, 1914, do resolve as follows:

Whereas cooperative organizations of farmers and consumers have been grievously injured and hindered in their legitimate development and work for the producers and consumers of America in the past by threatened prosecution and actual litigation under the Sherman Act; and

Whereas, following the message of President Wilson, there has been introduced into Congress several bills purporting to define more strictly and certainly the said act; and

Whereas these bills not only do not protect the farmer adequately against unfair discrimination, but actually, by the wording of the said bills, do make it still more difficult for farmers to legitimately cooperate for the manufacture, grading, and sale of their products and for consumers to carry out that combination among themselves which lead to the best and most economic system of distribution; and

Whereas all political parties are pledged to aid in every manner the legitimate organization of farmers for better agricultural marketing and cooperative action.

Therefore we condemn heartily all bills now before Congress which strive to define more clearly the Sherman Act and which really include, as unfair restraint of trade, the attempts by farmers and consumers to organize for their own interest and mutual protection: Therefore be it

Resolved, That we hereby petition our Members in Congress to work for the defeat of said measures and for the enactment of such legislation as will truly carry out the purpose and intent of the trust program outlined by President Wilson without injuring the interests which we represent, and from which millions of American citizens must get their living.

(Signed) D. O. MAHONEY,
President Executive Board, Wisconsin State Union,
American Society of Equity.

Attest:

[SEAL.] M. WES. TUBBS, *Secretary.*

The CHAIRMAN. The committee at this point will take a recess until half past 2 o'clock this afternoon.

(Thereupon the committee took a recess until 2.30 o'clock p. m.)

AFTER RECESS.

The committee reassembled pursuant to the taking of recess.

The CHAIRMAN. We will be glad to hear first this afternoon from Mr. Dorsett Carter, of Purcell, Okla.

STATEMENT OF MR. DORSETT CARTER, OF PURCELL, OKLA., PRESIDENT OF THE OKLAHOMA CENTRAL RAILROAD CO.

Mr. CARTER. Mr. Chairman and gentlemen of the committee, I wanted to make a few remarks in regard to tentative bill No. 2, the third and fourth subdivisions of the fourth section, so far as the same relates to transportation companies, to the matter of one transportation company acquiring another transportation company.

Those provisions read:

Third. To prevent any competition in manufacturing, making, transporting, selling, or purchasing of merchandise or any commodity.

Fourth. To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves, or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

I am president of the Oklahoma Central Railroad Co., a short-line road in the State of Oklahoma. I noticed the other day from the record of this committee that a Mr. Van Houten, from New Mexico, appeared before your committee on the same subject, and that during his statement a question arose as to whether or not those subdivisions which I have referred to did or did not affect the transportation companies, and I was unable to determine from the record as to whether there had been any conclusions reached along that line, but if it does not relate to transportation companies it is very misleading.

I happen to come from a State which has had a very similar provision in its constitution. Section 5, article 9, of the State constitution of Oklahoma had in it a provision that prohibited a foreign corporation, a foreign transportation company, from purchasing a domestic line. That constitution took effect in 1907.

Just prior to the going into effect of that constitution in October, 1907, we sold our little line of railroad to the Atchison, Topeka & Santa Fe Railroad Co. for $3,400,000, and we were in the act of delivering it in New York City at the time the panic of 1907 broke out, on October 16 of that year.

Thirty days later Oklahoma's constitution took effect, and the panic was still on, and we could not make a delivery. On June 2, 1908, on account of the road not being able to make its expenses, we went into the hands of a receiver, and we are now in the hands of a receiver. We have operated very economically, and have never been able to make the road pay its expenses.

The matter was brought to the attention of the voters of the State of Oklahoma. Their attention was called to those drastic provi-

sions which are similar to those in the bills now before this committee, and to which I have referred, which are practically the same thing as the provisions in the Oklahoma constitution, with the additional fact that they would be applicable all over the United States, instead of simply applicable to one State.

As I said, this matter was brought to the attention of the voters of the State of Oklahoma in the way of an initiative petition submitted to the people in June, 1910. It was submitted in the form of an amendment to our State constitution which would have permitted the sale or purchase of these lines of railroad. The people rejected that constitutional amendment by a majority of some 50,000 votes.

In 1910, in November, there was another constitutional amendment submitted to the people of the State of Oklahoma, and they rejected that.

In April, 1911, there was still another constitutional amendment submitted to the people of Oklahoma on the same subject, and they rejected that also.

In 1912 there was another constitutional amendment on the same subject submitted to the people of the State of Oklahoma, and that constitutional amendment was adopted by a large majority. That amendment permitted one railroad to buy another; but from 1907 until August, 1912, we have existed in the State of Oklahoma under a constitutional amendment to which I have referred which applied only to the State of Oklahoma. That was an amendment similar to the provisions of this bill to which I have referred, but the provisions in the bill before you would apply, as I have already said, not simply to one State, as did the provisions of the constitution in the State of Oklahoma, but would apply to every State in the Union. These provisions would be enacted to affect the entire United States, while the provision in our constitution was only applicable to the State of Oklahoma.

I think if these provisions were made applicable to the transportation companies, it would prevent the construction of additional railroad mileage, and in the future would practically amount to the confiscation of the present small lines, indirectly work a confiscation of that property, and will not be any help whatever in the matter of fixing of rates. It would also deprive the State of a certain amount of taxes and deprive the people of a better service.

In the State of Oklahoma, since we have had the law such as I have referred to, there has not been as much as 100 miles of railroad projected, financed, and constructed since that law took effect. There were some roads built, although they had been projected and financed prior to that time. About 1,000 miles of the mileage in our State is that of independent lines, and, to my knowledge, not one of those roads has ever paid $1 interest on the money invested, which came out of the operating revenues of the property.

Our own road has lost over $500,000 in operating expenses during the last six years, and one-fourth of the mileage of the State of Oklahoma is that of independent roads, and unless they were permitted to sell their properties to other lines it would gradually work to confiscation of that property.

I noticed in this discussion with Mr. Van Houten the other day that it seemed to be doubtful whether these provisions would be applicable to transportation companies. We are in this situation now.

Since we have had that constitutional amendment in the State of Oklahoma changed, we commenced negotiations with the Atchison, Topeka & Santa Fe Railroad Co. and have arrived at an agreement with them by which they are to take over that property. That agreement is now withheld awaiting action on this measure.

We had already sold that property before the constitutional amendment in the State of Oklahoma took effect, for $3,400,000, and we are now selling it for $1,700,000, or about one-half what we would have gotten originally, and the bondholders are standing practically all of the $1,700,000 loss and received no interest on the investment while that legislation was in effect in Oklahoma.

Now, in regard to this question of competition. Our railroad crosses the Atchison, Topeka & Santa Fe Railroad Co.'s lines in Oklahoma twice, and in every town where we cross these lines there is slight competition. We have competition with the Atchison, Topeka & Santa Fe Railroad where they haul to Galveston; we haul in conjunction with the other three lines to Galveston, and we haul a great many commodities into those towns, and if this bill becomes a law I am quite sure that the Atchison, Topeka & Santa Fe Railroad Co. will not purchase our property.

From the discussion in this committee which I have read—the discussion between members of the committee and Mr. Van Houten—I doubt if it is the intention of the committee to make these provisions applicable to transportation companies, but I think it ought to be explicitly worded, so that there will be no doubt about it. It has just the same effect now with the financiers as if it did apply to railroad companies.

Mr. WEBB. Is this the same proposition which Mr. Van Houten discussed before the committee the other day?

Mr. CARTER. You mean the same railroad?

Mr. WEBB. Yes.

Mr. CARTER. No; it has no connection with the road he was talking about at all. The railroad which I represent is in Oklahoma, and the railroad which Mr. Van Houten represented is in New Mexico.

Mr. WEBB. But the conditions are the same, are they not?

Mr. CARTER. No, sir. Before you came in, I spoke in detail in regard to the conditions surrounding our railroad.

Mr. WEBB. If you have gone over that, you need not repeat it. I can read it in the record.

Mr. CARTER. The people of Oklahoma were wedded to that law, and it has proven to absolutely prevent the construction of roads.

Or you take the matter of service. We do not give to the people of the State the service they are entitled to, because we can not pay expenses. And not only that, but we have had something, which for six years we have been unable to sell. Now, if the provisions of this bill to which I have referred are enacted into law, it will confiscate existing independent property; that is, it will eventually do it. No man with money will invest his funds in something which now can not be maintained and pay expenses, and which he will be prohibited from selling. All the railroads constructed in Oklahoma after this amendment took effect are now in the hands of receivers.

Mr. MORGAN. How about the roads built through the northwestern part of the State?

Mr. CARTER. That was a railroad financed by the Missouri, Kansas & Texas Railroad, and is not an independent property.

We can not even operate a passenger train over any other line. We only run a freight train, but we have the business for it, and we do not run the freight train if we have not the business. The corporation commission treats us very nicely. In the matter of rates we are not helpful to anybody in the State. There is not a rate ever promulgated in the State by our commission in reference to which I could go into the courts and by showing that double that rate should be charged, and could not get twice as much as they allow us on any basis upon which you put the proposition, either upon reproduction value or otherwise. We have to follow in the trails of the big trunk lines.

Take another feature of it. Take the matter of taxation. There are a great many branch lines owned by the trunk lines in our State which are taxed from $20,000 to $25,000 a mile, as the valuation upon their property. Our road pays $5,000 a mile, and no independent road pays over $12,000 a mile.

If the Atchison, Topeka & Santa Fe Railroad Co. owned our line, they would run 10 trains a day over it, and the people living along the line of the road would have cars during the crop season when they need them, whereas now we do not have them. We own very little equipment. They would have better facilities in the way of passenger facilities which we can not give them, because we have not the money with which to buy them and furnish them to the people.

I think Oklahoma was the first State which got a law similar to this. It has practically cost the people $2,500,000. I mean the people who invested in that. They tried to change that law, and just as they had it changed and as we are about ready to transfer the property at this heavy loss, we are confronted with this proposed bill, and the people who would buy it say that they do not care to take it because we could not deliver it to them now, because we are in the hands of of a receiver.

I notice that some of you gentlemen asked Mr. Van Houten some questions as to how to remedy that matter with reference to the small lines. Some of you suggested a distance of 150 miles, and some members of the committee thought it might affect the terminal companies. I went through that campaign in Oklahoma when three of the amendments were submitted by the legislature in a period of two years, and I think that was conclusive evidence that those who had studied the question realized that it was of sufficient importance to have the change made. The legislature in two years submitted three distinct propositions, and finally the fourth proposition carried. It made a provision like this, which was finally adopted on August 5, 1912, and which reads something like this: "Upon first receiving the written consent of the corporation commission, one railroad can sell to another."

If the provisions of the bill now proposed before this committee, which I have already quoted, are intended to be made applicable to railroad companies, I would not see any objection to having the Interstate Commerce Commission give its consent for one line to buy another line, and I am quite sure that no injury would be done, but a great service could be rendered to the community, and I think there would be no objection to having the Interstate Commerce Commission

authorized to give its consent to that sort of a transaction. That would eliminate the question of mileage and terminals.

If these provisions are proposed to be made applicable to railroads, I hope you will consider that matter so that there may be some way in which a meritorious proposition can be disposed of, provided you find a buyer to purchase it.

I had not intended to take so much of your time as I have, gentlemen, and I thank you very much for giving me this opportunity to express my views in regard to this particular part of the bills which you have under consideration.

Mr. NELSON. I believe the next gentleman who is to be heard this afternoon is Mr. W. H. C. Clarke, of New York.

STATEMENT OF W. H. C. CLARKE, ESQ., OF MOORE & CLARKE, ATTORNEYS AT LAW, NEW YORK CITY.

Mr. NELSON. Will you please give your name, your business, and your address?

Mr. CLARKE. My name is W. H. C. Clarke, of the law firm of Moore & Clarke, of New York and Washington. I will try to be as brief as possible.

Mr. NELSON. Whom do you represent?

Mr. CLARKE. We have no retainers on this question. I am here to speak against sections 1 and 2 of the Clayton bill.

Mr. FITZ HENRY. Which one of the Clayton bills?

Mr. CLARKE. No. 1 and No. 2 of the committee print.

Commodities entering into interstate commerce fall roughly into two classes, which I shall describe as branded commodities and unbranded commodities.

By unbranded commodities I mean commodities which enter into commerce without any designation of their origin. They might be likened to mavericks, in that they contain no brand or indication of their proprietors or original producers. The other class of commodities are the branded commodities, by which I mean trade-marked commodities, which carry on them or in connection with them some brand or indication of their origin.

The principal characteristics of branded or trade-marked commodities are that they are uniform in character and that they carry with them the good will or reputation of the originating proprietor, who assumes the responsibility for the commodity and is willing to take any blame for any defect which may develop in it.

The first section of the Clayton bill interferes to a marked degree with the marketing of the unbranded class of commodities. The second section of the Clayton bill interferes in a similar degree with the marketing of branded commodities.

The first section of the Clayton bill provides in substance that the same commodity shall be sold by the dealer to all consumers at the same price, after making an allowance for transportation charges. That bill, unless some legislative provision could be made for equalizing the inequalities in the customers of dealers, could not possibly be carried into effect, even in the case of a little grocery store on the corner, and much less in the case of a large manufacturing concern. The groceryman has to equalize the inequalities of his customers by inequalities in price on the same commodities. Where one man's

credit is unimpaired, and his bills are promptly paid, and where he probably buys closer, studying the prices of similar commodities in all nearby stores, he gets better prices than the customer who is slow pay and who is unreliable, and until some means can be found to equalize these inequalities in customers or consumers it is impossible as a matter of practical business for the dealer to sell the same commodity at the same price to all his customers.

While this is a small example, it is even more true in the case of dealers making or handling large commodities, such as printing presses, where there are so many unequal conditions or factors necessary to be considered in making up the prices at which the same commodity must be sold to different consumers that it would be a practical impossibility to fix any uniform price on such a commodity.

These two classes of commodities, branded and unbranded, have produced two rather distinct systems of salesmanship for marketing them.

Those systems of salesmanship may be described as "public salesmanship" in the case of branded commodities and "private salesmanship" in the case of unbranded commodities.

For instance, in marketing a trade-marked article, the aim of the proprietor is to advertise the commodity itself, as distinguished from advertising himself. His aim is, so to speak, to magnetize that particular commodity or to instill into it the advertising value he can produce.

In the case, for instance, of Sapolio, the article is magnetized with all the accumulated advertising which the proprietor has been able to generate by making, year in and year out, a good commodity, and by marketing it always at a uniform price, and by spreading its sale as widely as possible, and by advertising it widely over a long period of time in periodicals and elsewhere. This is what I call "public salesmanship."

Now, in the sale of bulk or unbranded commodities, the advertising system is personal or private. There the aim is to advertise the dealer rather than the commodity. An example of the private system of salesmanship is Woodward & Lothrop, of your city, who aim to advertise themselves, as distinguished from the articles which they sell. Sometimes the two systems overlap, but in the main the distinction prevails.

These two classes of commodities, branded and unbranded, and these two systems of salesmanship, "public" and "private," demand different rules to govern them.

I do not want at this time to go particularly into the rules which I think should apply to the marketing of unbranded commodities. I wish, rather, to take up two systems of marketing branded commodities. These systems, are the uneven-price system and the even-price system.

Mr. WEBB. What is the difference in proportion between the branded and unbranded commodities sold on the market?

Mr. CLARKE. I do not know. I should judge they are about half and half. I think, judging from popular demand for and consumption of branded commodities, they form a very important branch of our commerce, and should be given careful legislative attention.

Mr. WEBB. What do you mean by branded and unbranded? Do you mean the difference between having a man's name on the goods and not having it on the goods—having a trade-mark and not having a trade-mark?

Mr. CLARKE. Yes; I mean that. A branded article contains a trade-mark to indicate its origin; an unbranded article has no indication of origin, and is lost in the bulk of similar articles. It is like a maverick. Branded articles are like branded cattle. The proprietor is known, and his goods are always distinguished from the mass by means of his trade-mark.

Mr. WEBB. His trade-mark?

Mr. CLARKE. His trade-mark. It indicates that he, as a manufacturer, is willing to take the responsibility for the quality and character of his commodity, and to have its origin known to everyon. If a cake of Sapolio, for instance, should prove to be faulty, the blame would not be put on the man who sold it, but on the originating proprietor, in this case Enoch Morgan & Sons.

The two systems of marking branded or trade-marked articles are what I term the "uneven price system" and the "even price system," and for the sake of brevity, I think I can develop my argument by first stating to the committee what I believe to be the disadvantages of the "uneven price system," and then setting forth some of the advantages of the "even price system."

By uneven and even prices I mean simply that under the uneven price system these trade-marked articles go forth into commerce and are sold at different prices by different dealers who make their own prices without regard to any price which may have been established by the originating proprietor.

The "even price system" is one wherein the proprietor, when he creates a trade-marked article also fixes the even price at which the article is to be sold everywhere at retail by all dealers.

What I conceive to be the disadvantages of the uneven price system are, first, that uneven prices prevent a class of competition which might be discribed as "show-case" or "stock" competition.

When these trade-marked articles go into commerce the aim of the proprietor is to have every retailer carry his particular article in the show case or on the stock shelves, and the aim of every other proprietor is to do the same, so that under a perfect system of distribution every retail store would have a complete stock of all the trade-marked articles in its line.

The result would be, for instance, that you could go into a hardware store and ask for a razor, and under perfect conditions of trade, the hardware dealer would have in stock a complete line of razors. He would take you to his razor show case and you would have an opportunity to examine a razor out of every factory in the world. You would be able to examine razors ranging in price all the way from 25 cents to $7.50, to $10, or $15. This examination of a complete line of goods produces what I term "show-case competition."

You examine that entire line of razors, and the even or uniform price of each is marked on it. If you pick out one make of razor, you are fostering competition to the extent that you are patronizing that one factory. If you pick out another razor you are fostering competition by patronizing another factory.

The first disadvantage of the system of uneven prices is that it prevents or impairs this show case or stock competition. Uneven prices cut into the stock of some of the dealers, and makes the stock incomplete, so that when you go into a store to select a razor, there would be certain razors that probably had been driven out of the stock by reason of the fact that some department store or some cut-rate dealer has used that particular razor as a leader by probably cutting the price below the trade cost and selling it thus at a loss, and if this practice has been followed persistently enough, other dealers are forced to level down their prices below cost, and clear out their stock of those particular razors, and to that extent the stock of your dealer is incomplete. Uneven prices thus prevent or impair this effective form of show case or stock competition.

The second disadvantage of this uneven price system is that it gives the big dealers an advantage over the little dealers. It tends to monopolize the sale of trade-marked articles in the hands of the dealers who are using those articles as leaders. The large dealers have the advantage of the quantity price; that is, they are able to buy articles in large quantities and at lower prices, and the advantage of the quantity price, added to the advantage of selling trade-marked articles at uneven prices as an advertising leader and thus driving these articles out of the show cases of their smaller competitors, gives the large dealers a very great advantage.

Right on that point I wish to call your attention to the fact that there is a similarity in principle between this practice of department stores in using certain trade-marked lines as leaders, on the one hand, with the practice of a large oil company, which at one time was engaged, as is charged, in the practice of underselling the market in competing territory, and overcharging the market in noncompeting territory. On the one hand we have the example of this oil company with a map of the United States spread out before it, divided up into States like a checker board, and playing the game of unfair competition. In one square it would lower the prices until competitors were put out of business, and in another square where it had no competitors it would charge enough to make up its losses in the competitive squares. In principle there is a very great similarity between that practice of the oil company and the practice of some department stores. In the case of the department store these various blocks of the checker board have been brought together and piled up into one great store which affords same chances of manipulation similar in principle to those of the oil company.

At one time the proprietor of the department store can conduct a campaign to injure his competitors in a particular line. For instance, he drops the prices in his china department; at the same time, in the other departments maintaining his prices sufficiently to make up the losses in his china department. This campaign could be kept up until he has injured his competitors in the china line. He will make the losses in one line always balance against the higher prices he will charge in another department. Now, that is one of the practices which is fostered by uneven prices in these trade-marked, and even in untrade-marked commodities.

Another disadvantage of the uneven price system is that it gives an unfair advantage to cities, and to certain sections of cities, over

surrounding country districts. I think that is a matter which should be seriously taken into consideration.

Uneven prices give the city retailer an advantage over the country retailer, because the city retailer has a larger number of customers to draw from, and that means, in the city, that the department store in a certain section has an advantage over the city store in the outlying districts.

Another disadvantage of the system of uneven prices in trade-marked goods is that in effect it denies the right of ownership in that great class of trade-mark property which is created as the result of advertising and the carrying on of business with high standards.

The reason why the right of ownership in trade-mark property or good will is lost or impaired under the operation of the uneven price system is this: A man can not be said to own any property unless he has the right to prevent others from wantonly destroying it. In the case of my house, I would not consider that I had a very strong right or title of ownership unless I could prevent some other man from throwing a brick through my window or wantonly burning my house. Under this system of uneven prices for trade-mark goods we have almost a parallel case to that. A man spends his life developing a certain trade-mark article of which he is proud and into which he has put his best work and behind which he places his reputation and about which he spends money and time for advertising. As soon as that article is so magnetized with advertising value that it practically acts as its own salesman, one of the retailers engaged in the other system of private salesmanship gets the idea that he would like to draw some of that advertising value out of that article and unto himself. So he cuts the price on that article, perhaps, below the cost. He thus secures a great deal of advertising for himself. He advertises for instance that here is the Ingersoll watch which everybody knows is worth clearly $1, and I am selling it for 50 cents. He advertises himself by demagnetizing the Ingersoll watch of the advertising value which has been instilled into it by years of effort and expenditure.

Now, it is perfectly possible for this retailer to carry that system of price-cutting so far that he can absolutely drive the Ingersoll watch out of the market. If the retailer wants to sell that watch long enough as a leader at 50 cents—and, I understand, that is below the actual cost of the watch to the retailer—if he wants to sell it at that price long enough he can drive the Ingersoll watch out of the stock of all other dealers, because they are not able to sell the watch at that price. By that time the price cutter has drawn out so much of the advertising value from the article that it is completely demagnetized from an advertising standpoint; it has lost its value as a leader, and it is no longer profitable to him and he drops the sale of it.

It seems to be a pyschological fact that the owner of the trade-mark commodity which has been persistently cut to a low level in price is unable to get the price back to a living level, and the commodity must continue to be sold at the low-price level or dropped from the market.

Thus by carrying the uneven system to its logical conclusion a trade-marked article can be driven from the market, and the right of ownership in the advertising value or good will be absolutely destroyed.

It does not happen very often that price cutters actually drive a trade-marked article off of the market, because long before they reach

the point where all the advertising value of an article is destroyed the article has become so hackneyed as a leader that the price cutters drop it from their own line.

It seems to be clear that there can be no right of ownership in advertising property or trade-mark good will unless the owner who has created that property is enabled to restrain others from injuring him against his will, and this protection seems to be impossible under the uneven price system.

Uneven prices also increase the cost of marketing trade-marked articles, because they demoralize the market.

Uneven prices also give an advantage to large manufacturing proprietors over small proprietors. I mean by this that the manufacturing proprietor who has a sufficiently large capital is enabled to control the market or to make retailers his agents in law and fact and to consign his goods to them in order thus to maintain a uniform price for his commodities all over the country. This advantage the smaller manufacturing proprietor is not able to share on account of lack of capital and for other reasons. Even prices place the small proprietor on an equality with his larger competitor.

A further disadvantage of uneven prices is that when the large proprietor follows the practice which I just described the small dealer is deprived of his independence as a retailer. He is forced to enter into an agency agreement with the large proprietor, by which he loses his independence, to some extent, in the matter of handling competing commodities.

Finally, uneven prices injure the consuming public to the extent that they prevent trade-marked or branded commodities from being distributed everywhere. Uneven prices prevent show-case competition. They impair the stock of your particular dealer and in this way they injure you as a consumer.

The advantages of even prices are practically the opposite of these disadvantages of uneven prices which I have set forth.

Even prices permit show-case and stock competition. They enable all retailers to keep a complete stock of all commodities in their lines, and when a consumer goes into a store to purchase a certain article at a certain price he has the opportunity to examine the articles from every factory in the country.

Uniform prices also put the small dealer on an equality with the department store or larger retailer. They put the country on an equality with the city; they would establish and maintain the right of ownership in advertising or trade-mark property; that is, by establishing by law a system of uniform or even prices for trade-marked goods, the owners who have created the property will be able to preserve it and to prevent others from driving their goods off the market.

By fixing by law or establishing a system of uniform or even prices for branded or trade-marked goods, the cost of distribution would be decreased. Under that system every uniform or trade-marked commodity would be able to go into the stock of every retail store in the country and compete in price, quality, and general reputation of the originating proprietor with every other commodity in that stock. By relieving proprietors of the expense which they are now under of keeping open the channels of distribution of their commodities, the

cost of distribution would be materially decreased, and this would lower the price of the articles themselves.

One other advantage of even prices would be that the market conditions are so clear and even that competition would be encouraged. For instance, under such an even-price system, if you were thinking of embarking in the business of manufacturing razors, you could go into any retail store and buy one of each of the many razors on the market. You could spread the whole lot out before you and say to yourself, "the problem before me as a manufacturer is to manufacture a better razor than any of these at the same price, or the same razor at a better price." If you were able to do that, you could embark in that business with some idea of the conditions you would have to meet. You could make your razor and establish your uniform selling price and have your razor put into the same show case with every other razor on the market.

An even-price system would thus clarify the conditions of competition so greatly that competition would be stimulated to a great extent. That is one of the big advantages which would follow the system of uniform or even prices.

Now, another advantage of the uniform or even price system for uniform commodities is that this system puts the smaller proprietor on the same basis with the large proprietor, and it seems to me that is one of the great arguments in favor of uniform or even prices for trade-marked goods.

As the law stands now any proprietor whose capital and resources are large enough is able to put his commodity into the hands of his own agents or consignees and have them sold in that way for his account. Under this system the proprietor interferes, to some extent, with the independence of the retailers. He can say, "I would prefer to have you not handle such and such other commodities." As long as the law permits a large manufacturing proprietor to establish a uniform price, in a manner which is attended with certain disadvantages, why not let us have a law which will enable all proprietors, whether large or small, to establish even or uniform prices without those disadvantages? In other words, why not let these trade-mark commodities go into commerce and filter down through the channels of trade to the retailers at a uniform level without any system of contracts or agency agreements by which the independence of the smaller retailers would be interfered with and the large proprietors be given an advantage over small competitors?

Finally, uniform prices are a benefit to the consumer, because they bring the commodities to every factory in his neighborhood and enable them to be sold there at reasonable prices. Under the system of even or uniform prices a price must be reasonable and fair, otherwise the consumer will not buy or another proprietor will put out a competing article at a uniform price which is lower.

Mr. DANFORTH. Assuming that your argument is right, how are you going to produce the result?

Mr. CLARKE. I have prepared a bill which has been introduced by Mr. Metz.

The CHAIRMAN. That bill is not before this committee?

Mr. CLARKE. It is not before this committee. Then there is also a bill which has been introduced by Mr. Stevens, and either the Stevens

bill or the Metz bill will give us that result. The Stevens bill is a contract bill and the Metz bill is a notice bill.

I have already pointed out that even or uniform prices benefit the consumer; first, because they cheapen the means of distributing branded commodities; second, because they encourage the competition of other similar commodities; and third, because they avoid discrimination between different localities and the consumers by placing trade-marked commodities on sale in all sections of the country.

Another marked advantage of the uniform or even price system is that it throws the competition between different factories, where it should be, instead of throwing it between retailers handling the same commodities coming out of the same factories, at the same original cost price.

It should be borne in mind that the marketing of a commodity is merely a part of the manufacturing thereof. Unless a commodity can be properly marketed it can not be made, and any condition which interferes with the marketing of a commodity interferes to that extent with its making.

As I have previously pointed out, the fourth paragraph of the first section of part 2 of the Clayton bill, in my opinion, would render unlawful the proper marketing of trade-marked commodities at even prices. Part 1 of the Clayton bill would interfere with the marketing of unbranded commodities.

With the permission of the committee I desire to insert in the record a copy of an article appearing in the Harvard Law Review entitled, "Predatory price cutting as unfair trade," by Mr. Edward Rogers, of Chicago, and also a letter addressed by me to Mr. Mortimer W. Byers, secretary of the National Association of Stationers and Manufacturers of the United States.

The CHAIRMAN. Without objection, the letter and the article will be incorporated in the record.

(The matter referred to is as follows:)

NOVEMBER 21, 1913.

Mr. MORTIMER W. BYERS,
Secretary the National Association of Stationers and Manufacturers of the United States, 41 Park Row, New York City.

MY DEAR MR. BYERS: I have read with much interest the extract from the annual report of Mr Patterson, delivered in Springfield, Mass., October 14, 1913, relating to a proposed amendment of the Sherman law. In my opinion this amendment, which is designed to enable the manufacturer to market his product, whether patented or not, at uniform prices in different sections of the country is a reform which is demanded by the necessities of modern business. It appears to me that the supporters of this reform have permitted themselves to be maneuvered into a wrong position. They have been put in a class with monopolists and restrainers of trade. This has been due somewhat to the fact that they have accepted the premises of those who oppose the principle of price maintenance. For instance, Mr. Patterson in his address says, "Unless I am entirely mistaken such a restraint upon trade as is involved in a price-maintenance agreement between a manufacturer and his customer may be well accepted, because it carries its own safeguard."

That is true; but why admit that price maintenance is a "restraint upon trade"? As a matter of fact, I believe the reverse is true. I believe it is more of a restraint on trade to prevent price maintenance than it is to permit price maintenance, because when price maintenance is prevented the ultimate market of the manufacturers is destroyed and their industries, as I show later, are demoralized, with the result that a restraint of trade which amounts, in effect, to a destruction of trade or confiscation of property is the result.

The supporters of price maintenance instead of permitting themselves to be classed with monopolists and restrainers of trade should insist that they are working for a reform which will strike from trade shackles which are now restraining it.

I believe that one reason why the supporters of price maintenance have been maneuvered into a class with the monopolists and restrainers of trade, who are now held up to such public odium, is that they are too general in their defense of the principle of price maintenance. They apparently do not attempt to tell the whole story to the public. They content themselves, as in Mr. Patterson's address, with the statement that price maintenance should not be held to be a wrongful restraint upon trade, but they do not go sufficiently to the bottom of the question to enable the public at large to reach an intelligent decision on this important question. I am satisfied that if all the conditions which make the principle of price maintenance a release rather than a restraint of trade are properly set forth in simple and easily understood terms, the intelligence of the public will readily array itself behind the reformers and the amendments which you are advocating.

One reason in my opinion why the courts and Congress and the public seem to oppose price maintenance and to confuse it with monopoly is that they are under the impression that the manufacturing of a product is one industry and that the marketing of that product is an entirely separate and distinct industry. As quoted by Mr. Patterson, the Supreme Court says, "But the advantage of established retail prices primarily concerns the dealers." This language shows clearly that the courts regard the marketing of a product as an entirely separate and distinct thing from the manufacture of the product. This is not true. The manufacturing and the marketing of a product are merely parts of one complete whole. Unless a product can be properly marketed its manufacture can not properly continue. Take away the market and the industry naturally falls. The operations of making and marketing can not be separated under modern conditions. Unless there is a steady, healthy market a large factory can not successfully operate, and if the market is demoralized and destroyed by forcing dealers to compete with each other by charging competitive prices for the one and the same article manufactured by one and the same factory, the factory is likewise demoralized and destroyed, and trade is restrained to the extent that the manufacturing and marketing of a valuable product is made almost if not quite impossible.

Until the decisions of the Supreme Court affecting the principle of price maintenance of patented and unpatented products were handed down, special manufactured products were marketed under price-maintenance devices in the form of either agreements or licenses. Under these price-maintenance devices a proper, steady, and uniform market was maintained for the products and competition existed where it should exist; that is, between the products of different manufacturers and not between retailers handling the products of one and the same factory. Under these market conditions the factories could be and were properly operated.

The Supreme Court then declared against the legality of price maintenance agreements on unpatented articles, on the ground that such agreements were against public policy. Next it declared against the legality of price maintenance agreements relating to patented articles, on the ground that the patent monopoly did not lawfully extend that far.

The result of these decisions was to bring about a condition of demoralization in the marketing of products with the necessary result that a condition of similar demoralization was brought about in the manufacture of such products.

For the purpose of contrasting the conditions prior to these decisions of the Supreme Court with the conditions subsequent thereto, we may take, for example, any proprietary breakfast food as an example of a special manufactured product in an unpatented class, and a safety razor as an example of a special manufactured product in the patented class.

Before the decisions referred to it was possible to market these products in such manner that substantially all retailers in the country carried stocks of these goods, and the competition instead of being between the retailers, which type of competition is so demoralizing that it amounts to a restraint of trade, was between the products of different factories. For instance, if the price or quality of a certain breakfast food or a certain razor was too high, the public would buy the product of another factory, which was offered at a better price and which was of a different quality. This kind of competition is healthy and advantageous alike to the public and to the manufacturers, as well as to the retailers who are able to keep their business in a healthy condition because each retailer, instead of being forced to compete with other retailers by cutting the price in one and the same commodity purchased by both retailers at a single price from the same factory, was an effective agent of competition because he had in stock in his store the products of all of the various factories, and the public could select which ever product contained the best value at the best price.

As against these conditions of free and unrestrained trade, in which every retailer could sufficiently afford to carry a stock of the products of all manufacturers of special products, and in which the public was thus able to foster conditions of free competition by being able to step into any retail store and take their pick of all the manufactured products, we must contrast the conditions which resulted when the Supreme Court declared against price maintenance of both patented or unpatented articles. The large mail-order or catalogue houses and the so-called cut-price retailers immediately proceeded to throw the market, and thus the factories, into a condition of demoralization by bringing about a condition of what might be called bastard competition; that is, competition which is so illegitimate and unnatural that in effect it works a restraint on trade because it demoralizes and destroys trade. This bastard competition is what resulted from forcing different retailers to compete with each other by cutting the prices in one and the same articles coming from one and the same factory at one and the same original cost price.

As soon as the catalogue houses and cut-rate retailers cut the price on these special articles they kill the stock which is on the shelves of the other retailers, and from that time on these other retailers can no longer handle these manufactured products, and the business of marketing these products goes entirely into the hands of the catalogue houses or cut-rate retailers. As soon as the catalogue houses and cut-rate retailers have the entire market in their hands the manufacturer is at their mercy and must sell to them on such terms as they dictate or go out of business. The result in many cases is that the factory is so demoralized that it can not be operated.

These conditions amount, as before stated, to a positive restraint of trade, and I have no hesitation in stating that, in my opinion, the principle of price maintenance is the very opposite of a restraint of trade and that the destruction of price maintenance is, in fact, the worst form of restraint of trade.

The attitude of the courts and Congress is that competition between different retailers is what modern conditions demand. That is not the case. Retailers dealing in the same products from the same factories can not be expected to compete with each other without demoralizing trade any more than the different agents of a manufacturing concern located in different parts of the country could be expected to compete with each other in selling their own product. As a matter of fact, different retailers handling the same product from the same factory are in fact the agents of that factory, and should not be expected to compete in that article. A type of competition which is wanted is competition between manufactured articles made in different factories competing with each other on the ground of price or quality or characteristics or designs of the different articles.

Unless this principle is established, namely, that retailers handling the same article from the same factory are not competitors, but are agents of a common principal, the product of a factory can not be successfully marketed, and if it can not be successfully marketed it can not be successfully made. If an article from one factory is offered at too high a price, the very retailers who handle it will have in stock an article for the same purpose from another factory which they will offer at a competing price.

The courts and Congress have gotten strangely topsy-turvy on this question of price maintenance. As a matter of fact, instead of so making and interpreting the laws as in fact to compel different retailers dealing in the same article from the same factory to sell that article at different prices, so as to compete with each other, it would be more logical to pass a law making it unlawful to sell the same products from the same factory at different prices in different stores. We all remember the time when one of the worst industrial crimes charged against a certain large oil company was that it sold its product at different prices in different parts of the country; that at competing points it sold its oil by such low prices as to put its competitors out of business; and that, at the same time, at noncompeting points it had sufficiently high prices to make up for the losses which it was sustaining in competition territory. This very industrial crime, which was charged so strenuously against this oil company some 20 years ago, contained the very condition which, in fact, the courts and the Congress are now trying to bring about. They are trying to force a condition where the same product made by the same machines in the same factory is to be sold at different prices in different retail establishments.

I am convinced that if this question is properly presented it can be established—

(1) That price maintenance instead of being a restraint of trade is a release of trade.

(2) That competition should be between the products of different factories, and not between retailers handling the same product from the same factory.

(3) That it would be more conservative and proper for Congress to pass a law making it unlawful to sell the output of a certain factory for different prices in different parts of the country than it is to bring about a condition wherein retailers are practically forced to sell the product of one and the same factory at different prices in

different places, or even in the same place, thus legalizing the very device which has been used so frequently by large corporations in underselling their competitors at competing points and making up for their losses by raising the prices in noncompeting territory.

(4) Retailers handling the same article from the same factory are not proper competitors, but are all agents of a common principal and should not be even permitted, much less required, to compete with each other by cut prices on the same article coming out of the same factory at the same wholesale price, any more than any other agents of the same concern should be expected or required to compete with each other in marketing the output of their common factory.

(5) Instead of going to Congress with an admission that price maintenance is really a restraint of trade, but not such restraint as should be prohibited, the proper course is to say that price maintenance so far from being a restraint of trade is, in reality the opposite, and the condition which has been brought about by the decision of the court's requiring the retailers to compete with each other in products derived from the same source at the same price is, in reality, the worst kind of restraint of trade in that it demoralizes and destroys the business of the retailers and the factories from which they derive their products.

Yours, very truly,

W. H. CLARKE.

PREDATORY PRICE CUTTING AS UNFAIR TRADE.

The methods of the unfair trader are as many and various as the highly specialized ingenuity of a dishonest schemer can invent. The designation "unfair competition" or "unfair trade" seems to have been adopted as a convenient description of offences against commercial morals not included in trade-mark infringement.

It was for many years assumed that unless a technical trade-mark were violated, no relief could be had. It was soon demonstrated that the acceptance of any such rule opened the door to all manner of commercial knavery, and at an early day judges with consciences and a proper sense of sportsmanship began to decide cases in favor of the complainant which were in no sense trade-mark cases, but where the defendant's conduct involved precisely the same wrong—the sale of one trader's goods as those of another—the result being accomplished by some ingenuous contrivance, the deceptive use of personal, geographical, or descriptive names, imitated labels or form of package or in some of the infinity of ways which enable one trader to represent his goods as those of a competitor, whose reputation is better and whose trade he covets.[1] The

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[1] In Perry *v.* Truefitt, 6 Beav. 66 (1842), Lord Langdale said (p. 73): "I think that the principle on which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretense that they are they goods of another man; he cannot be permitted to practice such a deception nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are manufactured of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name of the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

In Croft *v.* Day, 7 Beav. 84 (1843), Lord Langdale said (p. 88): "It has been very correctly said that the principle in these cases is this—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fra

(1845) Coats *v.* Holbrook, 2 Sandf. Ch. 586, 11. Cox, Am. Trade Mark Cases, 20, where not only an imitated name was used, but a simulated mode of putting up goods including the peculiar spools and wrappers employed by the complainant. Vice-Chancellor Sandford said (p. 594): "A man is not to sell the goods or manufactures of B. under the show or pretense that they are the goods or manufactures of A, who, by superior skill or industry, has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He had no right, and he will not be allowed, to use the names, letters, marks, and other symbols by which he may palm off upon buyers, as the manufacturer of another, the article he is selling, and thereby attract to himself the patronage that without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up or was alone accustomed to use such names, marks, letters, or symbols."

(1857) Williams *v.* Johnson, 1 R. Cox, Am. Trade Mark Cases, 214, involved an imitation of the get-up of Williams' Yankee Shaving Soap. Woodruff, J., (p. 222): "It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The court, in considering the propriety of enjoining him pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases."

digesters and text-writers at first were puzzled to know where to classify such cases. The author of a textbook on trade-marks would devote a chapter to "Cases analogous to trade-marks," and put them there. Finally, the term "unfair competition" was adopted (perhaps from the French Concurrence Deloyale) and has since been used to describe that class of wrongs where by artifice one trader's goods are sold as and for another's.[1] Probably the phrase "passing off" commonly used in England more correctly describes the wrong as we now understand it in this country than "unfair competition," but "unfair competition" is the preferable designation if it can be given the meaning that, as a part of the English language, it ought to have—that it includes not alone "passing off" but any conduct on the part of one trader which tends unnecessarily to injure another in his business. Universally in this country, until very recently, "unfair competition" was assumed to involve the element of actual or constructive fraud—a misrepresentation, express or implied, concerning the commercial origin of goods. This was so whether the false representation in that respect affected a single trader or group, for in either event there was deception of the public coupled with damage to the business good will of the individual or group. The wrong may consist, as it does in the common case, where an article is falsely represented to be the product of an individual whose goods are sought after because of public belief in their excellence, in diverting custom to the pirate which would otherwise have gone to the reputable producer. The same wrong less centralized may also be perpetrated, where the false representation concerns geographical origin, by the false use of a reputable place name.

It is well recognized at the present time, though there are some earlier cases to the contrary,[2] that the manufacturer of a product in a certain district has a right as against a person not manufacturing in that district to the use of the name of the district. All or any rightfully and truthfully using the place name may sue.[3] One of a number of truthful users of a personal name[4] has a right to stop a person from the false use of the same name and to be compensated in damages proportionately to his interest in the subject matter.[5] A person who is rightfully using the generic name of a patented product has a right to stop a person falsely using the name or using the name in connection with a different product.[6] This probably applies as well to the use of generic names of unpatented articles; that is to say, the manufacturer of an article under a name indicative of a reputable class of goods may stop persons from using

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[1] Powell v. Birmingham Vinegar Brewery Co. (1891), 3 Ch. Div. 419 (1894), 3 Ch. Div. 462 (1896), 2 Ch. 54, 64 (1897), A. C. 710; Dyment v. Lewis, 144 Iowa 509 (1909), 123 N. W. 244, 245, 26 L. R. A. N. S. 73 (note); Reddaway v. Banham (1896), A. C. 199; Bates Mfg. Co. v. Bates Numbering Machine Co., 172 Fed. 892, 894 (1909); Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 145 (1895); Manitowoc Pea Packing Co. v. Nomsen, 35 C. C. A. 267, 93 Fed. 196, 197 (1899); Shaver v. Heller & Merz, 108 Fed. 821 (1901); Garrett v. Garrett, 78 Fed. 472 (1896); Pillsbury v. Pillsbury-Washburn Flour Mills Co., 64 Fed. 841 (1894); Hires v. Consumers' Co., 100 Fed. 809 (1900); R. J. Reynolds Tobacco Co. v. Allen, 151 Fed. 519 (1907); Sterling Remedy Co. v. Spermine Co., 112 Fed. 1000 (1901); Scriven v. North, 134 Fed. 366 (1904); Walter Baker & Co., Ltd., v. Slack, 130 Fed. 514 (1904).

[2] New York & R. Cement Co. v. Copley Cement Co., 44 Fed., 277 (1890); 45 Fed., 212 (1891).

[3] Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 Fed., 608 (1898); Newman v. Alvord, 51 N. Y., 189 (1872); California Fruit Canners' Ass'n v. Myer, 104 Fed., 82 (1899); Key West Cigar Mfg. Ass'n v. Rosenbloom, 171 Fed., 296 (1909); El Modelo v. Gato, 25 Fla., 856, 7 So. Rep., 23, 6 L. R. A., 823 (1890); Keller v. Goodrich, 117 Ind., 556, 19 N. E., 196 (1888); Blackwell v. Dibrell, 3 Hughes, 151, F. C., 1475 (1878); Anheuser-Busch v. Piza, 24 Fed., 149 (1885); Southern White Lead Co. v. Coit, 39 Fed., 492 (1889); Southern White Lead Co. v. Cary, 25 Fed., 125 (1885); Pike v. Cleveland Stone Co., 35 Fed., 896 (1888); Northcutt v. Turney, 101 Ky., 314, 41 S. W., 21 (1897); Gage-Downs Co. v. Featherbone Co., 83 Fed., 213; Elgin Nat. Watch Co. v. Loveland, 132 Fed., 41 (1901); Collinsplatt v. Finlayson, 88 Fed., 693 (1898); Brisham v. Beachim, L. R. 7 Ch. D., 848 (1878); Southern v. Reynolds, 12 L. T. N. S. 75 (1865); Dunnachie v. Young, Scottish Session Cases, 4th series, vol. 10, p. 854 (1883); Lochgelly Iron & Coal Co. v. Christie, Scottish Session Cases, 4th series, vol. 6, p. 482 (1879); The Canterbury Frozen Meat & Dairy Produce Co., Ltd., v. The Christchurch Meat Co., 8 New Zealand Law Rep., 49 (1889).

For the Continental law on this subject see Kohler "das Recht des Markenschutzes," pp. 108-118.

The wine producers in the vicinity of Rheims and Epernay have been diligent and successful in enjoining vineyard proprietors outside of the Champagne district from the geographically false use of the word "Champagne." (Walbaum v. X., 5 Propriété Industrielle, 19; Syndicate of Wine Merchants v. Ackerman, 19 Journal du droit International Privé 1063; Chapin v. The Syndicate of Dealers in Champagne, 20 Journal du droit International Privé 406, decision of Landgericht de Strasbourg, 19 Feb., 1896, 12 La Propriété Industrielle 78.) This controversy culminated in the delimitation decree of Dec. 7, 1909, and the riots which followed.

The brewers at Pilsen succeeded in stopping brewers outside of Pilsen branding their beer "Pilsener," 20 Patent Blatt, No. 12, p. 104.

[4] Pinet v. Pinet, 14 R. I. C., 933 (1897); Small v. Sanders, 118 Ind., 105, 20 N. E., 296 (1889); De Youngs v. Jung, 25 N. Y. Supp., 479 (1893); 27 N. Y. Supp., 370 (1894); Barber v. Manico, 10 R. P. C., 93 (1893); Clark Thread Co. v. Armitage, 67 Fed., 896 (1895), 74 Fed., 935 (1896); Wm. Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co., 11 Fed., 495 (1882).

[5] Wm. Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co., 11 Fed., 495, 500 (1882).

[6] Singer Co. v. Hipple, 109 Fed., 152 (1901); Janney v. Pan-coast Ventilator Co., 128 Fed., 121 (1904).

the name on goods not of the class where the false representation is sufficiently specific to involve origin as well as class.[1]

On the same principle members of societies have a right to stop the use of the name of the society or its emblem or label by persons not members and not entitled to use these various things.[2]

These cases all proceed upon the theory that a community mark represents the reputation or good will of those making up the community or group, that any one of them has a sufficient interest to stop a wrongful use by an outsider,[3] and that it is wrong by misrepresentation to steal away the customers of an individual trader or of a group of traders.

A trade-mark is not a name or device in the abstract, but is a means applied to goods to indicate their commercial origin. It does not exist as an extrinsic thing.[4] When applied to merchandise, a trade-mark is of value exactly as the information it conveys or implies is of value. If it is valuable that the public should know that a certain article is produced by a certain trader, then the trade-mark or other thing by which that information is conveyed is of equal value. The value, however, is not in the trade-mark, but in the mark plus the information it conveys concerning the origin of the merchandise to which it is applied—the trade-mark as symbolizing a business good will or reputation,[5] and it is the good will or reputation which is the property not the symbol as a separate thing.[6]

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[1] In Jaeger v. Le Boutillier, 24 N. Y. Supp., 868 (1893), it was held that the complainant had no exclusive right to the name "Jaeger" because indicative of a system, but that the name could truthfully be applied only to woolen garments. Defendant described as "Jaeger" garments made partly of cotton. Held, that notwithstanding the lack of exclusive right in the name complainant could sue. Gildersleeve, J. (p. 201): "The plaintiff's right to use the name 'Jaeger' as designating underwear made in accordance with the Jaeger system is so qualifedly exclusive that its right to protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. The application of the name 'Jaeger' or 'Jaeger System' to underwear containing an admixture of cotton is an untrue and deceptive representation, and, as against such use, the plaintiff is entitled to relief. It is a false representation of fact, which tends to conceal the identity of the defendant's goods, not made after the Jaeger system, with the goods of the plaintiff, made in accordance with that system, and creates a disastrous confusion, detrimental to the plaintiff. One of the uses by the defendant of the name 'Jaeger' to designate underwear containing an admixture of cotton must be held to be for the purpose of taking advantage of the reputation the all-wool Jaeger goods have acquired, and of the Jaeger name, as applied thereto. The application of the name 'Jaeger' by the defendant to goods part cotton tends to deceive the purchasers and users of plaintiff's goods, and actually mislead them into buying the goods containing cotton sold by defendant, in the belief that they are the goods dealt in by the plaintiff. Moreover, since the goods containing an admixture of cotton can be profitably sold at a less price than the all-wool goods, the tendency must be to unfairly divert custom from the plaintiff to the defendant." Jaffe v. Evans 70 N. Y. App. Div., 196 (1902); Vibe Sec-Brush v. Feed Miller Brew. Co., 87 Fed., 801 (1898).

[2] Carson v. Ury, 39 Fed., 727 (1889); Society of Accountants v. Corporation of Accountants, Scottish Session Cases, 4 ser., vol. 20, p. 750 (1893); Society of Accountants & Auditors v. Goodway (1907), 1 ch., 489, 76 L. J. ch., 304, 96 L. T., n. s. 326, 23 T. L. R., 286, 24 R. P. C., 159.

[3] In Wm. Rogers Mfg. Co. v. Rogers & Spurr Co., 11 Fed., 495, 500 (1882), Judge Lowell said: "It is further argued that the Rogerses are so many that the court can not find an intent to appropriate the reputation of one of them more than another; and that, if any suit will lie, it must be by all those who use any trade-mark whose distinctive feature is the name 'Rogers.' I believe it to be true that the Greenfield Rogerses did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightly uses the name may enjoin its interfering use by others."

[4] In Rey v. Lecouturier, 23 R. P. C., 263 (1906) (House of Lords), Lord Shaw said: "In short the business of Chartreuse liqueur, as such is carried on by them (the monks), and the English trade-marks are therefore trade-marks in respect of a thing, the business in which is not and can not be conducted by the appellants. The trade-marks are in the latter; the business in the monks. My Lords, such severance is not legally possible."

Weston v. Ketcham, 51 How. Pr., 455, Cox Man., 437 (1876), Sedgwick, J.: "There is no such thing as a trade-mark 'in gross,' to use that term by analogy. It must be appendant to some particular business in which it is actually used upon, or in regard to specific articles." Mayer v. Virginia-Carolina Co., 156 O. G., 539; 35 App. D. C., 423 (1910); C. D., 399; 1 Pomeroy Eq. (1905), sec. 1405, n. 10; Bozon v. Farlow, 1 Mer., 459 (1816); Baxter v. Connolly, 1 Jac. & W., 576 (1820); Cadiske v. Till, 1 Russ., 376 (1826); Metropolitan Bank v. St. Louis Dispatch, 149 U. S., 436 (1893); Hulte v. Igleheart, 137 Fed., 492 (1905); Allan on Good Will, p. 12; Eiseman v. Schiffer, 157 Fed., 473, 476 (1907); Rey v. Lecouturier, 25 R. P. C., 265, 291 (1908); Robertson v. Quiddington, 24 Beav., 529 (1860); Musselman's Appeal, 62 Pa. St., 81 (1869); Commonwealth v. Ky. Distilleries Co., 116 S. W., 766 (1909); Metropolitan Nat. Bank v. St. Louis Dispatch Co., 36 Fed., 722 (1888); People v. Roberts, 159 N. Y., 70, 76, 53, N. E., 685 (1899); MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co., 113 Fed., 468, 474 (1901); Dietz v. Horton, 170 Fed., 865, 871 (1909); Williams v. Farrand, 88 Mich., 473, 50, N. W., 446, 448 (1891); Sebastian on Trade Marks, 4 ed., 9; Avery v. Meikle, 81 Ky., 73 (1883); Grocers' Journal Co. v. Midland Pub. Co., 127 Mo. App., 376, 105, S. W., 310, 312 (1907); Macmillan v. Erhmann, 21 R. P. C., 357, 361, affirmed (C. A.), 21 R. P. C., 647 (1904); Spiegel v. Zuckerman, 175 Fed., 978, 984 (1910); Messer v. The Fadettes, 198 Mass., 140, 46 N. E., 407 (1897); Pinto v. Badman, 8 R. P. C., 181, 192 (1891); Kidd v. Johnson, 100 U. S., 617 (1879); Thorneloe v. Hill, 8 Reports, 718, 11 R. P. C., 61, 71 (1894); Dixon v. Guggenheim; 2 Brews., 321, R. Cox, 559, 576 (1870); McVeagh v. Valencia Cigar Factory, 32 O. G., 1124, F. & S., 970, 973 (1885).

[5] State v. Bishop, 128 Mo., 373; 31 S. W. Rep., 9; 29 L. R. A., 200 (1893), Burgess, J.: "Abstractly and apart from its application and use, a trade-mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives it the character of property. It is then a symbol of reputation or good will." Ball v. Broadway Bazaar, 194 N. Y., 429; 87 N. E., 674, 676 (1909); Commonwealth v. Ky. Distilleries Co. (Ky.), 116 S. W., 766 (1909); Carrol v. McIlvaine, 171 Fed., 125, 128 (1909); Royal Co. v. Raymond, 70 Fed., 376, 380 (1895).

[6] While there are a number of cases which hold that the right to a trade-mark is property, a little examination will demonstrate that the notion is unsound, and that the true theory is that there is no such thing

It seems as if good will in this connection is more a sentiment than the thing we commonly run across in judicial opinions. Good will, to define it inexactly, is the friendliness which a consumer may have toward a particular trader's goods. It is that friendliness which induces him to buy one product rather than another. In order that his inclination toward a particular article may be exercised it is necessary that he be furnished the means of distinguishing the thing he wants to buy from others of a similar kind. Therefore, the trade-mark, or whatever it is that enables the purchaser to pick out from among others the thing that he wants, is with him, at least, the embodiment of the friendliness or good will which he has toward that product. The probability of successive purchases is what the courts call good will.

The theory of all the cases enjoining trade-mark infringement, as well as those restraining the diversion of the business of one trader to another by artifice or contrivance, by means of which a false representation concerning the commercial origin of merchandise is made, is that every trader is entitled to the first reward of his honesty, skill, or enterprise; that if his product has a reputation and is preferred by purchasers to the goods of others, he has a right to every benefit which ensues from that fact. He has the right to take advantage of this public preference for his goods, and by a trade-mark or otherwise to announce to the public the fact of their origin with him, and thus visibly to symbolize and perpetuate his reputation.[1] In short, that the good will which he has created belongs to him alone, and that attempts by others to divert it to themselves are wrongful.

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as *property* in a trade-mark. The property is in the business good will which the trade-mark symbolizes not in the trade-mark itself. Reddaway v. Banham [1896], A. C., 199, 209, 210; 13 R. P. C., 218, 228.

Lord Herschell: "The word 'property' has been sometimes applied to what has been termed a trade-mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade-mark, though no doubt some of the rights which are incident to property may attach to it."

Chadwick v. Covell, 151 Mass., 190, 194; 23 N. E., 1068, 1069; 6 L. R. A., 389 (1890).

Holmes, C. J.: "Undoubtedly the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considerable money value as an advertisement, but the fact that a right would have a money value, if it existed, is not a conclusive reason for recognizing the right. The exclusive right to particular combinations of words or figures for purposes not less useful than advertising—for poetry or the communication of truths discovered for the first time by the writer, for art or mechanical design—has needed statutes to call it into being and is narrowly limited in time. When the common law developed the doctrine of trade-marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of Paradise Lost; but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and perhaps from defrauding the public. It is true that some judges, noticeably Lord Westbury, have preferred to rest the protection to trade-marks on the notion of property rather than of fraud; but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent need not have been intended—as when a man ignorantly adopts a trade-mark already in use—and that within certain limits a trade-mark may be sold, which nobody denies. Hall v. Barrows, 4 De Gex, J. & S., 150, 158; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas., 137. The limitations are clearly marked by the language of Lord Cranworth and Lord Kingsdown in the latter case on appeal to the House of Lords. 11 H. L. Cas., 523, 534, 538. See also Manufacturing Co. v. Loog, L. R. 8 App. Cas., 15, 29, *et seq.*; Wotherspoon v. Currie, L. R. 5 H. L., 508, 514, 519; Ainsworth v. Walmsley, L. R. 1 Eq., 518, 523; Collins Co. v. Brown, 3 Kay & J., 423, 436. At least as strict a rule is to be drawn from Pub. St., c. 76, § 1; Gilman v. Hunnewell, 122 Mass., 139, 146."

Collins Co. v. Brown, 3 K. & J. 423, 69 Am. Reprint, 117 (1857). W. Page Wood, V. C.: "It is now settled law that there is no property whatever in a trade-mark, but that a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold."

See Lord Justice James's remarks in Singer Co. v. Loog, L. R. 18 Ch. Div. 412, 413 (1880); Judge Loring's observations in Cohen v. Nagle, 130 Mass. 4, 7; 6 N. E. 276, 282 (1926), and Chief Justice Knowlton's in Fox v. Glynn, 191 Mass. 344, 78 N. E. 89, 91 (1906). See also Carey's Publishing Co. v. Gage, 3 Can. Com. Law Rep. 119, 129; Turton v. Turton, 42 L. R. Ch. Div. 128, 61 L. T. N. S. 571, 576 (1889); Lee v. Haley, 22 L. T. N. S. 251 (1869); Powell v. Birmingham, 13 R. P. C. 235, 253 (1896); Walton v. Crowley, 3 Blatch. 440, R. Cox, 166, 173 (1856); Carroll v. McIlvaine, 171 Fed. 125, 129 (1909).

[1] In McLean v. Fleming, 96 U. S. 245, 251 (1877), Mr. Justice Clifford said: "Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. * * * Every where courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade and in the labels or trade mark which he adopts to enhance and perpetuate it. * * * A trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

In Partridge v. Menck, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 1 How. App. Cas. 558, R. Cox, 72, 77 (1848), the chancellor said: "The court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business. And that having appropriated to himself a particular label or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers, or the patrons of his trade or business, by selling under his flag without his authority or consent."

In Amoskeag Mfg. Co. v. Spear, 2 Sandf. S. C. 599, R. Cox, 87, 91 (1849), Judge Duer said: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device in order that they may be known as his

It would seem as if the damage to good will rather than deception of the public is really the important thing, which induces the courts to interfere in trade mark infringement and passing off cases. Whether or not the defendant's conduct is calculated to deceive the public into the belief that his goods are the complainant's is, of course, a material inquiry, because if this false representation is being made, the complainant is certainly damaged for he is in danger of having his customers decoyed away from him by the defendant's misrepresentations and "thus the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right, are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another." [1] But it would seem that it is the abstraction for another's use of the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right that gives the right of action rather than the means by which this is accomplished. Public deception can not be an indispensable element. Deception of the public without more is not a ground for private action. "Somebody," said Lord Justice James, "has a right to say, 'You must not use a name whether fictitious or real, or a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent misstatement of yours from the profits of the business which would otherwise come to me.' That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything." [2] Of course fraud does not necessarily mean intentional fraud. The element of actual fraud has long ceased to be important. While it has frequently been said that fraud is the essence of the offence, this can mean no more than constructive fraud. Here, as elsewhere, men are presumed to intend the natural consequences of their acts. "The act, however innocent, is considered constructively fraudulent if the result would tend to unfair trade, to confusion of goods and to interference with the rights of another." [3] That a trader can not be legally injured in his business good will, except by stealing his customers away from him by deceit, can not be the law. It is the damage, not the manner of it, which is important.

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n the market for which he intends them, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of the individual, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage competition by which the interests of the public are sure to be promoted, a competition that stimulates effort and leads to excellence, from the certainty of an adequate reward."

Judge Thompson said in Skinner v. Oake, 10 Mo. App. 45, Price & Stewart's Trade Mark Cases, 430, 468 (1881): "The courts have proceeded upon the twofold principle that the public have a right to know that the goods which bear the signature or mark of a particular manufacturer or vendor are. In fact, the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods has the right to any advantage which may accrue to him from the public knowing that fact."

In Tennison v. Thomas, 34 Fed. 651, 657 (1888), Judge Bradford said: "The function of a trade mark is to indicate to the public the origin, manufacture, or ownership of the articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the articles bearing it."

In Congress & Empire Spring Co. v. High Rock Congress Spring Co., 57 Barb. 526, R. Cox, 439, 621 (1871) Judge James said: "The principle which underlies this doctrine is that he who by his skill, industry, or enterprise has produced or brought into market or service some commodity or article of use, convenience, utility, or accommodation, and affixed to it a name, mark, device, or symbol which serves to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry, or enterprise, and the public be protected from the fraud of imitators."

In Williams v. Brooks, 50 Conn. 278, P. & S. 654 (1882), Judge Pardee said (p. 650): "The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from sale of their manufacture to all who may desire and intend to purchase them."

[1] Mr. Justice Strong in Canal Co. v. Clark, 13 Wall. (U. S.) 311, 322 (1871).

[2] Levy v. Walker, L. R. 10 Ch. D. iv. 436, 39 L. T. N. S. 656, 657 (1879).

[3] "The fraud upon the public is no ground for the plaintiffs coming into this court." Lord Eldon in Webster v. Webster, 3 Swanst. 490, 36 Full Reprint, 949 (1791).

Manitowoc Co. v. Numsen, 53 Fed. 196 (1893). See also the comments of Lord Halsbury in Cellular Clothing Co. v. Maxton and Murray, 16 R. P. C. 397, 404 (1899): "The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things—I say things, because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the court. Lord Cottenham says in that case (Millington v. Fox, 3 Myline & Craig, p. 352): 'I see no reason to believe that there has in this case been a fraudulent use of the plaintiff's marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel: for, although there is no evidence to show that the terms "Crowley"

If deception of the public coupled with damage to the business of a particular trader or group or traders is actionable, and deception of the public without damage to such business is not actionable,[1] then it would seem as if it is the element of damage to business that is important rather than the deception of the public; that depriving him of his customers by deceiving them is only one method of unnecessarily injuring a man in his business, and that other conduct on the part of one trader not involving deception of the public, if it results in unnecessary damage to the business of another, ought as well to be capable of redress. It would seem as if relief should depend, not on the element of public deception, but upon the answer to the query, Is business or good will being diverted from one who has created it, to his injury and to the benefit of the parasite? If it is being taken away, whether by fraud or otherwise, so that its value to its creator is sensibly diminished, why should he not have redress? Why make sneak thievery a crime and legalize highway robbery?

Take a common case of price cutting. An article of recognized merit has an established retail price fixed by the producer of it. It is extensively advertised. The price is known. It is a reasonable price or at least is believed to be by the public or it would not be paid. Under modern trade and advertising conditions articles must be nationally distributed. They must be in the hands of as many retail dealers as possible. The effect of an advertisement of a particular article is not lasting. It creates an immediate impulse to buy or it is of little use. For the advertiser to have a return on his advertising expenditure the potential purchaser must be able to obey the impulse while he has it. It must not be permitted to wear off. The price of the

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and "Crowley Millington" were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names, and therefore I stated that the case is so made out as to entitle plaintiffs to have the injunction made perpetual.' That, my Lords, I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the trade marks act has since been passed, which gives a feasible and perfectly facile mode of remedy in cases in which trade marks apply." See also Gorham Mfg. Co. v. Schmidt, 196 Fed. 955 (1912); Gorham Mfg. Co. v. Di Salvo, 196 Fed. 956 (1912); Singer Co. v. Hippie, 199 Fed. 152 (1911); Estes v. Williams, 21 Fed. 189 (1884); Jaffe v. Evans, 70 N. Y. App. Div. 190 (1902); Janney v. Pancoast Co., 128 Fed. 121 (1904); Saxlehner v. Siegel-Cooper Co., 179 U. S. 42 (1900); William Rogers v. Rogers & Spurr Co., 11 Fed. 893 (1882); Shaver v. Shaver, 54 Iowa, 208, 6 N. W. 188 (1880); Brown Chemical Co. v. Frederick Stearns, 37 Fed. 360 (1889); McAndrew v. Bassett, 10 Jur. N. s. 550 (1864); Fraser v. Nethersole, 4 Kyshe, 273 (1887); Smith v. Carron Co., 13 R. P. C. 111 (1896); Powell v. Birmingham Vinegar Co., 13 R. P. C. 241, 256 (1896); Millington v. Fox, 3 My. & Cr. 338 (1838); Rose v. McLean Co., 21 Ont. App. 248 (1897); Ehrenger v. Pigott, 12 R. P. C. 412 (1895); Reddaway v. Bentham, 9 R. P. C. 307 (1892); *Re* Christiansen's T. M., 3 R. P. C. 64 (1886); Dale v. Smithson, 12 Abb. Pr. 237, R. Cox, 282 (1861); Phalon v. Wright, 5 Phila. 464, R. Cox, 307, 308 (1861); Davis v. Kendall, 2 R. I. 566, R. Cox, 112, 114 (1850); Barrows v. Knight, 6 R. I. 434, R. Cox, 235, 242 (1860); Sheppard v. Stuart, 13 Phil. 117, P. & S. 193 (1879); Hine v. Lutt, 10 Jur. 106 (1846); Dixon Co. v. Guggenheim, 7 Phila. 408 (1870); Royal Co. v. Jenkins, P. & S. 309, 311 (1880); Cartier v. Carlile, 31 Beav. 292 (1862); Dreydoppel v. Young, 14 Phila. 226, P. & S. 422, 423 (1880); Iller v. Abrahams, 52 N. Y. 519, P. & S. 438 (1880); Am. Grocer v. Grocer, 23 Hun, 398, P. & S. 546, 551 (1881); Coleman v. Crump, 70 N. Y. 573 (1877); Williams v. Brooks, 50 Conn. 278, P. & S. 634, 638 (1882); Tobacco Co. v. Commerce, 45 N. J. L. 18, P. & S. 705, 707 (1882); Colleen v. Brunton, 4 McLean 516, R. Cox, 52 (1849); Hale v. Smithson, 12 Abb. Pr. 237 (1861); Ainsworth v. Walmsley, L. R. 1 Eq. 518 (1866); Lorillard v. Wight, 18 Fed. 383, P. & S. 739, 742; Coats v. Holbrook, 2 Sandf. Ch. 586, R. Cox, 20, 31 (1845); Amoskeag Co. v. Spear, 2 Sandf. S. C. 599, R. Cox, 87, 94 (1849); Royal Co. v. Sherrell, 93 N. Y. 331, P. & S. 853 (1883); Liggett v. Hynes, 20 Fed. 883, P. & S. 898, 902 (1884); Landreth v. Landreth, 22 Fed. 41, P. & S. 943, 947 (1884); McCann v. Anthony, 3 West Rep. 436, P. & S. 1031, 1041 (1885).

[1] In American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (1900), (Circuit Court of Appeals of the Sixth Circuit, composed of Judges Taft, Lurton, and Day), the complainant, who was the only manufacturer of washboards made out of aluminum, sought to restrain the defendant from selling a board not made of aluminum an "aluminum board." The injunction was denied. Judge Day in the course of his opinion observed: "We do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade-mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'Aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill."

Borden's Condensed Milk Co. v. Horlick's Malted Milk Co., 206 Fed. 949.

Borden's Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 514.

Saxlehner v. Wagner, 216 U. S. 375 (1910), was a case where it was sought by the proprietor of the Hunyadi Janos water to restrain the use of the name "Hunyadi" by the defendant on an artificial water. Mr. Justice Holmes said: "The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood, what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article, and think they succeed. If they do not convey, but on the contrary exclude, the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name, they have not the right to explain by that name what they imitate. By doing so, they are not trying to get the good will of the name, but the good will of the goods."

article must be stated so that the reader of the advertisement may know that it is within his means, but, most important of all, while he is in the notion he must be able to buy the thing at the time he wants it at the first shop he sees. He must be made to feel that he can get it at one place as cheaply as another; otherwise he will shop around for a bargain and in the meantime he forgets; the impulse to buy that particular article has evaporated. Therefore, with national advertising general distribution and uniform prices are indispensable. The retail dealer in such an article need make no effort to sell it. It sells itself. The producer's advertising sends purchasers to his store. The established price guarantees a profit. The dealer is merely an inactive conduit to get the article into the hands of the purchaser. He creates nothing; he need do nothing. His customers, as far as that particular advertised article is concerned, are sent to him by the producer.

After the reputation and popularity of a nationally advertised and thoroughly distributed article are established everyone who knows the article knows its retail price. The consumer knows it as well as he knows the price of a dollar bill. A retail dealer then, for the purpose of attracting custom to himself, advertises and sells the article at a price conspicuously lower than the established and recognized price. Frequently this price is cost or below, the expectation being that any direct loss sustained will more than be made up by the value of the advertising received and in the sale at enhanced prices of other articles whose prices are not known. A dealer, for example, can well afford to sell for 69 cents a watch which is advertised by its producer as a Dollar Watch, and which everyone else in his town sells at a dollar, if he can, at the same time, sell for a dollar, a 50-cent chain, or give to the public the impression that he is able to sell everything he deals in 31 cents cheaper than anyone else. The public rushes to buy, not because a watch is advertised at 69 cents, but because a particular watch under a well-known trade-mark, which is known to be universally sold at a dollar and believed to be worth it, is offered by this particular dealer at 69 cents. In short, it is the utilization by the dealer of the good will of the producer that makes the situation possible at all. It is the localized good will of the producer in the community in which the retailer does business that makes cutting of prices on the producer's goods worth while. It is the knowledge of the public that the producer's goods are reputable and have the value which the producer has set upon them, by fixing the price that makes their sale at cut prices attractive. One cut-price sale invariably provokes others in retaliation. Where one dealer cuts the price of a Dollar Watch to 69 cents his neighbor, not to be outdone, advertises at 59 cents. Another then cuts to less, with the result that sooner or later, usually sooner, all the dealers in the community are forced to sell this particular watch at a price which yields no profit. The result is that purchasers are persuaded not to buy or to take an unknown article represented to be "just as good." The reputable and popular article is sold under protest or not at all. The local dealer who survives this competition is invariably a department store, or other concern of large resources, which can afford to do business for a time at a loss. The effect of a cut-rate war on the producer, whose well-advertised and reputable product was the subject of the first attack, is disastrous. Through no fault of his own he is deprived of the distribution of his goods in the community. His market is taken away from him for no reason except that his reputation is good and his products in demand, are of recognized value, and known to be worth the price he asks. His advertising expenditure is wasted because ineffective. Purchasers with the impulse to buy can not gratify it, and it is manifest that such conditions, if at all extensive, will ruin any business. The public are not benefited because, even if for a while they are able to get an article of recognized value at a cut price, soon they can not get it at all or only at great inconvenience.

The first step in this progress of destruction is the utilization, without permission, of the producer's good will for another's private gain, resulting in damage. The result is the same as if the producer's good will were taken away from him by fraud. The effect is identical as if the element of deception, as in ordinary cases of unfair competition, were present.

The law of unfair competition has been extended in the last 20 years to include the suppression of all deceptive artifices by which one trader's customers are taken away from him and transferred to another. The element of deception can not be the sole consideration. The real injury and the only thing which gives a private right of action is the damage to the business good will of the original trader and its unlicensed utilization by a competitor to his own advantage.

Of late years the courts, in their efforts to circumvent the ingenuity of trade parasites, have begun to enjoin acts of unsportsmanlike dealing, not involving the element of deception—the duplication of talking machine records,[1] putting of adver-

[1] Fonotipia Co. v. Bradley, 171 Fed. 951 (1909).

tising inserts in newspapers by outsiders,[1] and the like, on the ground that this is a diversion of business good will from the creator of it to one who seeks to utilize it for his own benefit. It would seem that predatory price cutting ought to be included in this category.

The effect of malice on otherwise lawful acts is a topic which has provoked endless discussion.[2] In the present instance there is no occasion to become entangled with the subtleties connected with the words "malice" and "maliciously." Conceding that the intent with which an act is done is an important consideration where the act is lawful, it is of no consequence where the act is unlawful, and the unauthorized appropriation by a person who has had no hand in its creation of the business good will of another, to his own advantage and the creator's disadvantage and possible ruin, can not be a lawful act.

It would seem as if an early development of the law ought to be in the direction of putting a stop to predatory price cutting. Of course, it must be conceded that the fixing of prices, except perhaps in cases of agency or consignment, can not be accomplished by contract[3] or, where goods have been sold, by licenses under patents.[4] The essence of the situation here under discussion is not the propriety, legality, or necessity of fixing prices. It is in the unnecessary policy of an act calculated to injure and resulting in injury with respect to that most subtile of property rights, business good will. That such conduct is felt to be a real menace is shown by the fact that in at least two widely separated localities it has been made the subject of statutory prohibition. There is a section of the Danish statute[5] dealing with illegal marking of goods and unfair trading which expressly forbids price cutting, and a recent New Jersey statute[6] is broad enough to cover it. The Tribunal of Commerce of Brussels (March, 1905) has held certain phases of price cutting to amount to unfair trading.[7]

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[1] Press Publishing Co. v. Levi Bros. & Co., 3 Trade-Mark Reporter, 59. Stapleton, J.: "The cases hereinbefore cited demonstrate the jurisdiction of equity, applied to a variety of situations, to protect property from the consequences of injury and damage attributable to unfair business conduct and methods."

[2] See Tuttle v. Buck, 107 Minn., 145, 119 N. W., 946, 22 L. R. A. N. S. 599 (note), 16 A. & E. Ann. Cas., 807 (1909); Dunshee v. Standard Oil Co., 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. 263 (note) (1911); Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed., 163, 44 C. C. A., 426, 62 L. R. A., 673 (note) (1900); Huskie v. Griffin, 75 N. H., 345, 74 Atl., 595, 27 L. R. A. N. S., 967 (note) (1909); Sparks v. McCrary, 156 Ala., 332, 47 So., 332, 22 L. R. A. N. S., 1221 (note) (1908); Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md., 656, 69 Atl., 405, 16 L. R. A. N. S., 746 (note) (1908); Swain v. Johnson, 151 N. C., 93, 65 S. E., 619, 28 L. R. A. N. S., 615, 18 Har. L. Rev., 411, 8 Mich. Law Review, 468.

[3] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S., 373 (1911).

[4] Bauer v. O'Donnell, 229 U. S., 1 (1913).

[5] "An act (No. 137) providing penalty for the use of illegal designation of goods or merchandise, for unfair competition, etc." Approved by King Christian X, June 8, 1912.

"SEC. 13. * * * It shall also be unlawful to sell or offer for sale at lower prices, goods in original packages from producers or wholesale merchants—upon which goods their fixed prices for retail sale is stated—unless the sale falls under the provisions in sec. 6 or the producer or wholesale dealer has given his consent to such reduction of price, or similar authority might be acquired. Offenders may be liable to fines not exceeding 2,000 Kr. as the circumstances may demand."

Section 6 refers to clearance sales of damaged goods, removal sales, and the like.

[6] Chapter No. 210, Laws of 1913, State of New Jersey. An act to prevent unfair competition and unfair trade practices. Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. It shall be unlawful for any merchant, firm, or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or by a sale a concern going out of business.

A merchant placed on sale with a great flourish of advertising a well-known product of his competitor at a very low price, at the same time puffing a similar article of his own make, which he offered for sale at a much higher price. The decision of the court condemned the defendant's practice and laid down the following principle applicable to such cases: "Nobody supposes that a merchant can not sell or dispose of his merchandise at a price less than its cost whenever he shall judge it to be for his interest to unload a particular stock or kind of quality of goods, even though he pursue the policy of sacrificing certain articles to gain an advantage in respect to others; for everyone is free to dispose as he will of what he has legitimately acquired. Nevertheless, the merchant can not by such an act through fraud or malice prejudice another."

Passing upon the circumstance of the case before it, the court decided that the defendant had with premeditation put on sale the plaintiff's merchandise, not with the expectation of suffering the prejudice which would come from its sale at the price fixed, but for the purpose of vaunting his own product and for the sake of the advantage which he would gain by the demand for his goods unfairly created in this way, in the expectation that his goods and not the goods of his rival would be sold. Thereby he sought to create a fictitious reputation for his goods and one unjustifiable by the circumstances of the market and to cause prejudice to another dealer. This is stated to be suggestive of the French law on the subject. La Propriété Industrielle, 1905, p. 223; Singers Trade-Mark Laws of the World, 73.

2. Any person, firm, or corporation violating this act shall be liable at the suit of the maker of such branded or trade-marked goods, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the court.

3. This act shall take effect immediately. Approved April 1, 1913.

A similar act is before the Legislature of Georgia and perhaps other States.

The opponents of efforts to fix and maintain prices invariably contend that where an article is purchased, title passes and control over it by the seller is gone; that it is the property of the purchasing dealer to do with as he pleases. This has long been the favorite argument of those who justify the perpetration of unfair trading by the use of personal names or by the deceptive use of other devices in which no exclusive right can be maintained. A man's name is undeniably his own property, but he is not permitted to use his own property, whether it be his personal name, or anything else he may own, in such a way as unnecessarily to cause damage to his neighbors.[1] Ownership is not a license to injure another. Sixteen String Jack, whose operations on Houndslow Heath have made him immortal, doubtless owned the black mask and pistol which were the necessary tools of his occupation. A man with his own rifle may lawfully shoot at a target. He ought not in all conscience, however, to be permitted to pot his neighbors and defend on the ground that he owns the gun.

If it be objected that relief against injurious price cutting would be novel, it may recalled that Lord Hardwicke in 1742[2] refused to enjoin the imitation of a trade-mark on that ground, saying:

"Every particular trader has some particular mark or stamp, but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. * * * An objection has been made that the defendant in using this mark prejudices the plaintiff by taking away his customers, but there is no more weight in this than there would be to an objection to one innkeeper setting up the same sign with another."

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[1] Shaver v. Heller & Merz Co., 108 Fed. Rep., 821, 827 (1901). Sanborn, C. J.: "Thus the issue in this case finally narrows to the question whether or not one has the right to use the word 'American' to sell the property of one manufacturer as that of another. From the facts that 'American' is a geographical term, that it may not constitute a trade-mark, that no one may have a proprietary interest in it, counsel for the appellants draw the conclusion that everyone has the right to use it to palm off the goods of one vendor as those of another. Does the conclusion necessarily follow from the premises? Everyone has the right to use and enjoy the rays of the sun, but no one may lawfully focus them to burn his neighbor's house. Everyone has the right to use the common highway, but no one may lawfully apply it to purposes of robbery or riot. Everyone has the right to use pen, ink, and paper, but no one may apply them to the purpose of defrauding his neighbor of his property, of making counterfeit money, or of committing forgery. The partner has the right to use his firm's name, but he may not lawfully employ it to cheat his copartner out of his property. Everyone has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions."

And Judge Sage, in Garrett v. Garrett, 78 Fed., 472, 477 (1896), in answer to a similar argument, observed: "It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the Constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver. It has been held, with reference to trade-marks, that a man has not the right to use even his own name so as to deceive the public, and make them believe that he is selling the goods of another of the same name. Holloway v. Holloway, 13 Beav., 209 (1850). In William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co., 11 Fed., 848 (1882), it was held that, while 'anyone has a right to the use of his own name in business, he may be restrained from its use if he uses it in such a way as to appropriate the good will of a business already established by others of that name; nor can he, by the use of his own name, appropriate a reputation of another by fraud, either actual or constructive.' The same ruling was made in Rogers Co. v. Wm. Rogers Mfg. Co., by the Court of Appeals of the Second Circuit, as reported in 17 C. C. A. 576, 70 Fed. 1017 (1895). In these last two cases the name was used as a part of the name of a corporation. In the last case the court cites Manufacturing Co. v. Simpson, 54 Conn., 527, 9 Atl., 395 (1887), and Rogers v. Rogers, 53 Conn., 121, 1 Atl., 807, and 5 Atl., 675 (1885), where a large number of reported cases upon this portion of the law of trade-marks is collected. See also Landreth v. Landreth, 22 Fed., 41 (1884), where the court held that, 'while a party can not be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person.'"

[2] Blanchard v. Hill, 2 Atk., 484 (1742).

Lord Mansfield in 1783, Singleton v. Bolton, 3 Doug., 293, was of a different mind, saying: "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie."

It will also be recalled that in 1891[1] Mr. Justice Bradley declined to enjoin the false use of a geographical name at the suit of one truthfully using it, on the ground that to grant such relief "would open a Pandora's box of vexatious litigation." Because a notion is new it is not necessarily unsound. It has always been the boast of courts of equity that they adjust themselves to modern instances and as new wrongs develop new remedies will be applied or old remedies will be enlarged to meet the changed conditions.

"It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has lead to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition, and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men can not always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person."[2]

EDWARD S. ROGERS.

CHICAGO, ILL.

The CHAIRMAN. Representative Dyer, a member of this committee, has requested that the following letter and brief be incorporated in to-day's proceedings. Without objection, it will be done.

ST. LOUIS, MO., *March 14, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee of the House of Representatives,
Washington, D. C.

MY DEAR SIR: Inclosed please find a tentative bill, prepared by Prof. Early and myself, covering the subject of interlocking directors and control over interstate corporations. This tentative bill has been prepared and is herewith submitted to comply with the request of some members of the Committee on the Judiciary made at the time that I had the privilege of appearing before said committee.

In my letter to you of recent date I explained that I had succeeded in getting the cooperation of Prof. Early in this work and told you in that letter of him.

I also inclose some observations on the bill as prepared by us. Necessarily, we have had to do this work at odd times, as and when opportunity has been afforded, and it is not, therefore, offered as a finished product; but if our efforts result in aiding the Committee on the Judiciary in solving this intricate and difficult problem, Prof. Early and I shall feel well repaid.

Yours, very truly,

THOS. B. HARLAN.

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[1] New York & Rosendale Cement Co. v. Coplay Cement Co., 44 Fed., 277 (1890), where it was attempted by a dealer manufacturing cement in the town of Rosendale to enjoin the false use of that name on cement made elsewhere.

In 1898, Pillsbury Washburn Flour Mills Co. v. Eagle, 86 Fed., 608, where the millers of Minneapolis rightfully using the words "Minnesota Patent, Minneapolis, Minn." upon their flour successfully enjoined a grocer selling flour produced in Milwaukee from falsely using the words "Minnesota Pattern, Minneapolis, Minn." thereon, Judge Bunn, speaking for the Circuit Court of Appeals of the Seventh Circuit, observed: "To still say that the court has no jurisdiction or power to grant relief is to fly in the face of the well-grounded principle running through all the cases * * * This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief."

[2] Elliott, J., in Tuttle v. Buck, 107 Minn., 145, 119 N. W., 946, 22 L. R. A. N. S., 699 (1909).

A BILL To prohibit certain persons from being or becoming directors or officers of railroads and national banks, and to fix the responsibility of persons acting as common directors or exercising control over interstate corporations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after two years from the date of the approval of this act no person who is engaged as an individual or as a member of a partnership, or as a director or officer of a corporation, in the business in whole or in part of selling railroad cars, or locomotives or railroad rails, or mining or selling coal, or the conduct of a bank or trust company, shall act as a director or other officer in any railroad company, owning or operating more than one hundred and fifty miles of track, nor shall any such individual, member of a partnership, or director or officer of a corporation conducting a bank or trust company, or engaged in the manufacture or sale of wire or telegraph or telephone apparatus, act as director or officer of any telegraph company or telephone company, with more than one thousand subscribers.

SEC. 2. That from and after two years after the date of the approval of this act, no person shall at the same time be a director or officer in two or more Federal reserve banks, National banks, or banking associations, or other banks or trust companies, which are members of any reserve bank and are operating under the provisions of an act, approved December 23, 1913, entitled "An act to provide for the establishment of Federal reserve banks; to furnish an elastic currency; to afford means of rediscounting commercial paper; to establish a more effective supervision of banking in the United States, and for other purposes," and a private banker or a person who is a director in any State bank or trust company not operating under the provisions of said act shall not be eligible to be a director in any bank or banking association or trust company operating under the provisions of the aforesaid act.

SEC. 3. That any person who shall violate section 1 or section 2 hereof shall be guilty of a misdemeanor and shall be punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate not exceeding one year or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That no person who is a director or officer in any two or more corporations engaged wholly or in part in interstate or foreign commerce shall receive or be permitted to retain any profit or other benefits growing out of any arrangements, combinations, contracts, agreements, or transactions conducted or effected between such corporations of which he is a common director or officer; nor shall any persons who control, directly or indirectly, any corporation engaged wholly or in part in interstate or foreign commerce receive or retain, to the detriment of any such corporation so controlled, or any stockholder thereof not a party to such control, or any creditor thereof, any profit or benefits (other than dividends or emoluments lawfully earned and paid) derived by the exercise, directly or indirectly, of such control. Any corporation, creditor, or person suffering loss or damage by reason of such interlocking directorate or such control may proceed against any such person or persons so acting as common directors or exercising such control in any manner provided by law for the redress of fraudulent transactions, and in such proceeding proof of the existence of such interlocking directorate or such control, together with proof of loss or damage sustained by the person seeking redress shall establish a legal presumption of his right of recovery. The burden of proof shall then be upon the party so charged to establish that such loss or damage was not due to the existence of such interlocking directorate or control.

SEC. 5. If in any action or prosecution brought in pursuance, or to enforce the provisions, of an act approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," it shall appear that any two or more corporations engaged, wholly or in part, in interstate or foreign commerce, shall have been therefore, or are competitors, and if it further appears that such corporations have a common director or directors, or that such corporations are controlled, directly or indirectly, by the same person, or by persons confederating together, it shall be presumed that such corporations are in combination in restraint of interstate or foreign commerce, under the provisions of and subject to all the remedies and penalties provided in said act of July 2, 1890, and the burden shall then be upon such common director or directors or officers or persons so exercising such control to prove the contrary: *Provided*, That nothing herein contained shall apply to railroads owning or operating less than 150 miles of track or to telephone companies with less than 1,000 subscribers.

OBSERVATIONS ON A SUBSTITUTE TO TENTATIVE BILL NO. 3, COMMITTEE PRINT, SUBMITTED BY MARION C. EARLY AND THOMAS B. HARLAN, OF THE ST. LOUIS (MO.) BAR.

The provisions of section 1 exempt short-line railways from its operation, for the reason that in most instances short lines are operated as feeders and it would be an unnecessary expense to compel the maintenance of distinct officials. Furthermore, not to admit this exception would unnecessarily limit development, particularly in the West.

This section extends to telegraph and telephone companies, because these are essentially interstate and a monopoly formed between such interests may be as harmful as any other form of combination. The section does not extend to employees, for the reason that joint employees are necessary in a great number of instances. For illustration, a provision against joint employees would render it necessary for a railroad to maintain an agent in a small town and the telegraph company would be required to employ a different person as operator. As the work is now done, the same person is employed by the two interests, which have only enough work for one. Should the companies not be permitted to employ the same person in such cases, great waste would result and no corresponding public purpose served.

With respect to telephone companies: In the rural districts "farmers'" systems are common, and throughout the United States there are small independent plants financed, as a rule, by local capital. These local systems may extend into two or more States, but no illegal or harmful results are liable to flow from the existence of such small exchanges, and the section therefore exempts those having less than 1,000 subscribers—a suggestion purely arbitrary, however, on our part.

Section 4 puts into statutory form long-recognized principles of equity jurisprudence as administered somewhat generally in many of the States of the Union. It is intended to clearly lay down a principle of law concerning the constitutionality of which there is no room for doubt. It is declaratory of the common law and its provisions are such that no one who is desirous of doing right can well find fault with its condition.

If a person fleeces a corporation in which he is a director or if through a dummy directorate he profits by evil means, he can not in good conscience retain such profits. The provisions of this section 4 make easier the work of an injured party to compel the wrongdoer to disgorge his ill-gotten gains; but if the alleged wrongdoer is guiltless the section provides an easy and practical road by which he may discharge himself. All he is required to do is to disprove the prima facie presumption against him by revealing the whole truth of his transactions, and thus demonstrating his freedom from wrong.

What honest person can object to such scrutiny? The case of Barrie *v.* United Railways Co. (138 Mo. App., 557) clearly announces the rule where an interlocking directorate exists. The facts revealed in this case involve about all the points to which the proposed enactment relating to the subject of interlocking directorates refers. The authorities of the whole country are exhaustively reviewed by the court, and we call attention to this case. Upon the same record the Missouri Supreme Court later reviewed the Barrie case (247 Mo., 326) and therein further elucidated the rule.

The provisions of section 5 offer substantial aid to prosecutions or actions under the Sherman Act, and at the same time impose such burden upon interlocking directors or persons seeking to control corporations for their selfish ends as we believe will discourage the practice. On the other hand, business not seeking a monopoly has nothing to fear.

Section 5 was suggested by the provisions of section 4 of tentative bill No. 3, committee print. The committee's bill provides that the existence of a common director, other elements being present, "shall be conclusive evidence that there exists no real competition," and then proceeds to provide for conviction of the offender based upon such conclusive presumption. We are satisfied that this can not be done. It would amount to conviction by legislative act, and a denial to the accused of the constitutional guaranty of a fair and impartial trial. In our search of authorities we have failed to find any case when the legislature had enacted a measure in such drastic terms.

The provisions in our section 5 go only to the extent of shifting the burden of proof, which is a matter of procedure, and does not deny the accused a fair and impartial trial. In the case of statutory crimes no constitutional provision is violated by a statute providing that proof by the State of some material fact shall be presumptive evidence of guilt, and shall cast the burden of proof upon the accused. (See Santo *v.* State, 2

Iowa, 165; 63 Am. Dec., 487; Com. v. Minor, 88 Ky., 422; Com. v. Smith, 166 Mass., 370; State v. Altoffer, 2 Ohio N. P., 97; State v. Kyle, 14 Wash., 550.)

The presumption of innocence is merely a rule of evidence and does not create any vested rights in the accused. (Wilson v. U. S., 162 U. S., 613.)

(The committee thereupon adjourned until Thursday, March 19, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY O. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPRIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 32.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, March 19, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Jackson, of Boston, is to be heard this morning, and Prof. Neystrom, assistant professor of economics, University of Wisconsin. We will be very glad to hear from Mr. Jackson at this time.

STATEMENT OF MR. JAMES F. JACKSON, OF BOSTON, MASS.

Mr. JACKSON. Mr. Chairman and gentlemen, I wish to call attention to the way in which the proposed legislation with reference to interlocking directorates would affect certan local State-regulated public utilities. I have nothing whatever to say as to the general question of Federal legislation that is aimed to prevent such directorates in cases where railroads, telephone companies, telegraph companies, or other interstate corporations would realize from such directorates a power that would interfere with competition. I assume that that principle is settled; that such directorates are objectionable; and that Federal interference is not only justified but

desirable. The particular class in which I am interested is that which is subject to-day to advanced and thorough State regulation. They are necessarily monopolies and, therefore, necessarily subject to regulation where they exist.

Take, for instance, an electric-light company in a city, a water-power company, and a street railway company. In Massachusetts the laws have been for some time very drastic in regulating such companies. There are here and there many such corporations and instances where a company, although local in all essential parts, by virtue of its situation may come within the class called interstate public-service companies, and as the one in which I am specially interested illustrates that class I wish to give the few minutes that I have before the committee to that particular company. It is an interurban street railway company. In very few, perhaps in no State other than in Massachusetts, is there a clear distinction drawn between an interurban street railway company or an interurban railway company and an electric railroad company. In our State we have a separate code of laws—one for the steam railroad, another for the electric railroad, and another for the street railway, including such street railway as that about which I am speaking. It is, perhaps, as an interurban street railway within State lines almost wholly, the largest in mileage in the country, and its history is this: It is a chain of local street railways made up by consolidation into a strong system, which has to-day the very best of management; which recognizes the right of the public to influence its conduct by conference and by consultation; by interviews indivdually with the public or representatives, and through the legislature by State regulation. This company serves a line of cities and towns from the northeast corner of our State to the southeast.

Originally the company at the northeast had a line which ran into New Hampshire 15 or 20 miles; at the southeast the company doing business in the neighboring city, Fall River, acquired a leasehold right in the Newport company, so that our company technically carries passengers over the line for a few miles into New Hampshire on the north and for a few miles into Newport on the south. The point that I want to bring out particularly is that in every essential characteristic it is a locally regulated street railway. It is not the development of the street railway idea into the interstate or interurban which we find in other parts of the country and which is distinguished under our laws from such a company as this, the Bay State Street Railway Co., that being its name.

Mr. CARLIN. Do you think these proposed bills affect you in anywise?

Mr. JACKSON. I was fearful they would under a clause which in the original bill refers to all public-service corporations. It is only on that account——

Mr. CARLIN (interposing). Which clause do you refer to?

Mr. JACKSON. Well, I ought to be able to name it, but it is where the act is applied to all public-service companies, as I recall it. I read it and interpreted it many weeks ago.

Mr. CARLIN. Do you mean with reference to interlocking directorates?

Mr. JACKSON. Yes.

Mr. DANFORTH. You will find it in the book which is in front of you.

Mr. CARLIN. Bill 3?

Mr. JACKSON. Yes; it is on the second page of this particular bill, page 14 of this pamphlet. The provision is:

Shall act as a director or other officer or employee of any railroad or other public-service corporation which conducts an interstate business.

The interstate commerce act has been interpreted as not applying to the ordinary street railway company, but in the last decision which was rendered, in the Omaha case, the court left the matter for future determination in the cases of what are called interurban railway companies. And I assumed that that phrase in this bill would bring us within the meaning of the act, and that is the reason why I specially wished to present our situation to the committee.

Mr. McCOY. On page 1 of that bill you will find that the people who are to be prevented from acting as directors in railroads or other public-service corporations that conduct an interstate business are such people who as "individuals, members of partnerships, or directors or other officers of a corporation in the business, in whole or in part, of manufacturing or selling railroad cars or locomotives, or railroad rails, or structural steel, or mining or selling coal, or the conduct of a bank or trust company." Now, which particular one of those things would hit in your case if they were enacted?

Mr. JACKSON. The bank or trust company. And it is to that point that I want to call particular attention. Under the State regulation of our company all issues of stock and bonds must be supervised, and in the case of the issue of stock Massachusetts has provided that the price at which that stock is issued must be determined, in the final analysis, by the public-service commission. The law used to be that that commission should fix the price. It was afterwards liberalized so that a company is allowed to fix it, but the public-service commission is required to investigate this price, and if it is inconsistent with public interests then the stock can not be put out at that price.

Mr. McCOY. Your suggestion, in order to protect your situation, would be just what? That we exempt interurban companies?

Mr. JACKSON. My thought was that where a State does regulate the issues of stock and bonds, as we do, not only stock but bonds, that there is no danger to the public from the presence upon the board of a company like ours of a banking man. The company needs it. I think I could find nowhere an instance of where so much good is done and absolutely no evil. The history of our company shows that it has issued in all about twenty millions of stock and eighteen or twenty millions of bonds. In every instance the bonds have been open to the bids of anybody. On our board we have men whose standing in the community and whose financial experience and ability are such as to enable the management to tell when it is wise to put these bonds out, have enabled the public to deal with our company and to know the character of the bonds that we

are issuing, and in this way made it possible for the company to follow a course of management that has strengthened it and improved it continually.

Mr. CARLIN. Do those banks, under your State law, have the right to deal in your railroad securities?

Mr. JACKSON. I think that they do. Our board includes directors of trust companies, and in no case, I think, has any one of these trust companies taken the bonds. We have now pending before our public-service commission a petition for the approval of an issue of bonds. The time was selected by reason of the advice given by these men within our board; the amount was determined by the public-service commission at a recent hearing. Now, the commission goes further and they say, "You are to establish a sinking fund to meet the difference, within the term of the bond, between the amount realized as proceeds and the face value of the bond." In doing that we are required to furnish evidence—and I am now engaged in preparing it—to show what can be realized from these bonds. We can only do it by presenting proper evidence to them, and if our statements are not proper, are not correct, in their judgment, they have full power to investigate; they have the absolute control over it. They then fix the amount at which these bonds can be sold, so that when it comes to a question of influencing——

Mr. CARLIN (interposing). Do they fix the commission to be paid for the sale?

Mr. JACKSON. They would. I can say this about the commission, that there is no commission paid that would raise the slightest question in reference to this company or any other street railway company that I ever knew about. Recently I was personally engaged in opposing an issue of New York & New Haven bonds, where one of the points made was that the commission paid was wasteful; and our State board, which for the first time in the history of the New Haven was called upon to pass upon the question, decided that that was against the public interest and refused to capitalize it.

Mr. CARLIN. Was that particular commission by contract with one of the board of directors of the company?

Mr. JACKSON. It was.

Mr. CARLIN. That is the very evil we are trying to reach by this bill.

Mr. JACKSON. I so understand. Now, if the company in question is subject to State regulation, my suggestion is that the evil is corrected, and in this instance, that of the New Haven Railroad Co., which is not merely a local organization, but which has its charter from two States, Massachusetts asserted its own right to stop just that thing and it was stopped.

Mr. McCOY. Suppose your corporation were a New Hampshire corporation. Would your Massachusetts Public Service Commission have any jurisdiction over the issue of stocks and bonds?

Mr. JACKSON. We claim in Massachusetts the right to decide upon all issues of stock and bonds in the case of any company that goes beyond State lines into other States, where the issue is proposed for the purpose of meeting general corporate purposes or expenditures

within Massachusetts. That is the old contest between the State and the New Haven.

Mr. McCoy. Can a foreign corporation operate a street railroad in Massachusetts, or do you require them to incorporate in Massachusetts?

Mr. Jackson. No foreign corporation does, but there is no law forbidding it. There is a law which provides that if the stock ownership in a Massachusetts company passes to holders outside of the State the charter may be recalled or annulled. That would be a process which would be brought by the attorney general.

Mr. McCoy. And all of your franchises are indeterminate, are they not?

Mr. Jackson. Yes.

Mr. McCoy. Your street railroad franchises?

Mr. Jackson. Yes; they are all based upon the theory that the company has them subject to revocation and can hold them during good behavior.

In reference to the history of our company I think the testimony would be universal that it would be exeremely bad in effect for the public interest, as well as for the company, if we should be prevented from unsing the financial judgment and the ability of the men who to-day form, in part, our directorate. They are the very strongest men that we can get, and it never has been suggested that in anyway they have attempted to deal with the company for the benefit of any other corporation. Not only is that true, but it seems to me in a hearing like this—the thing more to the point is this: That they could not, at least so far as any issue of stock or bonds is concerned, because that is absolutely within the control of our State authorities. There is one suggestion that I think I ought to make. If it is found that for any reason this company should be included as a possible subject of legislation of this kind I would like to urge upon your thought this method of doing it, and that is that the law should be so left as to permit a proper administrative board to exempt its application. I have understood from what one of the gentleman interested in this legislation has said here that he felt, as so many of us do feel, that a law of this kind ought to go comparatively slow and not pushed to the uttermost at the first step, and with that in view, he suggested, I think, that the law should not apply to communities which were under a certain figure in population or companies which were under a certain figure with respect to capital stock.

Now, while I make the suggestion with some diffidence, I do feel very strongly that that is very unwise kind of legislation. It rests upon no principle whatever. If a company has issued five millions of stock, and no more, the suggestion is that the law does not apply. Why not as well to one that has issued six millions or five and one-half millions? There certainly is not any principle in it. That is purely arbitrary and produces a method of limiting and cutting down an act which it seems to me, particularly from the Federal standpoint, ought to stand on principle. Now, as I say, I do not presume here in your presence, where this subject has been discussed so long and so thoroughly, and from so many general principles, to take up your time with a discussion of any general principle beyond this, that it seems to me that the statute should go to the extent of

meeting the known obvious evils, and that beyond that, where there are cases in which the application of such a law would work more harm than good, that there ought to be elasticity in some way that would prevent it. I do not know that the analogy is absolute, but when it comes to the question of the issue of stock in Massachusetts the company is allowed to name the price, but the principle of our anti-stock watering statutes is maintained through the investigation and decision of an administrative board. To point it, suppose that there were a class of companies that technically were of an interstate character simply because they happened to be built up, as this interurban road is, of a chain of purely local city and town railways, and it was thought that that was not a case where there was harm being done. A proper board, the Interstate Commerce Commission, if you will, that has charge over interstate carriers, could well have the authority, it seems to me, to say that this law, which was needed and applicable elsewhere should not be applied where it would do, as I say, more harm than good.

Our situation is one in which we vitally need money. Everywhere people are asking us to do things for them; to put in double tracks instead of single tracks. We are not, I would like to have it appear, doing a railroad business. We do not have any rapid lines, for instance. It is almost impossible to encourage people 40 miles from Boston to use street railways to Boston unless it be during the summer, when they go for the ride, but where they are going for business purposes they go in some other way. Nor is our railway company one that is in touch with any steam railroad company. It has not even, as far as I know, been invited to sell its franchise to the New York & New Haven road or any other steam railroad company. It is purely and essentially a local company and does business of a local character.

Mr. DANFORTH. How would you omit such a company from the general verbiage of this act as now drawn?

Mr. JACKSON. If it was to be exempted?

Mr. DANFORTH. Yes.

Mr. JACKSON. I have not the language, but I would like to think of some way; I would like to suggest that in definite form and make it in writing to the committee.

Mr. DANFORTH. There are other States that have this same provision, I think, in regard to the issuance of securities?

Mr. JACKSON. Oh, yes.

Mr. DANFORTH. And what would apply in the case of your corporation would apply in the cases of corporations controlled by those public-service boards?

Mr. JACKSON. Yes. The essential thought I had in mind was that if the committee does find that there is State regulation which takes care of such companies, the exemption should apply to them generally. As I said, in our State we undertake to make a distinct difference between electric railroads and interurban street railways. We have issued two charters to electric railroads and not one of them is built.

Mr. MITCHELL. Is there any street railroad in Massachusetts that is not chartered under your State laws?

Mr. JACKSON. I think not. I was asked if people from outside of the State could build railroads in the State. Of course, they could organize under our laws and do it. I do not know of any way in

which they could build a street railroad in Massachusetts except by becoming incorporated in Massachusetts. That is the correct answer to the question rather than the one I gave. The State has attempted to protect itself in that respect, as I have explained, by a provision that if people outside do secure control over any of our street railroad companies the attorney general may take steps toward having the charter recalled.

Mr. BEALL. Are the securities of those public-service corporations, such as that which you represent, usually sold through banks and trust companies?

Mr. JACKSON. I think they are placed generally, and they would be included.

Mr. BEALL. Is it generally the case that when securities are disposed of to trust companies, that the trust companies insist upon their having some one connected with them on the board of directors of the company?

Mr. JACKSON. I think that no one of the gentlemen who are serving with us ever took his seat as the result of any such request.

Mr. BEALL. I was not speaking of your particular enterprise, but I was speaking generally. Generally speaking, is that one of the conditions under which a trust company would handle the securities; that is, to be represented upon the board?

Mr. JACKSON. I have never know of any such case.

Mr. BEALL. You do not think that is the general practice?

Mr. JACKSON. I do not. Of course my knowledge is limited, even within Massachusetts, because I have not been connected with trust companies, but I have never heard that suggested. I did occupy for some seven years a place where such securities came before me from time to time, but I never knew of such a case.

Mr. BEALL. Do you think that if such conditions do prevail, the conditions should be remedied by legislation? In other words, do you think that any great evils would result from such conditions?

Mr. JACKSON. I think not. That is the feeling I have—that is, until it has been shown to me affirmatively that there are some existing evils resulting from it, I believe that the Federal Legislature ought to leave that matter until some later time. I do not know of any existing evils now of that kind.

Mr. BEALL. I happen to know of some corporations in my State engaged in the construction of railroads, and I know of one case where they were financed in a certain city through a certain trust company, and my recollection is that an officer of that trust company was placed upon the board of directors of that Texas corporation. I never heard of any particular evil resulting from it or of any special complaint against it.

Mr. JACKSON. There is one way in which the officers of trust companies and of banking institutions, or, as you say, particularly of trust companies, do appear upon the directorates of corporations of one kind or another, and that is where the trust company is made trustee for the bondholders. I can conceive, and, in fact, I know of some instances, where the trust company has had its representative on the boards of directors of companies for which it was trustee.

Mr. BEALL. That is the situation in the case to which I refer.

Mr. JACKSON. It seems to me that in some instances that may be all right, and in some instances it may be a privilege that is abused, and I have in mind a particular case where that occurred. In that instance the trust company was not only represented, but it took over the entire management of the company openly. The result was that they fell into trouble. Where there is a contract between two boards, in which there is a common directorate, our law makes it exceedingly difficult for a corporation to get away with something that it ought not to have. It is against legal principles. If, for example, there is a contract between a railroad company and an express company, where there is a common directorate, and one company or the other suffers from that fact, the contract can not stand. It seems to me, coming back to the question of where a trust company is trustee for bondholders, there are very decided advantages in having somebody to represent that trust company on the board of directors of the company which has issued the securities, because the bondholders are very apt to be better informed and to have their rights better protected if there is somebody upon the board of the company which has issued the securities looking on and seeing what is being done. That representative of the trust company, looking after the interests of the bondholders, would be better informed as to whether or not there is a good and sufficient reason for foreclosing the mortgage. Therefore, it seems to me, as a general rule, that if the privilege is not abused, and I do not think it is abused very often, there is a decided public benefit conferred. It is one of those things that I would suggest ought not to be prohibited or changed unless there is some positive proof that it is working an existing evil.

Mr. MITCHELL. Mr. Jackson, do you suggest that it would strengthen this act if there were some administrative board such as you have suggested provided for? Do you think it would strengthen this act to include a provision for such an administrative board to which might be submitted the questions that have been suggested, to see whether or not the public interest was being conserved?

Mr. JACKSON. That would be my suggestion, I suggest that the act should include in its terms a provision for cases where it might be far better to have an investigation. That suggestion comes from my own experience on an administrative board. The statute was broad and stated the general principles but the application of it in particular cases was left in the hands of the administrative board.

Mr. McCOY. What was that board?

Mr. JACKSON. I was on the Board of Railroad Commissioners for Massachusetts until 1907, when I resigned.

Mr. DANFORTH. Do you know how many States there are that have this provision under which the securities issued by corporations are controlled by public service boards?

Mr. JACKSON. I can not give the exact number, but I know that the number is constantly increasing. New York has one I am sure.

Mr. DANFORTH. Has Connecticut one?

Mr. JACKSON. I do not know about Connecticut. That State has a new public utilities commission.

Mr. DANFORTH. But you do not know whether they have made any provision with regard to the issuance of securities by corporations?

Mr. JACKSON. No, sir.

Mr. DANFORTH. But you say that New York has it?

Mr. JACKSON. I am sure that New York has, and I was told yesterday that it was coming in the Western States, too. It seems to me that the whole tenor to-day in all of the State legislatures is to give a surer grasp over monopolies. They are working in the same sort of atmosphere which I imagine prevails here in Washington; that is, that the monopolies should be controlled.

Mr. DANFORTH. Wiped out, I think is the better phrase. That seems to be more nearly the sentiment.

Mr. JACKSON. I am rather inclined toward the control idea.

Mr. MITCHELL. For how many years were you a member of the Board of Railroad Commissioners of Massachusetts?

Mr. JACKSON. I was appointed to fill an unexpired term in 1899 and I was there until 1907.

Mr. MITCHELL. Were you the chairman of that board?

Mr. JACKSON. Yes, sir; if regulation is carried too far, it goes too much into the matter of management, and the public had better take the whole thing over. If regulation is reasonably applied, I believe in it.

Mr. MORGAN. You stated, if I understood you correctly, that there was a growing sentiment in favor of the control of monopoly. Now, what do you mean by that term "monopoly"? Do you mean actual monopolies, or do you simply mean concerns that have more or less monopolistic power?

Mr. JACKSON. I think that regulation should follow in the degree that the corporation is a monopoly. If it is an absolute monopoly, then, there should be a firm control over it in place of the competition which has been removed.

Mr. MORGAN. Do you refer to industrial corporations or to public service or public utility corporations?

Mr. JACKSON. I had in mind the public-service corporations.

Mr. MORGAN. And not the industrial corporations?

Mr. JACKSON. Not the industrial corporations; but I can see how the line of demarcation disappears.

Mr. MITCHELL. Mr. Jackson, would you care to submit a draft of an amendment covering the administrative feature that you have referred to?

Mr. JACKSON. I will be pleased to do so.

Mr. MITCHELL. I think the committee would be glad to have it. I suggest that Mr. Jackson be permitted to submit an amendment in line with his suggestions.

The CHAIRMAN. We will be glad to have it, Mr. Jackson.

Mr. JACKSON. I will submit it to the committee.

STATEMENT OF PROF. PAUL H. NEYSTROM, ASSISTANT PROFESSOR OF ECONOMICS, UNIVERSITY OF WISCONSIN, MADISON, WIS.

Prof. NEYSTROM. Mr. Chairman and gentlemen of the committee, I began my work with the University of Wisconsin four and one-half years ago. The position that I have held for the last three years is that of assistant professsor of economics. I would like to say just a word about the character of the work I have done, for the reason that my experience is somewhat different from that of most who have appeared here. I am not coming to you with anything in the nature of an economic theory. I have been employed by the University of Wisconsin in their extension department, and I have been doing my teaching out around in various parts of the State instead of inside the halls of the university. Four years ago I began to conduct a course for retail dealers and sales people, and since I first began that course I have had in my classes about 1,000 retail dealers and sales people.

I also helped to establish at the University of Minnesota during last month—that is, during the month of February—a short course for merchants. The plan of this course is exactly the same as the plan of the short course for farmers given by the agricultural colleges. The object of the course is to increase the efficiency of retail merchants, to enable them to cut down the cost of doing business, and to make their work more satisfactory to the consumers. My personal work in connection with these courses has been to try to discover what the best possible means are for distributing goods from the producers to the consumers. I take it for granted that the method of distributing goods that must prevail in the long run must be the most economical method, and anything that bolsters up any other method that is artificial or more expensive is socially wrong.

Therefore, the problem before me has been to try to discover that method which would work out best in the long run for the consumers. The retail dealers, as well as other business men, must conform themselves to the method that is most beneficial to the consumers and that will most economically meet the consumers' demands. I do not see that there can be any other philosophy or theory at the back of this economic problem.

Now, I want to call your attention to certain phases of this problem, particularly with reference to the competition which must be met by the small-town merchant. I want to discuss the relation existing between the small-town merchant and the large mail-order concerns. I suppose that you have heard a great many statements about the mail-order business. To illustrate my subject better I have brought with me two or three charts, and I think you can probably see them from where you are sitting. I think you can see at this distance these straight black lines and circles [indicating].

This chart [indicating] exhibits the customary method of showing the way goods are distributed from the producers to the consumers. The circle fartherest on this side [indicating] represents the producer, and the circle fartherest on the other side [indicating] represents the consumer. Now, the customary way of showing the method of distributing goods is something like this [indicating]. Consumers and business men generally, who have not given a great deal

of thought to this subject, are likely to get from this sort of presentation a confused and wrong impression about it, as I shall point out to you.

Here [indicating on chart] is what we call the usual channels of distribution; that is, the distribution of goods from the producer to the wholesaler, from the wholesaler to the retailer, and from the retailer to the consumer.

Now, I want to take just a moment to compare that method with the mail-order method of distribution. Under the mail-order method the producer sells in most cases direct to the mail-order house. As you see, the producer sends his wares with only one middle man intervening to the consumer. In probably 75 to 90 per cent of the cases the mail-order house purchases its goods direct from the producer, and then the mail-order house sells them direct to the consumer. Now, the ordinary impression that you would gather from this comparison is that in this first method of distribution—that is, from producer to wholesaler, from wholesaler to retailer, and from retailer to consumer [indicating], there are two middle men between the producer and the consumer, whereas in the second channel—that is, by the mail-order method [indicating], from the producer to the consumer—there is only one middle man. In other words, there appears to be an elimination of a middle man, and, in the ordinary way of looking at the matter, if we eliminate a middle man, the presumption is that we have saved a certain amount of expense.

Now, I have here two other charts that show exactly the same facts, but in a little different way, and, I think, in a truer way. Here [indicating] is a chart that represents distribution through the regular channels of trade—that is, from producers to wholesalers, from wholesalers to retailers, and from retailers to consumers. Now, of course, there are variations in these channels of trade. Sometimes there are more middle men than this chart represents. I refer to such middle men as brokers, commission men, etc. But the uses of the middle men are shown in this chart [indicating]. The wholesaler gathers together the products of many producers. Then he distributes them out in bulk or in suitable quantities and assortments to the retailers, and the retailers distribute them to their immediate trade in their communities at the time and in the manner desired. This [indicating] chart shows the mail-order method of distribution. Again, as you see, there is the activity of gathering the products together by the mail-order house in a manner very similar to that of the wholesale house, but instead of shipping the goods out in bulk, or in large quantities, as the wholesaler does to the retailer, the shipments from the mail-order house are here made in small lots—that is to say, each single shipment is made to an individual customer.

Now, we can appreciate what a problem is involved in the mail-order-house method of distribution, as compared with the distribution through the regular channels, when we remember that the customers of the mail-order house may run into the millions. In fact, one mail-order house claims to have over 6,000,000 regular customers, another claims to have 3,000,000. Every order sent to a mail-order house has to be separately filled and separately sent out by some means of transportation to the ultimate consumer. The separate shipment of each parcel in this way must make a large expense in

this method of distribution. In other words, gentlemen, the method of distribution shown on this chart from producers to wholesaler, from wholesaler to retailer, and from retailer to consumer [indicating] has this advantage, even if we assume that it does not have any other, that the shipment of the goods from the producer to the consumer is made in a much more economical way than are the shipments made by the mail-order-house method of distribution.

Mr. McCoy. Let me suggest that when you refer to the charts and say, "from this point to that point," you indicate by some descriptive words, such as "wholesaler" or "retailer" or "consumer," as the case may be, just what is meant.

Prof. Neystrom. I am not familiar with your procedure here, and I may not be presenting this just as it should be done.

Mr. McCoy. My suggestion is that when you refer to your chart, you refer to it in words that will indicate just what you mean when we come to read your statement in the record. Such references as "from this point to that point" will not mean anything in the printed record. If, when you refer to a point on your chart, you will indicate in words to what point you refer, we will be better able to understand it.

Mr. Morgan. Perhaps the gentleman's charts are copyrighted and he would not care to have them printed.

Prof. Neystrom. No, sir; I simply use these charts in my classes.

Resumming my statement, gentlemen of the committee, I have made it my business during the last few years to make a collection of data on the costs of doing business in the various kinds of concerns that are distributing goods, and I want to call your attention to the figures that I have. I can give you a general statement regarding them, at any rate. I have collected statements showing the costs of doing business in over a hundred retail concerns, seven of which are mail-order houses, but most of them are general stores in various towns in the States of Wisconsin, Illinois, Indiana, and Minnesota.

Now, the cost of doing business in wholesale concerns runs all the way from 6 per cent to 15 per cent of the sales. The cost of doing business in retail concerns, depending, of course, upon the line of goods carried, runs all the way from 10 per cent up to 25 per cent, and even to 30 per cent of sales. Of course the percentages depend altogether on the kind of institution it is and the grade of its efficiency. If you eliminate the department stores, whose expense is somewhat higher, the average cost of doing business in the small stores—that is, the stores in small towns in the State of Wisconsin, so far as my figures indicate, at any rate, is somewhere about 18 per cent. The cost runs from 15 per cent to 22 per cent, and I take the average to be, according to the figures I have collected, 18 per cent.

Now, the cost of doing business in the mail-order concerns, from seven of which I have obtained the figures, runs from 16 per cent to 26 per cent, and the average is 22 per cent of sales. Mr. William C. Thorne, vice president of Montgomery Ward & Co., in appearing before the parcel-post subcommittee of the Committee on Post Office and Post Roads of the United States Senate in 1912, testified that the cost of doing business in the mail-order houses ran from 16 to 25 per cent, and my figures correspond almost exactly with his, with the exception that the highest cost as shown by my figures is 26 per

cent. He did not give the average cost of doing business in the mail-order houses. Now, if the cost of doing business in the retail stores averages about 17 or 18 per cent, to that must be added the cost of doing business by the wholesale concerns, and that cost, as I have stated, runs all the way from about 6 per cent to 15 per cent. It is from 6 per cent to 7 per cent for groceries, and from that figure up on other lines of goods. The cost is from 12 to 15 per cent, for instance, on hardware.

In order to find the entire cost of distribution by either of the two methods I have outlined, we would have to add to the cost of doing business in the stores the transportation items, in one case from the producer to the wholesaler and from the wholesaler to the retailer, and in the case of mail-order distribution from the producer to the mail-order house, and then from the mail-order house to the consumer. Of course, the regular retailer charges to his expenses the cost of delivering the goods to the consumer—that is to say, his delivery expense is counted in with his cost of doing business. The figures which I have already given you for retail stores include the delivery expense. Therefore no further account need be taken of that. All of the figures I have given you showing the cost of doing business are based on the sales and not on the costs of the goods.

Now, the cost of transportation from the producer to the mail-order house is probably about the same as the cost of transportation from the producer to the wholesaler. So far as I have been able to learn, the difference is not great. To make a fair comparison of the costs of doing business, we can start with the wholesaler in one case and the mail-order house in the other, and then add the items as they occur on the way to the consumer. To the 22 per cent representing the average cost of doing business in mail-order houses we would have to add the transportation charge to the consumer. The average order handled by a mail-order house in Chicago, according to the statement of one of their executives, is somewhere around $10. He stated that it was between $8 and $11, and the average is, as I have said, somewhere about $10 per order. Now, I understand that the transportation charges on packages of that value average about 50 cents. We may probably take 50 cents as the average cost per package for transportation, and 50 cents is 5 per cent of $10, which is the assumed average value of the average order. Therefore you must add 5 per cent to your 22 per cent of expense, and that will give you a total cost of 27 per cent.

That 27 per cent represents the cost of distribution by the mail-order method. From 27 to 30 per cent of the sales prices takes care of the expenses of distributing a very large part of the goods that go through wholesalers and retailers. The differences, gentlemen, in the expenses of distribution by these two methods, considering nothing else but expenses, are very small, and I can hardly say that there is an advantage on either side. It is a question upon which you can get figures, no doubt, from business men when they appear before you, and it is a question upon which you will be able, no doubt, to get a great deal of information through the proposed trade commission. I will state in passing that the bill providing for the trade commission is one I hope to see passed. So far as my figures have gone they do not show that the mail-order house has any distinct advantage in the way of a lower expense of doing business over

distribution through the regular channels of trade. It has several disadvantages, so far as the consumer is concerned, in not being able to give the personal service that retailers should give, and not allowing a free inspection of actual goods before purchase. Whatever advantage the mail-order house has over the small store lies not in its method of merchandising, but it lies in the fact that the mail-order house is able to buy large quantities of goods at special or quantity prices—at inside prices. Another factor that gives them an advantage is the character of their advertising.

Now, as to quantity prices, I want to explain just what I mean by that term. I do not say that there should not be some sort of quantity-price system. When the merchant goes to the producer or to the wholesaler and buys a large quantity of goods from him, the merchant is taking those goods off the hands of the producer or wholesaler, and he is saving that producer or wholesaler storage charges, insurance charges, the cost of handling goods in smaller quantities, etc. Therefore I believe that the merchant in this case is entitled to a price that takes into account the savings that his quantity purchase gives to the producer or wholesaler who supplies him with that large quantity of goods.

But when he gets the advantage of this special or quantity price, it simply means that he assumes extra expenditure himself; he is undertaking to do his own storage business, to insure his own goods, and to handle them himself, and he must, therefore, incur those expenditures himself. He is advancing his own money upon which, of course, he must have interest. So that, on that kind of quantity price, he will not be able to sell his goods to the customer at any less price than the regular retail dealer who buys in small quantity. There will be no appreciable difference in that respect then between the concern that gets that kind of quantity price and the retail dealer who buys in small quantities. But there is a different inside or quantity price which the producer or jobber sometimes gives to the distributer. This inside price is very much lower than the price at which less favored buyers can procure the same goods. This inside price represents a special favor; it is a discriminatory price, and that is the thing that makes the principal trouble in the field of distribution, and especially between small-town dealers and mail-order houses. No dealer will buy goods at a quantity price—that is, no large dealer, such as a mail-order manager—unless he has in mind the possibility of getting a price lower than that quoted to his competitor—that is, an inside price—and in many cases the mail-order concerns—I have traced this down in several instances—are able to make a very large net profit on the goods that they sell and still sell them for less than the small retail dealer can.

I am not here with any suggestion as to how this can be met; I am simply reciting to you a condition which exists. As I have said before, I have no theory about this matter. You people are experts in how to handle this matter from a legislative standpoint. You will find the remedy. However, it is the greatest evil, to my mind, in modern merchandising. This unfair price is given to the big dealer here and there, to the dealer who has plenty of capital; not because he is efficient, but simply because he has much money. I take it that the mere presence of money does not mean efficiency. The big capitalistic concern gets prices which permits it to sell goods to the

ultimate consumer, in some cases, when it so desires, for less than the prices at which the average retailer can buy them. I have looked at this thing from the standpoint of the ultimate consumer as well as the retailer. If a manufacturer should sell to the dealers at large for the same price at which he sells to this one special retailer, the ultimate consumer would eventually be benefited. However, in most of the cases that I have studied, the quantity price that he gives to the large dealer could not possibly be given to all dealers, consequently but few consumers gain any advantage from this discrimination. If the producer did that he would be doing a losing business, and to bear that out I want to give one or two illustrations.

A trunk manufacturer in the Middle West has been selling trunks to one of the large mail-order concerns in Chicago for a number of years. He has been selling them at inside prices. The regular retail dealers to whom he has sold have found during the past few years that their customers were able to buy one kind of trunk that he produces at about the same prices which those trunks were being supplied to the regular retail dealers for; that is, their customers were able to get these trunks from the mail-order house for less than the retail dealer could supply them. The retail dealers naturally found their trade dwindling on this particular line and they stopped handling it.

The orders for trunks became smaller for this factory and finally the manufacturer found himself in this position: He was unable to find a sale through the regular channels of trade at all, because there were no retail dealers who wanted to handle his trunks by reason of the fact that they could be obtained from the mail-order concern at a lower price than that at which they could get them. At about the time this dawned on him he made the buyer of this large large mail-order concern a proposition that the mail-order concern should take over his entire product. The buyer was willing to do that and such an arrangement was made and the entire product taken. When that arrangement had been completed this factory manager hired a cost accountant to go over his plant and determine what the costs of making these trunks were. On investigation it was found that he was selling trunks at less than cost, and that the price that was paid by the mail-order concern amounted to about the cost of labor, material, and direct charges, but did not include overhead charges at all.

Now, that is an illustration of the kind of quantity prices that I have in mind. Only a few of the largest retailing institutions, such as mail-order concerns, are able to get such prices. If manufacturers were to give inside prices to everybody they would soon have to quit.

With reference to the other item, that of the character of advertising that is done by the mail-order concerns, I might point out that there are several elements that many people call dishonest——

Mr. FLOYD (interposing). Before you leave that illustration, I would like to ask what became of that concern.

Prof. NEYSTROM. Well, this cost accountant completed his work last summer, and the manager of the factory has frankly said that he faces nothing but bankruptcy.

Mr. FLOYD. What is the necessity for legislating if a man by his own foolishness brings himself into bankruptcy?

Prof. NEYSTROM. I would not say anything about that, and it was not on that account that I gave the illustration. I simply meant this: That in case the quantity price is permitted the small dealers will be unable to compete with large capitalistic dealers. I can not give you any more than a suggestion about it. Small dealers will have to get prices that are equivalent or equal to the prices that are being given to the big dealers in some way, otherwise they will be forced out of business entirely. There is a way, although I do not know that it is legal, but it seems to me it is their only salvation if you do not make price discrimination illegal, and that is to combine. These dealers can combine and say to the producers, "We must have the same price that is given to these large competitors of ours." I think that a combination of several hundred retailers of this kind could get equal terms and compel the manufacturer to do as well by them as anyone else. Now, that is the condition, and whether it can legally be met in the way I have suggested I do not know. But that is the situation I have hoped to outline before you to-day.

Now, if you care to give me a moment or two of time on the other matter; that is, the character of advertising that the mail-order concerns do, I shall be glad to have it. The quantity-price evil is the main point that I wished to explain. I would be glad to have you ask questions on this matter.

Mr. GRAHAM. Could you not state in a few sentences what your thought is with reference to the advertising? Give us the trend of your thought as to what its object is?

Prof. NEYSTROM. I want to say that it is the most efficient trade-getting advertising in the world. They have about the best advertising managers in the world. I can not say that it is generally dishonest, but there are many, many little things—matters of price comparison, and so on—that lead people to think things about their goods that are not always true. They are things, however, for which the mail-order houses can not be held in a legal way. For example, we will take an article that they are offering for sale at $1.35 or $1.50. They may say that this article sells regularly for $2 in the retail stores. I have tested out articles of that kind in several instances and have found that their statements in some cases were true, but in many others that they were not true. When not true, would it not be correct to say that those statements were untruths? But whether that could be reached in any legal way is very doubtful, I think. But I am strongly in favor of more strict laws on advertising.

Mr. GRAHAM. It could not be reached by anything we might do. That would be a matter for State regulation.

Prof. NEYSTROM. Of course, this refers to a mail-order house in Chicago, and their advertisements go all over, and whether it is a matter wholly for State regulation or not is a question that would have to be determined. It seems to me that some action might be taken by Congress.

Mr. TAGGART. What would you think of a special income tax on mail-order houses that might cause them to help the people out as much as the people are helping them out?

Prof. NEYSTROM. I think that would be excellent. I am a believer in that kind of a tax.

Mr. TAGGART. A special tax?

Prof. NEYSTROM. Yes. I believe in such classification of taxes in regard to concerns doing interstate business.

Mr. GRAHAM. Would you think that the imposition of a special tax upon mail-order houses would be constitutional?

Prof. NEYSTROM. I would not care to go into detail on that, because I have not given it sufficient thought. My impression is that it would be one way to reach the situation; and, as I have said before, it is, to my mind, absolutely necessary that some way be devised by which this matter of quantity prices can be corrected. Under the present situation special prices are given to men simply because they do a big business or have great wealth. It suggests the same thing as if a rich man should have the privilege of going to the post office and buying postage stamps for less than the regular rates, or a rich man going to the tax collector's office and, simply because he is a rich man, get a reduction in taxes. The same proposition confronted this country a few years ago in regard to the railroads at the time the Interstate Commerce Commission was formed. Discriminatory rates were granted by the railroads to big shippers everywhere, and small shippers were made to pay the highest rates. Yet that thing was checked, very largely at any rate, by the laws that were passed by Congress.

Mr. MORGAN. Do you not think that a large quantity should be sold for less than a small quantity?

Prof. NEYSTROM. Yes; that is what I said at the beginning of my remarks on the subject. I said a merchant is entitled to all the savings that he gives to the producer by taking large quantities off his hands; that is, storage, insurance, cost of handling, interest on the money invested, and so on. But that would not make it possible for the merchant to sell the goods to the consumer for any less than they are sold by all dealers. The reason why we have trouble, in a competitive way, between large and small dealers is because one gets inside prices to such an extent that he is able to sell below the other fellow and still make a good net profit.

Mr. McCOY. I want to ask you about that chart with mail-order houses on it. I notice that you did not take into consideration the practice which has been talked of here—that is, of the mail-order houses ordering shipments direct from the producer to the consumer—so that the article is not handled by the mail-order house, but goes direct from the producer to the consumer.

Prof. NEYSTROM. Well, the same situation exists in the case of wholesalers. I should not say there would be very much difference in this regard. Wholesalers, in many cases, have articles shipped direct from the producer to the retailer instead of going through the wholesale house.

Mr. McCOY. Is that a practice that prevails to some extent?

Prof. NEYSTROM. Yes, sir; and especially with reference to heavy articles. Such articles are frequently shipped direct from the factory instead of going through the wholesale houses. Now, many articles that are handled by wholesale houses, as, for example, dry goods, groceries, and so on, are handled in the same way by mail-order houses—they are all brought together and reshipped. As proof that there is a weakness in the mail-order method of distribution, I want to point out that some of the mail-order concerns are beginning to

establish branch warehouses, to which they have goods shipped and from where they are redistributed. They have certain central points from which their goods are redistributed to the consumers. So it would seem that there is not the greatest economy in the pure mail-order form of distribution and that it is necessary for the mail-order house to borrow some of the methods of distribution through the regular channels of trade. In other words, some mail-order concerns now have two middleman links in the chain of distribution instead of one. They recognize that direct distribution is not the most economical.

Mr. MORGAN. I have many small merchants in small cities in my district, and those merchants are complaining that they are being injured by these mail-order houses. Now, as I understand it, the advantage which a mail-order house has over a local merchant consists, first, largely from the fact that the mail-order house gets an inside price.

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. An unfair price?

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. A less-than-cost price sometimes?

Prof. NEYSTROM. Yes.

Mr. MORGAN. And, second, which is a minor matter, they have methods of advertising——

Prof. NEYSTROM (interposing). If you will pardon me, I would not say it is a minor matter. One of the strong factors in mail-order business is the use of the cut-price leader to attract trade. This is a form of advertising, and a dishonest one in many cases.

Mr. MORGAN. Then, as a matter of defense or of protection to themselves, the only thing you have to suggest is that retail merchants, trading in a certain section of the State or part of the country, would have to organize and insist on manufacturers and producers selling to them at the same rates at which they sell to large mail-order houses.

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. That is the only remedy you have to suggest?

Prof. NEYSTROM. That is the only remedy I have to suggest outside of legislation which would operate in the same way as the legislation which was passed to overcome the discriminatory rates that were granted in former years by railroads.

Mr. MORGAN. You think, then, that a mail-order house doing an interstate business should be placed under a trade commission of some kind?

Prof. NEYSTROM. Yes, sir; just so.

Mr. MORGAN. And then make a law that they must sell to all persons at the same price regardless of quantity?

Prof. NEYSTROM. With only the exception that was named some time ago. I think the quantity price should only be such as would cover the saving obtained by the producer in getting rid of his product in large quantities.

Mr. TAGGART. With respect to organizing, you do not mean that a law should be passed which would require or direct local merchants to organize?

Prof. NEYSTROM. No.

Mr. TAGGART. But what you would suggest would be that we take pains to see that they are not prevented by any law from organizing.

Prof. NEYSTROM. I should rather——

Mr. TAGGART (interposing). With the view of securing purchases in bulk at the cheapest prices possible.

Prof. NEYSTROM. In view of the outcome to the consumer, I would rather see it made unnecessary to form any such organizations. I can not see progress toward big organizations of any kind with an easy mind.

Mr. TAGGART. Well, your idea would be to give somebody power to say to somebody else, "You must sell at a certain price"; or, rather, "You must not discriminate in your prices"?

Prof. NEYSTROM. That is it.

Mr. TAGGART. If you sell a large quantity to A, and B should demand a small quantity, and stands ready to pay for it, you must sell to B at the same rate you sold to A.

Prof. NEYSTROM. Yes.

Mr. TAGGART. You think we can do that?

Prof. NEYSTROM. I do not see why you can not do it. I think if you could do what was done in the case of the railroads you could do the same thing with reference to other corporations.

Mr. GRAHAM. The railroads are common carriers.

Prof. NEYSTROM. I understand that.

Mr. GRAHAM. A railroad is considered along separate and distinct lines from the individual citizen who is doing business, and you can not regulate the individual citizen in his private business like you can a corporation discharging a public function.

Prof. NEYSTROM. Well, to that I have no reply to make. As I said, you people know what can or can not be done in a legislative way. All I am trying to do is to lay before you the condition as I find it with reference to quantity prices, a condition which is, as I have said before, to my mind, the greatest evil that there is in business at the present time.

Mr. MORGAN. You are familiar, of course, with the condition of the local credit organizations in Germany, for instance, and the farmers in France, where they have farm syndicates.

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. Where they unite and buy large quantities, and in that way get the same prices that a big merchant would get?

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. Could not the retail merchants and the country merchants form an association and have some one to represent them in buying large quantities, thus getting the best rates obtainable?

Prof. NEYSTROM. They could; but they do not do it. An organization, to make it effective, usually requires some closer form than such an organization as you have outlined.

Mr. TAGGART. Tell me if this is not the sum of what has happened: The point that I think you omitted was that a mail-order house does business for cash and, therefore, can do business cheaper; that the ultimate consumer patronizes the mail-order house except when he is broke. When he gets broke he goes down to his good old friend and tries his credit again; that the result is that the Government of the United States is running its delivery wagons for the mail-order

house; that the money of the local community is going into the coffers of the mail-order magnate, who is seeking to Napoleonize business; that it impoverishes the community; that the local dealer, who has borne the burden of the community for many years—that is, his share of it—has helped to build it up, and helped to pay the taxes of it, is now threatened with bankruptcy; that the people of the United States are in the delivery business; and that these mail-order houses are not paying any taxes to the United States in consideration of having their goods delivered—that is, the mail-order houses are not paying more taxes than any other corporation that may be doing business.

The House the other day saw fit to appropriate $25,000,000 for building roads everywhere. They pay a very small share of that; not any more than a local dealer does in proportion, and maybe not as much. Now, are you here to say any more in behalf of these mail-order houses? Do you think they will finally work out to be a good thing?

Prof NEYSTROM. No; I do not; I do not think so.

Mr. TAGGART. Are they not special privileges?

Prof. NEYSTROM. Yes, sir.

Mr. TAGGART. Which the United States has simply been victimized into subsidizing by the service of the United States Government in delivering their goods to the people.

Prof. NEYSTROM. May I add just one thing to what you have stated so well; and that is, that in spite of the fact that the little retail dealer gives credit, still his cost of doing business is as low as I stated it to be; in spite of the fact that credit is given in the small retail stores, the costs of distribution through the little retail stores compare very favorably with the cost of distribution through the mail-order method, considering all items of cost. Therefore it is necessary for concerns like the mail-order houses to have some special privileges in order to make a success of it. Now, if you care to have them have such special privileges, if you want them to take the place of regular retail stores, by all means grant them the privilege of doing business on the inside-price basis.

Mr. TAGGART. You mean to say that some board should make an order that there should be no discrimination in prices; that mail-order houses, in securing a large quantity, and the small merchants, in securing a small quantity, should be treated with absolutely no discrimination?

Prof. NEYSTROM. That is what I mean; yes, sir.

Mr. TAGGART. That there should be no discrimination in any way?

Prof. NEYSTROM. Yes, sir.

Mr. FLOYD. Would not your whole purpose be accomplished by striking out that clause in section 9?

Prof. NEYSTROM. Yes, sir; that is what I had in mind, that it might be reached in that way. However, I am not absolutely sure about that. I do not know just how laws are interpreted; but it seems to me that this would be the first step in solving this important problem.

Mr. CARLIN. Is not the real difference between the large mail-order house and the small merchant, after all, due to the fact that the large mail-order house can afford to do business on investment principles

and can take smaller profits, because of the great quantity of sales, while a smaller merchant can not afford to do it on that basis?

Prof. NEYSTROM. The facts in the case of Sears, Roebuck & Co., for the year 1913, according to published reports, are that they made a net profit of 9.8 cents on every dollar of sales they made.

Mr. CARLIN. And a small merchant could not live on that?

Prof. NEYSTROM. How many small merchants get that net profit? I am giving you the net profits of that company. In addition to their costs of doing business, whatever they may be, you must add 9.8 cents more and you have their margin of gross profit.

Mr. TAGGART. How much are their sales?

Prof. NEYSTROM. $95,000,000.

Mr. TAGGART. So that lacked just something of $9,000,000?

Prof. NEYSTROM. Yes, sir.

Mr. TAGGART. That all went to Chicago and left Wisconsin, Minnesota, Iowa, and other States?

Prof. NEYSTROM. Yes.

Mr. MORGAN. You have studied out and fixed your plan on the idea that you have the consumer, the producer, or manufacturer, and then have the wholesale house and retail house, or that there would be the manufacturer, mail-order house, and consumer?

Prof. NEYSTROM. Some such form; yes, sir.

Mr. MORGAN. Now, what is to hinder the people throughout the country, say the farmers, from organizing little syndicates or organizations and buying direct from the producer? Why can we not make a more economical system of distribution by cutting out the wholesaler and mail-order house? There you cut out from 18 to 25 per cent. Why can we not organize the farmers, as well as the people in the smaller towns and cities, and let them buy direct and thus solve this whole problem and at least cut out from 18 to 25 per cent of cost? Is not something like that necessary?

Prof. NEYSTROM. I believe in cooperation and I believe that cooperative systems in Europe are working very successfully. The history of that form of distribution has not been so very successful in this country, largely because such distributing concerns have not taken into consideration the costs of doing a distributing business. They have attempted to eliminate more of the costs than could be eliminated.

Mr. MORGAN. I have been very much interested in your talk, but it seems to me that if we do what you say we will get nowhere, because you say the cost of distribution from the mail-order house and the common retail merchant is practically the same.

Prof. NEYSTROM. Yes, sir.

Mr. MORGAN. However, you want the retailer to be preserved, and in order to preserve him and not let the mail-order house get all the business you propose to introduce some law that will make the producer sell as cheaply to the retailer as he does to the large dealer, but you have not reduced the cost of distribution to the people one particle. Now, then, is it not necessary to eliminate both the mail-order house and the wholesaler?

Prof. NEYSTROM. Well, if you do eliminate them, you must put something else in place of them.

Mr. MORGAN. Why could we not do that by organizing the people in the country into syndicates or little banking institutions with power to purchase direct from the producer?

Prof. NEYSTROM. There is nothing to prevent that, but the difficulty with those cooperative concerns is that the people do not understand the cost of distribution. Such a concern should hire a man as manager who understands distribution thoroughly As I said before, these cooperative organizations have not been successful here, because the people in charge have not taken into consideration the necessary costs of distribution. In order to be successful there should be some one in charge of the cooperative concern, one who has thorough knowledge of the work to be done, and in that way such a movement could be made successful. Now, I am led to say this because of my observation of what is being done in the cooperative concerns in Wisconsin and Minnesota. There they have quite a number of them, some of which are doing pretty well.

Mr. MORGAN. Why could not the producer, the manufacturer, send his catalogue to the small dealer or to the consumer the same as mail-order houses do? Why is it necessary for the manufacturer to keep together such an organization of so-called traveling men? Why not cut out that cost and let the manufacturers sell direct to the local dealers, and also cut out the wholesaler?

Prof. NEYSTROM. I am with you on every one of those points in principle. I want to eliminate every possible expense. But it can not be eliminated to the extent that the average citizen thinks it can when he thinks of cooperation. For example, the number of traveling men is entirely too large; it should be cut down, and I think the retail dealers feel exactly the same way as you and I think about the matter. In fact, there are many dealers who believe there are too many traveling salesmen, and are doing more and more to discourage the practice of sending out so many of them. On the other hand, the cost of doing a mail-order business from the producer to the consumer is tremendous. The cost of putting up a catalogue in one of the largest mail-order concerns is 92 cents. To this must be added the cost of keeping their mailing lists in order, together with the cost of transportation of the catalogues to the consumers, bringing up the cost to probably $1.15, $1.20, or $1.25. Many of these catalogues are wasted. Only some bring in orders. This means a high expense. So you see there are many things to be taken into consideration in working out a system of distribution.

I believe with you heartily on the principle you are speaking about, but I want to point out that there are a number of things in the way. In the meantime we have got to work with what we have. In agriculture we believe the best way to develop better farmers is by working with the farmers who are now on the farms instead of bringing in new ones to take their places. The same thing exactly can be done as to retail dealers. We should train them, if you please, in our schools and colleges to become purchasing agents for their communities and to work for the interest of their communities in every possible way, and then they will be fully entitled to have a good profit or rather it will be a good way for that service.

Mr. MCCOY. Is this the only country in which the mail-order house exists?

Prof. NEYSTROM. No; it exists in Canada, Australia, and New Zealand. It exists in the new countries. May I add just a word in explanation? In this country and other newer countries the farming population lives in an entirely different way from what it lives in any other civilized country in the world. A farmer in this country lives out by himself; he may be 4 or 5 miles from town and separated even from other farmers. He lives away from his neighbors.

In other countries, European countries, the farmers live in the towns; they live right next door to the small merchant or shop keepers in an established community. They go to the same church, their children attend the same schools, they visit with each other, they get each other's point of view. They feel a community interest there, that the farmer in this country does not feel, because the farmer in this country is not a part of any social community. The natural tendency of farmers in this country, until the present movement toward organization, such as this gentleman has spoken of, has been toward individualism, every farmer for himself. He did not feel any great concern or interest in his community; he has not any interest in anything particularly except his own farm. Now, that has militated against our school system, and the churches, and it has worked against the small town. That has been one of the reasons why the mail-order business has thrived so well in this country. It has been as easy for the mail-order house to get an order from the farmer as it was for the small-town merchant. The farmers have been as ready to believe the mail-order advertising as they were to believe the home merchant's, because they were not any better acquainted with the home merchant than with the mail-order house in many cases.

Mr. McCOY. That gives me a better answer than I had in mind, but I was wondering what the experience with mail-order houses abroad was.

Prof. NEYSTROM. There is some mail-order business in Europe, but it is very small in proportion to the total amount of business done. Some Chicago mail-order houses have a certain amount of business over there and, in fact, receive orders from all over the world. But the business is largely American. Australia has a certain amount of it. It appears in all new countries where you find this individualistic way of livng that I have descrbed. I ask that the accompanying matter be printed as an appendix to my remarks.

The CHAIRMAN. We are very much obliged to you, Professor.

Prof. NEYSTROM. Before closing I would like to include my main reasons in writing for favoring the price maintenance or price standardization policy that the Stevens bill (H. R. 13305) is proposed to cover.

1. Price maintenance is of greatest moment to concerns of small capital and to concerns that manufacture a specialty that can be marketed most economically through the regular channels of trade—producer, jobber or commission man, retailer, consumer.

A concern that has a monopoly of the production of a given commodity desired by the people is not likely to care much for price maintenance either one way or the other. To supply the consumer demand dealers are forced to carry the commodity in stock. If such a concern sought to maintain dealers' prices it would fix their margins at the lowest possible point, a point that in actual practice has, I believe, never given most distributing concerns any net profit whatever.

A concern with unlimited capital at its command is not likely to care much about price maintenance, either for or against. Such a concern can usually go out and secure its own outlets by means of chain stores, agencies, or branches if ordinary retailers hesitate in handling the goods. It is not impossible for such a concern under some circumstances to create so strong a consumer demand by the expenditure of large sums of money in advertising that dealers are forced to carry the goods for their customers in the same manner as the trust-controlled goods. But note the cost of either process. In the first, the unnecessary duplication of sales organizations; in the second, the great waste in advertising.

None of these methods is open to the average specialty manufacturer or the manufacturer with limited capital. To enable these classes of producers to distribute economically and to produce efficiently, price maintenance is a definite help. Whatever economies are wrought either in production or in distribution under competition will in the long run go to the profit of the consumers. The price-maintenance policy will serve as a shield or rather as a rule in a game to protect the producer in his development of economies. Production and distribution with price maintenance is like prize fighting with a rule not to strike below the belt. One foul blow below the belt might put the best man in the world on the floor in a moment and thus end the struggle. One foul blow in business competition, such as unjustified or dishonest price cutting has shown itself to be in several cases, might send the most efficient and socially useful producer into receivership. I do not believe in bolstering up or offering protection to any industry naturally weak, but I don't believe in letting exceptionally strong capitalistic or industrial institutions have peculiar advantages, especially when the public gets no profit therefrom.

2. To maintain the good will of the public toward his product the price maintainer must maintain a constant, standard quality. Such standardization is desirable from the standpoint of the consumer for the following reasons:

(*a*) The consumer can tell by one single inspection or trial whether the article is suited to his needs or not. If it is desirable, future purchases of the same article will take up but little time or energy. If it is not desirable he can just as easily avoid getting it. Thus the buying process of the consumer is simplified, time and energy are saved.

(*b*) Formerly when standards of life were much more simple then they are now, and before the time of the production of really standardized articles, the process of the buyer in making sure that he got what he wanted in the market consumed a great deal of time that might well have been employed profitably in some socially useful occupation. This time and thought and energy was expended solely in trying to avoid being imposed upon. With our present standards of living, even among the poorer classes, the average consumer is confronted by the problem of determining the relative values of every article purchased would wantonly waste a great deal more time, but in most cases would find himself utterly incapable of estimating even approximately the qualities laid before him. In no case, probably, would the consumer be at arm's length from the dealer, whom we may assume to be an expert in the line he handles. Without standard goods in the market, the consumer is likely to be cheated at every purchase. The simple presence of some standard article largely changes this. The standard, if well known, serves as a basis of comparison. If I am in a strange market and want a watch for about a dollar I would get an Ingersoll. If I were dealing with a reputaibe dealer in my home town and he should show me another watch which he positively claimed was a better watch than the Ingersoll for the same money, I might take his word for it and accept the substitute; but my point is that the Ingersoll would serve as the standard of comparison for both of us. If he can give me a better watch for the *same money* I feel myself the gainer. It is also likely that the dealer has profited more, too, by selling the unknown watch to me, the results of competition.

There are, of course, standard goods which are not price maintained, but they are generally goods produced either by trusts or by concerns having sufficient power to push them through to the consumer, even without the active consent of the dealers. A large number of standard goods are price maintained, however, whether legally so or not.

3. It is not likely that price maintenance can become general in all lines. Standardized articles will always attract competition and substitution. It will be found profitable to make variations both above and below the standard, and to change those variations from time to time, in order to suit individual

tastes and means. Tendencies to combine and to artificially raise prices will, of course, occur. This is another matter and should be met with summary action under the antitrust act.

4. Price cutting among the retailers does not bring to the consumer any general advantage. According to the best statements available fully 50 per cent of those in this business are able simply to hold their own. They grow neither richer nor poorer. Thirty-five per cent gradually lose their original capital and eventually pass out of the business. Only 15 per cent are able to gain, and out of this percentage, probably less than 5 per cent become wealthy at the retail business. It is clear that under such conditions price cutting in one quarter will only result in advances in some other, or what amounts to the same thing, a reduction in quality. Only to one who has had experience in buying dry goods, shoes, and clothing for a fairly large family and on not an overlarge annual salary is the extent to which quality can be cut down conceivable. These lines are the ones in which price maintenance prevails the least.

5. Some department stores and mail-order houses suggest or assert that their methods of doing business are more economical than those of the small stores scattered over the country. They give many general statements implying this conclusion, but, so far as I have seen, none have presented figures showing just how much more superior their efficiencies are. If it were true and it could be pointed out authoritatively that these large concerns are able to do business on a lower percentage of expense than the small stores, I for one would be glad to see everything swept from their pathways. It is fundamental with me that business should go to the agency that can perform the service that the public wants in the most efficient, economical, and satisfactory manner. But, as I have stated, such comparative figures have not yet been shown. So far as the results go that are available, there is not one exception that I know of to the rule that the small store is able to distribute goods on a smaller percentage of expense than the department store, considering goods of the same class. This is a question of fact that the Government ought to look into. The answer should be easy to get at. Upon it hinges important issues. A good many deparment stores will not handle a price-maintained article, not because it "makes them the manufacturer's slot machine," but because the profits allowed them are not large enough. By the pressure of their financial power they force undue differentials from their suppliers. Some department stores become manufacturers of parts of their own goods, but others prefer not to take over mills, because they can buy goods cheaper from other mills than they can make the goods for themselves. This is also a common fact that should be easy to prove.

6. The cut price in retail stores is more generally of psychologic rather than economic significance. Its purpose is to attract trade. When the prospective customer enters the store it is the well-understood duty of the sales people to try to sell him something else or in addition to the cut-price leader. No article serves the purpose of price cutting so well as a standard article generally sold at a fixed, well-known price. Everybody recognizes such a bargain, but everybody does not recognize the full significance of what happens to him when he gets into the store offering the bargain.

The small storekeeper is no better in his business morals than the department-store manager, but his opportunity for playing the same game on the public is much more limited. The retailer of one line can not cut prices on many things, or he will be without a business in a short time. The department store with 25 departments, however, can cut prices in any one of those departments on every article in the department, if it chooses to do so, and make up daily its deficits in that department by the profits from the other departments. In this way the department store can carry on war with all of the merchants of some one line in its town and drive them to extinction in the same way that the Standard Oil Co. used to kill off its competitors, by selling oil at less than cost in the competitor's territory and at a big profit in its own territory.

Price maintenance prevents the big store from using such unfair tactics. If the small store handles price-maintained articles its profits will be small, but the big store will not be able to crush it out by attempting to hit below the belt.

There are other reasons for favoring price maintenance, but so far as I am concerned the chief one is to prevent the large distributing organizations from wiping out the smaller ones. But I would not oppose this process if there were any evidence that the larger organizations could perform their distributive

functions more efficiently, economically, and satisfactorily to the public than the smaller ones. So far as my studies have carried me into the matter I have found no evidence that they can. They have advantages, as I have shown, over the smaller store, especially in their advertising and buying powers, but these advantages are derived, in part at least, from practices that society would disapprove if they were fully understood. Whatever advantages there may be in large scale production, the same rule does not seem to hold for retail distribution.

To give to these large scale organizations the free hand that they desire will only lead to a deeper accentuation of some of the economic ills that already beset us, such, for example, as the consolidation of independent specialty manufacturers into trusts, the concentration of retail markets in the large cities, and in certain sections of the large cities the piling up of enormous unearned increments in land values in those sections, the depreciation in values, and the decay of small towns, etc. As a citizen one can not lightly pass this struggle by without considering what the effect will be.

I am not opposed to department stores, mail-order houses, and chain stores simply as such. There is no question but that they perform some services for the public better than the small stores. There are department stores that I know of that do not employ the evil practices that I have referred to. These are appealing for trade on straightforward lines, using truthful arguments in their advertising. I would not want to see the development of that sort of merchandising checked. But I do not want to see these large merchandising establishments given any special advantage because of their size, advantages that they may use, if they want to, in crushing competition, advantages which never accrue to the public.

Prof. NEYSTROM. I would also like to present two important court decisions bearing on the price-maintenance question.

(Supreme Court of Washington. No. 10468. En. Blanc. Filed Dec. 13, 1913.)

FISHER FLOURING MILLS CO., APPELLANT, v. C. A. SWANSON, RESPONDENT.

In this action the plaintiff seeks to enjoin the defendant from selling flour manufactured by the plaintiff at less than the retail price fixed by the plaintiff in a contract of sale made with the defendant, and to recover damages in the sum of $1,000. The complaint alleges, in substance, that the plaintiff is a Washington corporation, with its principal place of business at Seattle, where it has erected a large manufacturing plant and installed special machinery for manufacturing a special brand of flour known as "Fisher's Blend of Patent Flour"; that the cost of manufacturing this flour is greater than that of ordinary flour; that the plaintiff has widely, and at great expense, advertised this flour as a blended flour, pure, wholesome, and of unusual excellence, and has used certain copyrighted designs and the above trade name to acquaint the public with the flour, so that it has become widely known as of unusual excellence and as of higher price than the ordinary patent flour, and that large quantities of it are sold in Seattle and King County; that it is necessary to operate the mill to its full capacity in order to continue the business at a profit; that the flour is sold in all of its markets in constant and keen competition with many other brands of patent flour of all qualities, and that the quantity of plaintiff's flour so sold is only a very small part of the pure blended flour and of the quantity of ordinary patent flour sold in each of such markets; that it is necessary to sell the flour through all retail dealers in each community rather than through one or two, as may be profitably done with ordinary patent flours, so that the good will of the retail dealers is necessary to the success of the company; that in order to keep this good will it is necessary to maintain a minimum retail price offering a reasonable profit to the retailer; that if the uniform minimum price is not maintained, the reputation of the flour will be injured, the good will of the dealers lost, and the plaintiff will be prevented from operating its mill at a profit; that the defendant conducts a retail grocery store in Seattle, and on or about October 3, 1911, entered into an oral contract with the plaintiff, agreeing to purchase from plaintiff a carload of this flour at the uniform wholesale price, and further agreeing not to sell the flour at less than a certain minimum retail price; that these prices were the same as the wholesale and retail prices maintained by the plaintiff and its other customers, and permit no more than a reasonable profit; that, according

to the contract, the plaintiff delivered an installment of the flour on this purchase, the defendant accepting therewith a written invoice containing the following stipulation:

"*Retail prices.*—Our flour is sold on condition, which is made a part of the consideration of the sale of said goods, that the purchaser, if he retails the same, will maintain our fixed minimum retail selling prices, and if he wholesales them, they are sold subject to the same conditions. Nothing in the above conditions shall prevent the purchaser from fixing the selling price in excess of the above lists when cost of transportation or other local conditions necessitates the same."

That since the delivery of the flour to the defendant he has violated the agreement by selling the flour at less than the agreed price, and has widely advertised such sales, which price is less than the general retail price of all the other patent flours so sold in Seattle and the State of Washington; that his purpose in so doing is to attract customers to his store, and that he has threatened to continue this practice; that the defendant's action in this respect is causing damage to the plaintiff by injuring the reputation of the flour with the public and destroying its sale to retailers in Seattle and throughout the State; that by reason of defendant's actions other retailers are threatening to follow his example, which will curtail the sales of the flour and cause irreparable damage to the plaintiff; that it has already decreased the sales of the flour, by rendering it unpopular with the retailers, to the plaintiff's damage in the sum of $1,000; that the plaintiff has no adequate remedy at law; the defendant demurred to the complaint upon the ground that it does not state a cause of action, and that the court has no jurisdiction of the subject matter. The demurrer was sustained, and the plaintiff electing to stand upon its complaint, the action was dismissed. The plaintiff appeals.

A single question is presented: Has a manufacturer who has given a reputation to particular goods which he creates the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods shall be sold to consumers?

It may be premised as a postulate that a manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation not inhibited by statutory enactment or inimical to a sound public policy.

It is not claimed, on the other hand, that the contract in question is inhibited by any statute of this State. No question of interstate commerce is involved. We are therefore not here concerned with the Sherman antitrust act. Nor is it claimed, on the other hand, that the fact that the article sold was under a trade name or in a trade dress, or the fact that it was manufactured by a patented process affords the contract any immunity from invalidity which it would not otherwise possess. These things must be regarded as immaterial to this discussion. No question of public-service corporations is involved. What we shall say has no application to contracts of corporations charged with public functions or duties as such.

The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between these contracts which, since the earliest history of the law on the subject, have been designated as "contracts in restrain of trade," and those more correctly designated as "contracts in restrain of competition." The term "contracts in restraint of trade" has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts, when without limit as to time or place, are invalid. (Long *v.* Towl (Mo.), 97 Am. Dec., 355.) The broader doctrine inhibiting as contrary to public policy all contracts which by any other means tend unreasonably to restrict competition is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. (See note to Harding *v.* American Glucose Co. (Ill.), 74 Am. St. Rep., 238, 239; Noyes, Intercorporate Relations, 366; 2 Eddy, Combinations, 719, 722; Cooke, Combinations, Monopolies, and Labor Unions (2d ed.), 160.) This broader doctrine

is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained; or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last we are not here concerned. It is manifest that in case of such contracts the public interest is not conserved by mere limitations either as to time or place. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. (Noyes, Intercorporate Relations (2d ed.), 357.) Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy; if it does not have that tendency, it is not. In applying this test the public interest is always the first and controlling consideration. A contract or combination creating a general, that is to say, complete restraint or restriction, however slight, within a given market, is essentially invalid, because it must either result from or tend to produce a monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable. It is not fairly necessary to the protection of the manufacturer. Having a monopoly, he needs no protection. It is not in any sense beneficial to the public, because it does not tend to create an incentive to increased excellence of product in order to maintain the better price, but because of the monopoly has a contrary effect.

And again, when the contract fixing the price is not ancillary to some main lawful contract the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its resonableness in other particulars. In such a case there is no main lawful purpose to subserve which partial restraint is permissible, hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid.

United States v. Addyston Pipe & Steel Co., 85 Fed., 271.

State v. Duluth Board of Trade (Minn.), 121 Fed., 395.

But it does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity in a given market in any degree is obnoxious to public policy. At common law contracts containing limited restrictions on competition as incidental to some main contract and not entered into for the sole purpose of suppressing competition or controlling the market are not always and necessarily invalid. (2 Eddy, Combinations, 723.)

"A monopoly created by the Crown seems to have been necessarily illegal, and, subject to the limitations hereafter considered, the same seems true of what is strictly a monopoly; that is, a complete restriction upon competition resulting from the acts of individuals. But, however it may have been as to restrictions upon competition created by the Crown, it seems clear enough that not all restrictions upon competition resulting from the acts of individuals are illegal. This results from the view that seems to be generally accepted, that the economic effects of a restriction upon competition are not necessarily evil; in other words, the unrestricted competition results in economic evils capable of prevention or removal by some degree at least of restriction upon such competition. A different view of such economic effects has, however, led to judicial declaration in sweeping condemnation of any restriction upon competition, though, as may readily be inferred, there is no decision to that effect."

Cooke, Combinations, Monopolies, and Labor Unions, 118.

State v. Duluth Board of Trade (Minn.), 121 N. W., 395, 410.

See also Noyes, Intercorporate Relations (2d ed.), 336.

1 Eddy, Combinations, 307–324, inclusive.

Harriman v. Menzies (Cal.), 35 L. R. A., 318.

Oakdale Mfg. Co. v. Garet, 18 R. I., 484

State v. Eastern Coal Co. (R. I.), 70 Atl., 1.

Lanyon v. Garden City Sand Co. (Ill.), 70 N. E., 313.

Partial restrictions have been held valid where the restraint was in different particulars. For example: The contract may limit the vendee's right of sale to a certain territory—a restriction as to place. (Phillips v. Iola Portland Cement Co., 125 Fed., 593.)

It may provide that the vendee deal exclusively with the vender and only in articles of the vender's manufacture—a restriction as to person.

Brown *v.* Rounsavell, 78 Ill., 589.

Wood Mowing & Reaping Co. *v.* Greenwood Hardware Co., 75 S. C., 378.

Ferris *v.* American Brewing Co. (Ind.), 58 N. E., 701.

Butterick Publishing Co. *v.* Fisher (Mass.), 89 N. E., 189.

Again, the restriction may be as to the price which the retailer must charge for goods purchased from the manufacturer—the case here involved.

Elliman, Sons & Co. *v.* Carrington & Son, 2 Ch. Div., 275.

Walsh *v.* Dwight, 58 N. Y. S., 91.

Grogan *v.* Chaffee (Cal), 105 Pac., 745.

Commonwealth *v.* Grinstead, 111 Ky., 203.

The foregoing authorities make it clear that the courts now generally recognize as th basis of the rule of public policy against restraints on competition the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order to injuriously affect the public, but, unless it be held that every restriction is per se illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public.

"It is not essential, however, to the control of the market, within the rule, that it should be complete. Practical control is sufficient; and this does not imply an absolute elimination of competition.

"On the other hand, a mere restriction of competition does not give control of the market and is not unlawful. The commercial maxim, 'Competition is the life of trade,' while not adopted as a maxim of jurisprudence, finds a place in many decisions, and the language of the courts is often broad enough to include, as opposed to public policy, every combination in restraint of competition, regardless of degree. But the weight of authority—as well as sound principle—supports the view that every combination restricting competition is not invalid—that restriction, to be unlawful, while not necessarily amounting to total suppression, must give substantially the control of the market.

"Just where the line is to be drawn between a lawful and unlawful restriction of competition—just what restriction is practical suppression—must depend largely upon the facts and circumstances of each case. As said in Hoffman *v.* Brooks, a case not officially reported: 'Those engaging in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreement which will result in diminishing competition and increasing prices.' Just the extent to which this may be done the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud."

Noyes, Intercorporate Relations, 356.

Cooke, Combinations, Monopolies and Labor Unions, 120.

As exemplifying that the facts in each case must determine the effect of the contract, and that practical control of the market or any approximation to monopoly marks the line between valid and invalid restrictions, see the following decisions: Harriman *v.* Menzies, supra; Walsh *v.* Dwight, supra; Oakdale Mfg. Co. *v.* Garst, supra; Phillips *v.* Iola Portland Cement Co., supra; Marsh *v.* Russell, 66 N. Y., 288; Export Lumber Co. *v.* South Brooklyn Sawmill Co., 67 N. Y. S., 626; U. S. *v.* Nelson, 52 Federal, 646; State *v.* Duluth Board of Trade, supra; Meredith *v.* New Jersey Zink & Iron Co., 37 Atl., 539.

The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare must be considered, and that of all circumstances, the dominant consideration is the welfare of the

public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy. As said by Lord Macnaghten in Nordenfelt *v.* Maxim-Nordenfelt Co. (1894, App. Cas., p. 565):

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the interests of the reasonable—reasonable; that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

And again, as said by Mr. Justice Hughes in Dr. Miles Medical Co. *v.* Parke & Sons Co. (220 U. S., 373, 406):

"To sustain the restraint it must be found to be reasonable, both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy."

Measured by our definition which, as it seems to us, is as stringent as any fair construction of the authorities will sustain, the facts and circumstances as alleged in the complaint disclose no sinister purpose in the contract pleaded, nor any tendency inimical to the public interest. It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers of that locality, it would doubtless be the result of an agreement, secret, or otherwise, between them, and all such contracts would be invalid as in aid of a combination in restraint of competition. The coincidence would almost be conclusive evidence of the illegal combination, and sufficient basis for declaring all of the contracts void. No such condition, however, is presented by the record before us.

Such a contract as that here in question is of interest to the public only where the whole of a given commodity, or a measurable approximation to the whole of that commodity is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. It is a monopoly, either actual or approximate, hence potential, against which the public interest is arrayed, not a fair reward to individual effort and initiative, which is an essential to competition as a competitive price. In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer can not have an effect appreciably inimical to the public interest because it can not fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be

compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition. Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in competition of prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both, hence is on all scores, against public policy. But where a given product is not in the hands of one man or a combination of men there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to enable him to maintain an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest so far as it is touched by the contract is in sympathy with it, because served by it.

Applying the principles which we have developed from the cases, it seems clear that this contract is valid. The facts alleged negative the idea of any existing monopoly in the appellant, and the contract has no tendency to create one. The retail selling price was first fixed merely as ancillary to the contract of sale to the respondent. The fixing of the price was reasonably necessary to protect the appellant and reasonable as applied to the public, in that it provides only for a fair profit. Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high-grade flours while maintaining the excellence of its product. As said by the Supreme Court of California in a case closely parallel to that before us, Gregan v. Chaffee, supra:

"Under these circumstances we see no reason why the contract alleged by the plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly."

After citing and reviewing many authorities, the opinion continues:

"The necessary result of what we have said is that the complaint must be held sufficient. It is alleged that the defendant bought oil under an express agreement that he would not sell it at less than given prices, and that he had sold and threatened to sell it at less than such prices. This is a violation of plaintiff's rights under this contract. Whether this contract could be enforced against persons who might come into possession of plaintiff's oil, with notice of the restriction imposed by him on its sale, but without having made any direct agreement to respect such restriction, is a question not here presented. (See Garst v. Hall & Lyon Co., 179 Mass., 588; 61 N. E., 219; 55 L. R. A., 631.)

In Walsh v. Dwight, supra, the New York Supreme Court, touching a contract closely analogous to that here involved, said:

"It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, can not be disputed. Nor can it be that a manufacturer of merchandise can not agree to sell to others upon condition that the vendees in selling at retail should charge a specified price for the goods sold or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his busi-

ness to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business, such an agreement is not illegal, as in restraint of trade, or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone who is willing to buy."

In Commonwealth v. Grinstead (111 Ky., 203), notwithstanding the existence of a statute expressly prohibiting any person, firm, or corporation doing business in Kentucky from entering into any pool, trust, combine, agreement, confederation, or understanding with any other person, firm, or corporation for the purpose of regulating, controlling, or fixing prices, the court upheld the plan of fixing minimum retail prices of certain brands of goods of established reputation by contracts between the manufacturer and retailer, on the ground that there was no concerted action among the manufacturers, since the price was fixed by each manufacturer on his own product only.

The English courts maintain the same doctrine.

Elliman v. Carrington, supra.

National Phonograph Co. v. Edison-Bell Consol. Phonograph Co., 1908, 1 Ch. Div., 335.

That the tendency to monopoly, complete or substantial, is the real test in all cases involving the restraint of competition is demonstrated by cases involving labor unions. Independent of statute, the test of legality as to contracts or combinations in restraint of competition is the same for sellers of merchandise as for sellers of labor. This, so far as we are advised, has never been judicially challenged.

"On principle, it is not apparent why the legality or combination among employees as such should be subjected to any different test from that applied to combinations among employers as such or among tradesmen as such."

Cooke, Combinations, Monopolies, and Labor Unions, sec. 52.

27 Cyc., 904.

Harriman v. Hensles, supra.

Milwaukee Masons and Builders' Association v. Niezerowski (Wis.), 70 N. W., 100.

Gatzow v. Buening, 106 Wis., 1.

Froslich v. Musicians' Mutual Benefit Association, 93 Mo. App., 383.

O'Brien v. Musical, etc., Union (N. J.), 54 Atl., 150.

Folsom v. Lewis (Mass.), 94 N. E., 316.

More v. Bennett (Ill.), 20 N. E., 888, 891, 892.

It would seem that the doctrine which would hold the contract here involved a contract or combination in illegal restraint of competition, carried to its logical extent, would render illegal practically every trades union or labor union in the country. The courts should be slow to adopt a rule of such far-reaching results. Such unions or associations for the purpose of maintaining wages are now universally recognized as legal.

24 Cyc., 810, 6.

The respondent relies solely upon the following decisions:

Parke & Sons Co. v. Hartman, 153 Fed., 24.

Bobbs Merrill Co. v. Straus, 28 Sup. Ct. Rep., 722.

Dr. Miles Medical Co. v. Parke & Sons Co., 220 U. S., 373, affirming the decision of the circuit court of appeals in 164 Fed., 803.

The decisions in Parke & Sons Co. v. Hartman is not necessarily in antagonism to the views here expressed. That case involved a monopoly. It holds that there is no such analogy between the statutory monopoly accorded by the patent laws and the monopoly resulting from the sole possession of a trade secret as to make it lawful to protect the latter by contracts or notices fixing the retail price, as is permitted in the case of patented articles. The opinion is devoted largely to a demonstration of the proposition, which we deem unquestionably sound, that the owner of a secret formula for the manufacture of a proprietary medicine, though he may protect the secret by contract against its disclosure, can not protect the profits resulting from his monopoly in the manufactured article (in that case Peruna), by contracts or notices fixing a minimum price at which the jobbers and retailers shall sell it. That the effect of the contracts there involved was an absolute prevention of any competition in prices, a complete or general restriction as to Peruna, because of their application to the whole supply of that article on the market, is shown by the opinion, where it is said:

"Thus all room for competition between retailers who supply the public is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of Peruna. There are no others. If there were there would not be a complete or general restraint, for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected."

That the learned judge who wrote the opinion recognized the validity of such contracts as between the actual contracting parties, where no monopoly was involved, and when merely ancillary to some main contract, and reasonably necessary to the protection of the retained business of the covenantee, is also evident from the following language, which further distinguishes that case from the one before us:

"Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we can not escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract can not be enforced if when unmasked they appear to be the main purpose of the contract, and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholsaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld, if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business."

The opinion, when fully considered, fairly recognizes every principle hereinbefore developed from the authorities as sustaining the contract here involved.

In Bobbs-Merrill Co. v. Straus it was held that the sole right to vend a copyrighted book secured by the United States statute to the owner of the copyright does not include the right to impose, by a mere notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. The distinction from the case in hand is too plain to require further comment.

Nor do we deem the decision of the United States Supreme Court in Dr. Miles Medical Co. v. Parke & Sons Co. controlling on the facts here presented. In that case the bill alleged the manufacture of certain proprietary medicines under secret formulæ and processes, and the sale thereof under trade-marks and trade dress; that to prevent injury to its business by the sale of its medicines at cut prices, complainant had adopted a dual system of contracts controlling the sale and resale of its product; that the system contemplated consignments to wholesale dealers permitting them to sell only to other contracting wholesale dealers and retail dealers who had also contracted with the complainant to sell its goods at fixed prices; that the defendant, refusing to enter into a consignment contract, had induced complainant's wholesale and retail agents, by means of fraudulent representations, to violate their contracts and sell goods of complainant's manufacture to the defendant, with the intention of selling such goods at cut rates to attract customers for other merchandise. An injunction against this practice was sought. It appeared that consignment contracts had been made with over 400 jobbers and wholesalers, and retail-agency contracts with 25,000 retail dealers in the United States. The court refused relief on the ground that, by its system of interlocking restrictions, complainant sought to control not only the prices at which its agents might sell its product, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus fix the amount which the consumer shall pay, eliminating all competition. The court held that such a system amounts to a restraint of trade, and is invalid both at common law and under the

Sherman Antitrust Act. It will be noted that the system there involved had no purpose, save to create and perpetuate a monopoly which, under any view of the authorities, is invalid. While certain expressions in the opinion might appear contrary to the views we have expressed, the opinion expressly states that the mere fact that some restraint results does not necessarily render the contract invalid, and clearly recognizes the principles upon which the contract here involved must be held valid. Mr. Justice Hughes, speaking for the court, uses the following language:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in the adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint it must be found to be reasonable, both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in Gibbs v. Baltimore Gas Co. (130 U. S., p. 400): 'The decision in Mitchell v. Reynolds (1 P. Wms., 181; S. C. Smith's Leading Cases, 407, seventh Eng. Ed.: eighth Am. Ed., 756) is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. (Rousillon v. Rousillon, 14 Ch. D., 351; Leather Cloth Co. v. Larsont, L. R. 9, Eq. 345.)'"

The cases upon which the respondent relies are all reviewed and distinguished from a case such as that here presented in Ghiarardelli v. Hunsicker (Cal., 128 Pack., 1041).

We do not hold that a mere notice printed on the packages or bill of lading, in the absence of express contract to be bound by such notice, would be sufficient to create a valid restriction of the sale price, however unobjectionable. We do not hold that a manufacturer would have the right, by any such notice, to pursue his product into the hands of third parties and fix their selling price. The right, where it can be exercised at all, rests in contract; and it would seem that the contract should be held binding upon the parties to it, except where the breaking of the contract is induced by the fraud of the third party. As observed in Dr. Miles Medical Co. v. Parke & Sons Co., supra:

"Whatever right the manufacturer may have to protect his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement."

See also Garst v. Hall & Lyon Co. (179 Mass., 588) and Bobbs-Merrill Co. v. Straus, supra.

Finally, it seems to us an economic fallacy to assume that the competition which in the absence of monopoly benefits the public is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at or above their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high-grade flour is a very different thing from fixing the price on one brand of high-grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has not interests to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. (Mazetti v. Armour & Co., 33 Wash., Dec. 433.) His reputation as a manufacturer, one of his chief assets, is bound up in them. The attitude of the respondent, who has willfully violated his contract, presents no equities in his favor. The allegations of the complaint show that the public interests will in no wise suffer from an enforce-

ment of the contract. As between the parties, the appellant is entitled to the relief for which he prays.

The judgment is reversed.

ELLIS, *J.*

We concur:

CROS, *C. J.*
GOSE, *J.*
CHADWICK, *J.*
MAIN, *J.*
MOUNT, *J.*
MORRIS, *J.*
PARKER, *J.*

GERMAN DECISIONS.

[Translation.]

[10.U. 2280.06. 32.]

IN THE NAME OF THE KING.

In the matter of the firm of A. Jandorf & Co., of Berlin, Belle-Alliancestr, 1/2, plaintiffs and appellant plaintiffs; attorneys in charge, Rechtsanwälte Justizrat Cohn and Dr. Selbiger, of Berlin, Motzstr. 68, against the Incorporated Association of Manufacturers of Branded Article, of Berlin, Königsstr. 55, represented by its managing committee, Judge of the Tribunal of Commerce Fritz Heinmann, of Cologne, and the director, Dr. Hans Rosemann, of Berlin, Bülowstr. 57, defendant and appellant defendant; attorney in charge, Rechtsanwalt Dr. Max Gabried, of Berlin, Königstr., 55, the 10th "Zivilsenat" of the Kongl. Kammergerichts in Berlin, following the verbal debate of October 25, 1906, in which the Senatspräsident Günther and the Kammergerichtsräte, Dr. Kanola, Pohlmann and Dr. Ritter, as well as the Landsgerichtsrats Dr. Schlössning, took part, has found:

The appeal of plaintiffs against the judgment of the Zivilkammer 12a of the Königlichen Landgerichts I in Berlin, published February 28, 1906, is thrown out. The costs of the suit are to be borne by plaintiffs.

SITUATION OF FACTS.

The defendant association, which includes about 60 members, manufacturers of pharmaceutical, toilet, and food products, a list of which members has been tendered and incorporated in folio 33 of the records, to which reference is herein made, has for its objects to regulate, both in the jobbing and in the retail trade, the sales of the branded articles manufactured by its members, and particularly to prevent that the said articles be sold below the price fixed for each of them. In view of this aim, the by-laws of the association provide:

(1) The manufacturers sell their branded articles and allow third parties to sell them only on the condition that the jobbers as well as the retailers strictly observe the determined selling terms, and particularly the minimum selling prices.

(2) In case a dealer should not conform to the terms, and particularly to the minimum price, attached to the sale of the branded article even of one member only of the association, it will be the right of all members toward that dealer and their duty toward the association to stop immediately all and any deliveries to the delinquent, even on existing contracts.

In January, 1905, the association made the following announcement in about 20 trade papers:

"In order to fight against unfair competition, and particularly against price cutting, and to maintain and promote fair trade, the association has taken the following decision:

"'Members of the association covenant reciprocally that any jobber or retailer who does not observe the price and terms of branded articles of even one member only will be barred from delivery of all articles of all members. This applies also to the case in which the obligation to observe prices and terms was not expressly imposed upon the dealer.

"'This is to serve as a public notification.'"

Manufacturers, who are members of the association, ask the buyers to give them a written declaration (revers) by which the latter agree to maintain the minimum selling price.

Now, the articles of two members of the association—"Bergmann's Zahnpasta," of the firm of A. H. A. Bergmann, of Waldheim, Saxony, and "Kaiser-Borax," of the firm of Henrich Mack, in Ulm—were sold by the plaintiffs in their department stores below the regular fixed price of 50 pfennigs, namely, for 45 pfennigs.

Consequently, the defendant association accordingly wrote on February 7, 1905, to the plaintiffs, first only about Bergmann's Zahnpasta, demanding that in future the regular minimum price be observed, and asking for a declaration to that effect to be given within eight days. The plaintiffs refused to consider this demand, pointing out that other department stores were selling that same Zahnpasta even cheaper than they. Asked by the association to give the names of such firms, the plaintiffs wrote, February 16, 1905, that they did not feel like giving information against anyone, but that they would keep to the regulation original price when other dealers would do the same.

Meantime, on February 15, 1905, the association made the same demand of the plaintiffs regarding Kaiser-Borax as they had made before with regard to Bergmann's Zahnpasta, but in this case also it received a negative answer, dated February 18, 1905. On February 21 the association informed the plaintiffs that it had been promised by another big department store that the price would be thereafter observed; it asked the plaintiffs to follow suit. The plaintiffs answered, February 23, 1905, that they would first make sure whether their competitor would comply with the wishes of the defendant and then they would do so, too.

Thereupon the defendant sent as "printed matter" to all jobbers who could come into consideration as sellers of branded articles of the description of the two articles in question a circular, dated April, 1905, bearing the title "Selling interdiction," and marked, both on the envelop and the circular itself, "Confidential," "Personal." This circular, certified copy of which is attached to folio 9 of the records, contained the names of the firms which, although they had been warned, kept on selling lower than at the regular prices branded articles of the members of the association, and the interdiction to deliver any and all branded articles of any and all members of the association to the firms named in this selling interdiction list, No. II, as long as the association did not raise this selling interdiction.

The name of the plaintiffs was in the above list.

Plaintiffs considered the action of the defendant as an illicit act directed at them in the sense of paragraphs 823, 824, 826, B. G. B., and make motion that the court decide:

I. That the defendant be ordered, under a penalty of 300 marks for each infraction, to refrain from the publication of selling interdiction lists applying to plaintiffs—(*a*) on principle, generally; (*b*) subsidiarily, in a general way, with the exception of Bergmann's Zahnpasta and Kaiser-Borax; (*c*) to specifically inform its members that the selling interdiction as appearing on the selling interdiction list II is null and void and raised.

II. That the defendant be condemned to pay to the plaintiffs the amount of damages—to be determined later on—which have been caused to them by the sending out of the selling interdiction list and by the enforcement of the general selling interdiction on branded articles.

As motives plaintiffs give:

That the selling interdiction used toward them by the defendant is not only unjustified but goes, economically speaking, beyond the limits of what is permissible. Outside of the fact that no conditions of price had been imposed upon the plaintiffs, the price of 50 pfennigs is fixed in quite an arbitrary way, and is, in fact, about 10 times higher than the intrinsic value. By selling these products 5 pfennigs cheaper, plaintiffs merely safeguarded the interests of the buying public, and it can not be construed as an unfair business attitude nor as regular price cutting. Many other articles have never been sold by plintiffs below their regular selling price. Accordingly, the action of the defendant, which tends to cut off the source of supply, not only of the two interdicted articles, but of all of those which belong to the association is illegal.

The manner in which the interdiction list was sent to all jobbers in Germany, as well as to the 60 members of the association, does not seem admissible. The fact that open printed matter bears the word "confidential" does not

prove its confidential character, for this mention would only exercise curiosity of strangers and contribute to make the intended confidential communication known to people outside.

The selling interdiction has heavy consequences for the business of the plaintiffs. There are so many such protected articles on the market that a department store could not possibly exist without them and would, at any rate, suffer a heavy loss. Even special departments, selling exclusively drugs, therefore representing in themselves a special business, have been almost paralyzed by the action of the defendant, for the public always asks for known protected brands such as the members of the association put out and it will not take any substitutes. Plaintiffs have not been able to sell the goods asked for after using up their existing stock, which has meant to them a reduction in sales estimated at about 1,000 marks per month for each of their department stores. To that loss should be added another element which can not easily be expressed in figures, viz, the fact that when the public does not find in a store such as the plaintiffs' a current, well-known article there will be other purchases which it will not make.

Plaintiffs claim that they are entitled, therefore, not only to the taking off of the present selling interdiction, but also to the suppression of further interdictions in future, and to damages.

The defendant asks that the claim be waived and answers that there has not been any illicit action on its part.

The argument raised by the plaintiffs of a total business obstruction does not fit in the case of department stores, for in such places all possible sorts of merchandise are sold outside of the interdicted products. Furthermore, part of the brands of the association do not belong to the articles sold by plaintiffs because such brands, according to the imperial ruling of October 22, 1901, can only be sold in pharmacies.

Nor can it be said that an offensive communication has been made in a public way. The selling interdiction, in which the words "price cutting" were avoided, is to be considered as confidential information sent to a limited circle of individuals, i. e., to jobbers who are permanent customers of the members of the association. The steps taken by the association prior to the selling interdiction are very cautious ones, and can not be legally attacked. It is not the association but, on the contrary, the plaintiffs themselves who have acted contrary to public ethics. Plaintiffs, who knew about the selling terms established by the association had, by selling below the usual prices applied in other stores, only as object the luring of the public and the creating with it of the wrong impression that they (plaintiffs) sold in general cheaper than other retail stores. The articles Bergmann's Zahnpasta and Kaiser-Borax have been used by plaintiffs in such a manner. In October and November, 1905, plaintiffs organized a regular window "parade." They have brought to the attention of passers-by huge quantities of Zahnpasta and the exhibit cartons were advertised at the prices of 33, 45, and 50 pfennigs instead of at the regular prices printed thereon of 40, 50, and 60 pfennigs.

This system of baiting hurts, of course, the smaller retailers—druggists in this particular instance—whose clientele is lured by the department stores. The defendant used as protection of the middle-class trade against the ruinous price-cutting and bait system of department stores the "revers" system. Such has been acknowledged as the standing feature of lawful trading in both branches of trade under consideration in this case. Plaintiffs, who did not sign such "revers,' could not obtain Bergmann's or Mack's goods except by unfair methods and through violation of contract toward the manufacturers on the part of third parties. By doing this they act contrary to the views existing in the pharmaceutical and toilet article branches—views according to which the sale below the prices fixed by manufacturers, and strictly observed by all regular trade, is an unfair competition. Since the same danger of price cutting threatens all the members of the association, it is to them a matter of self-defense to cut off the supply of their branded articles.

The claim is altogether unfounded, because the defendant has always been ready and is still ready to withdraw the selling interdiction as soon as plaintiffs agree to maintain the price in the future; also for the reason that plaintiffs can not show that they suffered any damage. They continued to sell as before all branded articles of the members of the association and they themselves bragged that they could get as much of these as they liked, notwithstanding the selling interdiction of the defendant.

The Landgericht, in its judgment published February 28, 1900, dismissed the charge in view of the fact that according to the decision of the Reisgerichts Bd., volume 50, page 277, there was no illicit act on the defendant's part.

Plaintiffs appealed in due form against this judgment, to the contents of which reference is herewith made, claiming that the contested judgment should be reversed in the sense of the original claim.

They have, however, in the verbal hearing, made the proposition that it be established—that the selling interdiction on the part of the defendant (be it in a public or private way, through sending of printed circulars to its members, or in any other manner) by which the source of supply of all so-called branded articles should be cut off from plaintiffs, is unlawful, and that the defendant be therefore condemned to abandon it under penalty of a fine for each infraction; that the defendant be further condemned to pay to the plaintiffs 3,000 marks with 4 per cent interest from the time of service of copy of the judgment, September 17, 1900, the judgment being declared immediately effective.

The defendant has presented a motion that the appeal be dismissed.

To justify the appeal, the plaintiffs state the following:

1. As to form: So as not to suffer any further injury in their business, they have complied with the requirements not to sell below the fixed price, whereupon the selling interdiction has been raised on March 15, 1900, all members of the association having been notified. This fact, which the defendant acknowledges, only removes that part of the claim mentioned under I *c*, for the compliance of plaintiff merely signifies a sort of armistice, and the renewal of the selling interdiction will surely follow as soon as plaintiffs again withdraw the said compliance. It is, therefore, their interest—which ought to be legally protected—to have the inadmissible interdiction declared null and void. Their loss due to this interdiction, reaches at least 3,000 marks up to the moment of the raising of the interdiction, and they claim the payment of this amount instead of the regular fixation of liability for damages.

2. In the way of facts: It should be considered according to judgment that members of the defendant association have not acquired the right through mere registering of the trade-mark to exclude third parties from the sale of such and to use the trade-mark with the idea of creating a monopoly which may compel third parties to do or not to do certain things in connection with the maintenance of price. With regard to dictating prices, defendant is, legally speaking, in no different position than the seller of any other goods is which said seller wants to put upon the market. Therefore it can only be a question of knowing whether defendant is allowed in any way or manner, be it with the aid of so-called "revers" or be it with the help of boycott, to impose the selling terms of any one member of the association.

While answering this question, it should be first considered that, according to public view, the trade-mark covers a definite product that has won the market owing to its being made generally known or owing to its popularity. Therefore the argument that a similar product of the same quality, but not protected by trade-mark, could be had cheaper elsewhere is not to be considered, so that, as has been pointed out in the original suit, it is of vital importance for a department store to be able to offer to its consumers branded articles. Since this fact is undoubtedly known by the defendant association, it is evident that the declaration of a boycott intended deliberately to bring about this result.

From a legal standpoint the views expressed by the Reisgericht in the judgment of December, 1902, which the previous judgment mentions without, however, seeming to give it sufficient weight should be taken into consideration. In the motives of said judgment it is stated that a delivery interdiction is illicit when it grows into a regular system of unjust intermeddling and damaging interference in business exploitation, and when the association thereby arrogates to itself a compelling and punishing power upon all business associates. This case, which is only mentioned by the Reisgericht, but without being further commented upon, applies here, for the procedure of selling interdiction as used by the defendant goes far beyond any fair bounds and grossly hurts the sentiment of propriety of any fair and right-thinking person. It is a fact that defendant works with a thorough boycott system, applying it to its own members as well as to nonmembers under penalty of suppression of supplies of all articles. In this manner defendant brings to bear its compelling and punishing power far beyond the limits of the association itself and upon the trade at large. This procedure appears the more condemnable, because not only those who cut prices on all branded articles, but even such as infringe ever so slightly upon one single article are stricken by the boycott. Defendant

can not take for its argument the fact that it first gives warning or that it asks for a declaration that the infraction was involuntary, for a third party can have no right to give such warning or to ask such question. Such an exaggeration of a monopoly system has nothing to do with trading liberty, nor with the right of protection of one's own work.

The chamber of commerce will confirm that defendant association includes about 60 manufacturers of the toilet article, pharmaceutical, and food-products branches, who represent both in the way of number and of importance the largest proportion by far of the German production, so that it would be either impossible or at least extremely difficult for a concern like the plaintiff's to maintain its full trade in these branches if it should be cut off from all articles of any and all manufacturers.

Claim is based upon page 824, B. G. B., for the fact that a communication having been sent, both to members and to nonmembers, to the effect that the boycott was declared upon certain firms, constitutes a publicity, such as is provided for in said article 824, B. G. B.

Lastly, the claim is sustained in article 823, B. G. B., because in this case competition, as a consequence of trading liberty, is not kept within licit limits. The result of the boycott, the heavy damage caused to plaintiffs, as also to any other firm that might be the object of such measure, were things that the association knew beforehand; moreover, they were deliberately intended, so that the selling interdiction was knowingly used as a punishing means, which, on principle, appears illegal.

Defendant first contended that the original claim could be modified, in view of the facts that through submission of plaintiffs to the selling terms, paragraphs Ia and Ib have become without object.

Further, that its procedure does not an any sense hurt public ethics. Particularly, it can not be said that the association, owing to its by-laws, incites its members to breach of contracts. The public communication to which plaintiffs refer in connection with this point, is merely intended to do away with individual notices to each manufacturer, calling attention to his rights, and to bring to the general knowledge the business terms fixed for the future. As to the relations between the members and their customers, the following principles have been established once for all:

1. Goods are only to be sold on condition that they will not be offered for sale below the fixed price. Jobbers must impose the same conditions upon their customers.

2. It must be clearly agreed in contracts for future deliveries that the manufacturer is not bound to further deliveries should the association put the selling interdiction upon the dealer. The jobber making such contracts must put the same restrictions upon his customer.

Members of the association who had not reserved the right to stop deliveries on contracts in case of the selling interdiction being declared have always been informed that they must continue deliveries notwithstanding the interdiction.

Defendant's procedure is merely a legal act of self-defense against the price cutting of the department stores. In the cases of the firms of Bergmann and Mack, not only have both firms been injured by plaintiffs in direct way, but they are threatened by further injury, inasmuch as the druggists' association has declared that they would not sell their products any more should plaintiffs continue price cutting. Other department stores, such as Wertheim, have long since agreed to maintain the minimum prices.

It can not be claimed that defendant has acted contrary to public ethics, but the plaintiffs did. Although plaintiffs knew perfectly well the terms fixed by Bergmann and Mack for the sale of the articles to the public, they obtained said articles through middle men, who were in this way led to breach of contracts. The argument of the plaintiffs that they intended to protect the public interest by a reduction of price better suited to the actual value of the goods, can hardly be taken seriously. In fact, it is for them a mere question of putting up a bait.

Also the statement that plaintiffs suffered damages is not correct, for they have been able to get, notwithstanding the selling interdiction, all the association's branded articles that they wanted; but even if plaintiffs should actually have suffered, that would be their own fault, and because they did not submit to the selling terms.

The provisions of articles 824 and 823, B. G. B., can not come under consideration as the matter stands, and it is once more pointed out as to the form

of these paragraphs that the list was sent confidentially and could only come to the knowledge of plaintiffs through breach of confidence.

MOTIVES.

The appeal is to be entirely dismissed.

With regard to the opposition made by defendant in connection with a change in the claim, it must be determined if this change contains anything inadmissible. This must be negatively answered.

If one compares the claims presented to the first court with the ones verbally presented to the court of appeals, one sees immediately that Claim I *c* has not been maintained, while Claim II has been transformed into a claim for a lump sum. These changes can not be objected to, so that only the change made in Claims I *a* and I *b* is to be considered. Now, an examination of the difference between the original claim and the appeal claim shows that the demand stated in the original claim is again formulated, but the part referring to an injunction to refrain from using the selling interdiction remains unchanged, while the other part this time takes the form of a claim for assessed damages. Now, the court is asked to establish that the defendant is not entitled, for the reasons stated in the original claim, to put the selling interdiction upon the plaintiffs. Since the shifting from a claim for fixed damages to one for assessed damages does not mean any change in the actual claim, this modification in itself would only then bring about a dismissal of the appeal if the premises of the claim for assessed damages (Art. 256, Z. P. O.) were not there. Defendant seems, indeed, to assert it, while emphasizing the fact that plaintiffs had agreed to maintain the fixed selling terms. Defendant, however, overlooks the fact that such a compliance, under the existing circumstances, means only an armistice, as the plaintiffs put it, but not a waiving of defendant's contestation of the admissibility of the selling interdiction; plaintiffs continue to contest that defendant, now as before, has any right to put on such selling interdiction. On the other hand, it is the plaintiffs' evident legal interest that the judge should find that such a selling interdiction is effective, for they would be governed by this in their attitude when buying the necessary supplies for their drug trade, and also it would enable them to rescind the signed "revers" at any time and then sell the products of the members of the association below the regular prices.

Now, when going into an actual examination of the claims stated, it appears first that article 824, B. G. B., which plaintiffs refer to to justify their claim, does not apply here and must be disregarded. Article 824, B. G. B., assumes that the statement made and spread by the defendant is contrary to truth. In this case both parties agree that plaintiffs have sold such articles, the minimum price of which had been fixed by the association; and the statement published in the selling interdiction to the effect that the plaintiffs sold such articles too cheaply was therefore in conformity with the truth. As to article 823, B. G. B., which plaintiffs also refer to, it could only possibly apply to the extent of paragraph 1, but even then the plaintiffs' claim can not be backed. True, the existing and organized exploitation of independent trade is a legal right, the illicit encroachment of which renders liable to damages. Also it can be conceded to plaintiffs that the going into effect of the selling interdiction disorganized and hurt their trade, and that such injury was, or would have been voluntary on the part of the defendants; only the premises to the claim that this disturbance or injury is unlawful are missing. Just as it is any manufacturer's privilege to fix a selling price according to his idea, upon his products, and to bind his buyers and middle men not to sell such products below the fixed price, so there is nothing to prevent a number of manufacturers, wishing to insure the maintenance of the fixed prices on their articles, from joining together and agreeing that any dealer who would cut the price of even only one article should be barred from delivery of all products manufactured by all the members of the association. Such associations are a consequence of the economic fight in which the individual stands in danger of disappearing under the fast-growing large concerns, and therefore seeks protection by joining others in the same position, for it is only through such associations that he finds himself able to fight against the opposed interests of big concerns; this conception is borne out by the statement of plaintiffs, from which statement it appears that plaintiffs would not have bothered about the fixation of price of articles of any manufacturer were it not for the fact that the boycott of all immediately followed. This boycott, which naturally grows out of the basic principle, according to

which any tradesman has the right to fix the price at which his products should circulate, is therefore in itself not unlawful.

This does away with the application of article 823, paragraph 1, G. B. G.

There remains, therefore, only the question of knowing whether the measure adopted by defendant is not, or would not be in the present case, disloyal; whether it does not conflict with what, under the circumstances, any right and fair minded person would consider proper. This question must be answered negatively, for if on the one hand it is admitted, as explained above, that any manufacturer, therefore also anyone entitled to trade-mark protection, is at liberty to determine whether he will sell his products and at what price, and if on the other hand one considers that when a buyer of these products, notwithstanding the selling terms imposed on all trade, and therefore on him too, manages to obtain the goods through a third party, also having knowledge of the obligation, and sells them at a lower price, this placing on the market of the products can only be based upon breach of contract, no fair and right-thinking tradesmen would think it objectionable that the manufacturer should aim, in any permissible way, to cut off the supply of this third party, and to oblige him to buy and to sell the goods in the same way as all other tradespeople obtain them and bid them for sale. This would be so much less the case when one considers that, in most instances and particularly in the present one, these measures are only a means of maintaining one's own business, or, in other words, merely a means of defense. The manufacturer—or, to keep within the conditions of the present case, the trade-mark protected manufacturer—whose business depends far less upon the distinctive qualities of his product than upon the fact that such product is not only heavily advertised but is displayed and on sale with many stores will, in the first place, aim to interest lastingly a great number of retailers in its sale.

He will, ordinarily, only be able to do so by fixing a selling price which leaves to retailers an attractive profit. But when the price is cut by a big department store while all the rest of the retailers maintain it, the next result will be that retailers will ask for a reduction of price so as to be able to sell the product to their customers at the same price as the department store does. If the manufacturer does not accord this, retailers will lose interest in the sale of his products; they will procure other goods instead of these, the sale of the latter being by and by restricted to department stores; in this manner the product will in time lose its reputation, owing to its being continually bid at a cheap price. It will therefore be less asked for and its sales will dwindle down to a small amount. If, however, the manufacturer gives in to his customers, the result will be that the department stores will again reduce the price of the product so as to continue to use it as a bait, which will again lead to new demands on the part of retailers for a further reduction of price, which, therefore, also in this case brings about a retrograding of the manufacturer's business. Accordingly, resorting to a suppression of deliveries to department stores, unless they adhere strictly to the fixed selling price, is only a means of maintaining one's own business. However, this would be entirely ineffective if tried by a manufacturer singly for experience, and also the present case shows that department stores would find ways and means to obtain the goods, notwithstanding all restrictions and contracts. The individual can only find effective protection in association with others who take measures in common to attain their aim.

The defendant association of manufacturers of branded articles has agreed upon such a collective measure to the effect that any dealer who would sell even only one product of a member below the fixed price would be cut off from supplies of all products of all members of said association until he agreed to maintain the selling price; the defendant association has used this measure against plaintiffs. After it has been expounded that the object which the selling interdiction aims at does not conflict with public ethics, the only point remaining to be determined is whether the means used to this effect go against the feelings of propriety of right and fair thinking people. This also is to be answered negatively. It is to be considered that the defendant had no other means but the selling interdiction to use against the plaintiffs in order that the latter should abandon their price-cutting practice, and that the use of said method to obtain the licit object was, in itself, quite admissible. Accordingly, there is only one question open, viz, whether the cutting off of supplies of all other products did not go beyond the limit of what is allowable in competition. This is not the case, for the reason alone that, as has been already determined,

any interdiction bearing upon one or a few products only would have been ineffective. But outside of that, the following must be considered: Certainly, the exclusion from obtention of all products of the defendant association's members had a rather important effect upon the business of the plaintiff. However, considering that the business in question is a big department store, it can only be construed as a mere complication in the run of the said business, in the sense that the plaintiffs, assuming that they could not procure the goods through other sources, would be unable to use them as a bait in their drug department. It stands to reason that if the means used could have that result alone, it could not be considered as conflicting with public ethics.

Plaintiffs, it is true, have further claimed that the procedure used by the defendant was against public ethics, for this reason: That in this manner the prices of the products were held at a value many times greater than the intrinsic value of the goods, and the possibility of offering them to the public at a reasonable price was thereby denied them. With regard to the latter point, it can be dismissed without further ado, as the plaintiffs' aim was merely to increase its business by luring the consumer. If this had to be specifically proven, it would appear from the undenied fact that plaintiffs organized on certain dates a regular widow "parade" with the tooth paste marked underprice. With regard to the former point, however, it should be considered that such a branded article does not belong to the necessities of life. Everybody knows that, having to bear heavy advertising expenses, they are offered for sale at a much higher price than their actual worth and that no other products of the same or similar composition can be had any cheaper.

Plaintiffs also miss their point when they attempt to draw from the circular an argument for their claim. Such circular, which is only intended for the interested wholesaler, bears in itself, either in form or contents, no motives for the plaintiffs' claim. Considering that the contents of the circular are in conformity to truth, article 823, paragraph 2, B. G. B., does not apply, as before stated, it does appear how defendant could have acted contrary to the sense of propriety of fair and right-thinking persons, because it sent the circular in open envelope, thus perhaps enabling third parties, for whom it was not intended, to take knowledge of the contents.

Lastly, when the plaintiffs emphasized that the contested procedure was contrary to public ethics, for the reason that wholesalers who might have neglected to put upon their buyers the price restriction would have to break their contracts in case of the selling interdiction, plaintiffs overlooked that this assumption is in fact incorrect, for as defendant has already explained the contract has to be lived up to, notwithstanding the selling interdiction, if this clause has been omitted in it; therefore a breach of contract leading to a claim for damages would, under the given circumstances, not necessarily be contrary to public ethics.

Since it thus appears that the procedure of defendant also does not conflict with the tenor of article 826, B. G. B., no other decision could be reached than the one already given.

The matter of costs is regulated by article 97, Z. P. O.

Made in Berlin the 28th day of February, 1909.

(Signed:) Gunther, Kanold, Pohlmann, Ritter, Schlössing.

(Signed:) Secretary of the Koniglichten, Landgerichts I.

[Translation.]

[Geschäftsnummer 73.0.179.05. 48. VI. 489. 06.]

IN THE NAME OF THE EMPIRE.

In the matter of the firm of A. Jandorf & Co., of Berlin, plaintiffs and appellant plaintiffs, attorney in charge, Rechtsanwalt Justizrat Haber, of Leipzig, against the Incorporated Association of Manufacturers of Branded Articles of Berlin, defendant and appellant defendant, attorneys in charge, Rechtsanwalt Justizrat Pützler, of Leipzig, the Reichsgericht, Zivilsenat VI, in its verbal hearing of October 7, 1907, under President Winchenbach and Reichsgerichtsrate Hoffman I. Tagg, Goldman, Dr. V. Schwarze, Schaffeld, Meyer, having found right:

The claim, upon revision of the judgment of the Koniglich Preussischen Kammergerichts zu Berlin, of October 24, 1906, is to be dismissed. The defend-

ant has asked for such dismissal. The procedure was in conformity with the judgment of the previous courts.

MOTIVES OF JUDGMENT.

The defendant association, which includes about 60 members, manufacturers of pharmaceutical, toilet, and food articles, aims particularly to insure that products manufactured by its members and covered by trade-mark protection should not be sold under the price fixed for each of them, either by the wholesale or retail trade. To this end all members have agreed amongst themselves that any tradesman who would sell, be it only one of the products of one of the members under the fixed prices, would be barred from delivery of all the goods of all members as long as he has not complied with the fixed selling terms.

The firm of H. A. H. Bergmann, of Waldheim, and of Heinrich Mack, of Ulm, are both members of the said defendant association, the former firm manufactures Bergmann's Zahnpasta, the latter Kaiser-Borax; both of these articles, covered by trade-mark protection, ought to be sold at 50 pfennigs.

Plaintiffs sell these articles in their four department stores for 45 pfennigs; therefore defendant asked them to observe in the future the minimum selling price of 50 pfennigs and to give a written declaration to that effect. This request having remained uncomplied with, defendant sent out on April 5, 1905, to all wholesalers handling branded articles of the same branch, as "printed matter," a circular marked "confidential," and asked said wholesalers not to deliver any branded articles to certain firms, among which the plaintiffs, as long as defendant did not inform them of the raising of the selling interdiction. This demand, which is the cause of the present litigation, has, however, been withdrawn during the course of the proceedings, plaintiffs having declared that they would abide by the fixed minimum selling prices. Plaintiffs had brought the following claim before appeal:

To determine that the selling interdiction of the defendant, be it in open form or not, through communication to its members as "printed matter," or in any other way, and having as object the declaration of the cutting off of supplies of all so-called branded articles, is unlawful, and accordingly to condemn the defendant to refrain from such interdiction toward plaintiff, under penalty of fixed fine for each time.

Further to condemn defendant to pay them an indemnity of 3,000 marks.

The court of appeals has discussed the appeal of the plaintiffs against the judgment of the Landsgericht. Said tribunal has expounded that the circular objected to by plaintiffs was not offensive, either in itself or in its contents; that defendants, it is true, deliberately attacked a legal asset of plaintiffs, viz, the exploitation of their business and thus damaged it; that, however, this measure was not unlawful and that neither the aim which the defendant had in view nor the means resorted to to attain it conflicted in any way with public ethics.

These views, which in general agree with the principles upon which the judgment was based by the Reichsgericht, as appearing in volume Z. S., page 56, 271 ff, should be indorsed, and the revision is therefore to be denied.

Appellants claim further that the tribunal in charge of the first appeal was not right in judging that if the goods are supplied by a third party below the agreed price, this can only possibly be done through breach of contract. This criticism is based upon a wrong interpretation of the contested judgment and does not need to be considered, for the tribunal of appeals has not discussed the reproof of acting against public ethics, formulated against the defendant, not only because the defendant could not be blamed for having tried to secure itself against a breach of contract, but also for the reason that the measure adopted by it was a means of maintaining its own business and was, therefore, really a means of self-defense. Now, the claim upon revision contains the following arguments against this view: The minimum price for both articles in litigation is about 10 times as high as the actual value, so that it can not be a matter of objective and legitimate protection of business. Defendant has no right to compel the maintenance of such an exaggerated price which restricts business in an inadmissible manner. In taking a stand against such an artificially increased price plaintiffs have acted in the interest of the buying public, and they should be protected in this matter even if they at the same time kept their own interests in mind.

Now, this point of view of appellants does not in any way apply to the present case. The tribunal of appeals did not commit any legal error in finding that

plaintiffs did not care so much to make the public profit of a cheaper price as to lure customers, and therefore increase their business; no protest was made by plaintiffs against this. As the Reisgericht has decided several times (see decision in vol. Z. S., 50, p. 277, vol. 63, p. 399) any tradesman or any trade association has the right to oblige his or its buyers not only not to sell below a certain price but to shift in turn this same obligation upon their buyers. Generally speaking, the right to subordinate business relations to special conditions, and the suppression of deliveries in the case of nonobservation of said conditions, can not be denied to any such tradesmen or trade associations. The fact that a big price is artificially maintained and that the buying public is given no possibility of buying the product at a more reasonable price does not change anything to that right; at any rate, not with products such as the ones in cause, which, as the tribunal of appeals rightly points out, do not belong to the necessities of life and can be easily replaced by products of like or similar composition, sometimes cheaper.

When judging the fixed minimum price limit of the two articles one should not leave out of consideration that they are goods which can only be maintained a certain time on the market, and which are burdened with heavy expenses in advertising, make-up, etc.

The appellants object further to the statement contained in the contested judgment that because no other means but the selling interdiction could be used by defendant against plaintiffs in order to compel the latter to cease price cutting such means to attain the result aimed at were in themselves admissible. Such statement should, however, not be judged by itself, but only in connection with the phrase following, i. e., that it should be nevertheless ascertained whether the selling interdiction of all branded articles of members of the association went beyond what is allowable in fair competition. This question has been negatively answered by the tribunal of appeals, after consideration of the circumstances appertaining to the present case. Appellants say that the tribunal of appeals could not have reached such a conclusion without determining the amount of damage caused to appellants by the defendant's action. However, if the tribunal of appeals, while acknowledging that the selling interdiction had a certain effect upon the business of the plaintiffs, has come to the conclusion that said business has merely been hampered, no legal fault can be found with such conclusion, which is based upon due consideration of the facts.

Now, as a measure which merely hampers business but does not threaten permanent economic existence, or does not paralyze the running of the business, and which particularly leaves the possibility of other earnings, can not be considered as going beyond what is allowable in the economic struggle. (See decision of the Reisgericht Z. S., vol. 51, p. 335; vol. 50, p. 279; vol. 57, p. 427; vol. 60, p. 101; vol. 64, p. 158.) Nor can one agree with appellant's views that such a small reduction of price as 5 pfennings upon two articles is in no proportion to the damage suffered by them, so that the means resorted to by defendant must be considered as an act of wantonness and hatefulness, for, as has been properly stated by the tribunal of appeals, the interest of manufacturers to maintain their own business necessitates that they should energetically oppose any selling of their branded articles below the fixed price.

Under the circumstances, appellants are wrong when they mean to base their claims upon the principles expressed by the Reisgerichts several times and particularly in the judgment mentioned in Z. S., volume 62, p. 264 ff, that:

"Where the individual misuses a monopoly practically belonging to him or the absence of any possibility of competition, in such a manner as to impose unfair disproportionate sacrifice on the general public, such action can not find any acknowledgment in law." This principle does not apply here, because no unfair disproportionate sacrifices have been imposed upon plaintiffs or upon the public.

Finally, appellants complain without any reason that the tribunal of appeals did not find in the manner in which the circular was sent any cause to sustain plaintiffs' claim. As the tribunal of appeals has rightly explained, plaintiffs' views that the manner in which the circular was sent conflicts with public ethics and hurts their reputation within broad circles, because said circular, notwithstanding the superscription "Confidential," was open to outside parties, is unfounded, for said circular did not contain anything else than the statement of the fact that plaintiffs sold branded articles under the fixed price together with the interdiction to sell them any such articles.

Accordingly, the claim for revision had to be dismissed without its being necessary to go into the objection which can be raised on account of the form

of the request for revision. The decision of the costs is regulated by Zivilprozessordnung, article 97, paragraph 1.

(Signed:) Winchenbach, Hoffmann, Tugg, Goldmann, Dr. V. Schwarze, Schaffeld, Meyer.

This judgment was proclaimed at the public hearing of October 7, 1907, and appears in the statement published October 14, 1907.

(Signed:) Walter, secretary of the court.

Made in Berlin this 29th day of March, 1910.

Rünig, secretary of the Koniglichen Landgerichts I.

[Translation of a circular of the Association of Manufacturers of Branded Articles in Berlin, of Feb. 6, 1913.]

PRICE CUTTING ON BRANDED ARTICLES.

In retailers' circles there still exists the view that prices of branded articles must be observed only when a regular contract has been entered into to that effect. It is therefore necessary, in the interest of the retail trade, to point out that the observation of the price of branded articles must follow, even without a specific agreement having been signed. It has on several previous occasions been found by the courts, and again lately in Berlin in a judgment of October 10, 1912, upon a claim of the Association of Manufacturers of Branded Articles, together with one of its members—the firm of Kathreiners Malzkaffee—against O. L., a retailer, of Berlin.

The retailer O. L. used to sell Kathreiners's malzkaffee appreciably below the price fixed of 35 pfennigs—i. e., at 30 pfennigs. Upon demand made of him by the association and by the firm of Kathreiners to maintain the proper price in the interest of the sound retail trade, he declared that he would fix the price as he pleased, having signed nothing, and that he would continue to sell Kathreiners's malzkaffee at 30 pfennigs, it being an excellent bait which drew to his store customers from many streets. Upon numerous complaints from the surrounding trade, the association was obliged to exclude O. L. from direct or indirect supplies through all members of the association and their purchasers. L., however, managed to obtain Kathreiners's malzkaffee, although members and their purchasers were not allowed to deliver it to him. In the interest of the heavily injured surrounding trade the association and the firm Kathreiners brought suit against him, demanding that he should be enjoined to refrain from price cutting under a penalty of 50 marks for each case of infringement. The court decided in favor of the Association of Manufacturers of Branded Articles and of the firm of Kathreiners, and condemned O. L., under penalty of 50 marks or three days' imprisonment for each infringement, to refrain from:

(*a*) Offering for sale malzkaffee of the firm Kathreiners, below the fixed price.

(*b*) Inducing to deliveries, third parties who have agreed not to deliver goods of the members of the association, to defendant.

At the same time the members of the Association of Manufacturers of Branded Articles and the firm of Kathreiners were granted the right to publish the judgment in the press at O. L.'s expense.

(Thereupon, at 12.20 o'clock p. m., the committee went into executive session, after which it adjourned.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY G. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 33.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Friday, March 20, 1914.

The committee assembled at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

STATEMENT OF HON. JOSEPH TAGGART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS.

Mr. TAGGART. Mr. Chairman and gentlemen of the committee, I beg leave to avail myself of the kind permission of the committee, and as a member of the committee, to make a very brief statement and to introduce into the record some printed matter in the nature of statements which may be of value in aiding us to perfect the anti-trust legislation which is now pending before the committee.

The statements which are here presented, as well as the statement that I am about to make, have been caused by the actions and conduct of a corporation known as the Western Newspaper Union. This corporation is engaged and has been engaged for many years in the business of printing patent inside newspapers and furnishing them to the editors and publishers of weekly newspapers. They

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are also in the business of casting and making ready-print plates, or plate matter used in the business of publishing newspapers, principally weekly newspapers.

A hearing was had before this committee beginning June 11, 1912, at which various statements were heard and much valuable information was produced and brought before the committee. It appears that the business of making these patent insides, both in the form of plate and in the form of ready print, has absolutely fallen into the hands of but two concerns in this country, the American Press Association of New York and the Western Newspaper Union, with headquarters at Omaha, Nebr. These two concerns furnish practically all of the ready print and plate material for the whole United States. It is said that their readers number, at least, 60,000,000 of people of the United States. The business is lucrative and very valuable. Advertisements are obtained, for which high rates are charged, on account of the great number of people who receive them, being published by practically every weekly newspaper in the country.

It appears that some time about three years ago these two concerns began to compete with each other very vigorously and they began to undersell each other. An action was brought in the United States District Court in the city of Chicago, a summary of which has been printed by the Government Printing Office. It was entitled "The United States of America *v.* Western Newspaper Union, American Press Association, and others." It is an actual fact that in that action, brought by the United States, a decree was rendered practically forbidding these two defendants—these two concerns that have a monopoly on this entire business, from competing with each other.

I will submit and ask to have printed a short summary of the pleadings and the decree as rendered by the court.

I wish to say that I believe the court was imposed upon. It seems as though the decree was submitted by agreement of the parties, to the court, and I can not imagine that a district court of the United States would have rendered such a decree except it was misled or in some way imposed upon. I believe that a study of this decree and of the statements describing the operations, especially of the Western Newspaper Union, will aid us in perfecting a bill, especially with reference to what may be the duty of the Department of Justice in dissolving and shattering into its constitutent parts such a gigantic monopoly as this. I believe a provision should be inserted whereby after such concerns are dissolved into their constituent parts that the parts should be absolutely restricted from having any interest in each other; that the directors, stockholders, and all persons concerned with each party, should be absolutely forbidden to have any share or hold any stock or exercise any directorship or control over any other part. And it should be provided that it will be the duty of the Department of Justice to proceed against any concern that has, by the methods detailed in these hearings and in these statements, assembled together a complete monopoly of the entire business of the country in any one line of work.

I submit these statements and ask that they be inserted in the hearings.

The CHAIRMAN. Without objection, the request of Mr. Taggart to have printed in the record the documents which he has handed to the reporter will be granted.

(The documents submitted by Mr. Taggart are as follows:)

EXHIBIT 1.

STATEMENT OF D. W. WITMER, KANSAS CITY, MO.

To the Members of the Judiciary Committee:

In presenting this document to you for your investigation I want to call your attention to the peace agreement between the "United States of America, petitioner, *v.* The Western Newspaper Union and the American Press Association, defendants." This, gentlemen, is an injunction handed down by Judge K. M. Landis. It was done in the name of the Government by Attorney General George W. Wickersham and his assistant, W. T. Chantland.

In this injunction the American Press Association and the Western Newspaper Union both confess that they had violated the Sherman law and the interstate-commerce law, and that they had driven all competitors in their line of business out of the field by unfair cutting of prices and by sending traveling men out slandering the various competitors until the field was cleared.

Gentlemen of this committee, do you realize that these two great organizations, representing a combined capital of over $7,000,000, reach once a week 60,000,000 people, or over two-thirds of the people of the United States? Should you, then, wonder that H. T. Oxnard, representative of the Sugar Trust; George W. Perkins, representative of the Harvester Trust; and M. M. Mulhall, representative of the National Manufacturers' Association, should reach for this influence, through which to color public sentiment in their favor, and at the same time pay these two great purveyors of news large sums of money for the service? As Senator Cummins stated, "It would be well to have a round-up of the whole business of trying to color public opinion in this way."

Gentlemen of this committee, you can readily compare the Western Newspaper Union and the American Press Association with the trusted chief of police who, through his underlings, protects crime, vice, and robbery rather than the public, who he is selected to protect.

These two great purveyors of news not only are violating the trust and interstate-commerce laws of to-day but stand ready and willing for hire to protect other trusts, such as above mentioned.

Prior to this last great exposure of some of the high officials of our country it has been a mystery to me to know how these two great companies could come to Washington and prevail upon Attorney General Wickersham and his assistant, Mr. Chantland, to use the name of the Government in securing the decree handed down by Judge Landis in their behalf. In this decree both of these companies and their officials have confessed that they have separately and jointly violated the Sherman law and the interstate-commerce law.

The Western Newspaper Union Co. confessed that they have spent over two and a half million dollars in acquiring the capital stock and properties of various ready-print companies, but still they have a capital stock of $6,500,000, which would lead you to believe that this is overcapitalized at least $4,000,000, on which they are expecting to collect large dividends from the poor, struggling country publisher, who, as is recognized by these great trusts, has the greatest medium for publicity in the world. Quoting Aaron Gove: "Many farmers read those patent insides. When I looked it up I found that a stick of stuff every week was not exorbitant in price, and it sure enough does get before the voters little by little and eats in."

Gentlemen of this committee, I want to ask you this question: Where has a poor man any chance to build a business against such unfair competition backed up by the Government and the Government's high officials, such as has been done in this case which is now before you for an investigation?

If there should be any members of this committee who heard part of this investigation during the last term they will remember that Mr. Courtland Smith testified before them that the Western Newspaper Union was attempting to destroy their business, and that they had appealed to Attorney General Wickersham for protection from this destruction, but instead of getting the protection they were really entitled to and punishing the members of the Western Newspaper Union Co. for violating the trust and interstate-commerce laws,

these two great companies and the Government join hands and formed one and a greater combination in violation of this trust act. This being the case, I again ask you wherein these two trusts had any right to enter into this agreement which protects them against any further onslaught by one another?

You will also remember that Mr. Smith testified that in case the Western Newspaper Union Co. was successful in securing control of the American Press Association, that it was the intent and purpose of Mr. Joslyn to sell out to Rockefeller and Morgan, the two controlling interests of our country, who fully appreciated the importance of being able once a week to reach 60,000,000 people of the United States with their colored public sentiment.

With this peace agreement as it now stands, making the Western Newspaper Union Co. and the American Press Association practically one, is it not right to presume that they stand ready and willing, for hire, to protect Rockefeller and Morgan interests, as well as others who have admitted before similar committees of this Congress to having received protection for hire? This being the case, I again ask you how the poor man has any chance to establish a business which in any way conflicts with any of the trusts of our country?

In the District Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, PETITIONER, *v.* WESTERN NEWSPAPER UNION, AMERICAN PRESS ASSOCIATION ET AL., DEFENDANTS.

SUMMARIZED STATEMENT OF PLEADINGS AND DECREE.

On August 3, 1912, there was filed in the United States District Court for the Northern District of Illinois a petition in equity in the above-entitled cause. On the same day answers were filed by the several defendants, and immediately thereafter, by agreement between the United States and the counsel representing the defendants, a decree was entered, hereinafter set forth in full.

* * * * * * *

The petition in said cause, omitting its formal parts, is as follows:

* * * * * * *

III.

STATEMENT OF THE INDUSTRY.

There are in the United States approximately 16,000 smaller or so-called country newspapers. With an approximate average circulation of 800 per paper, and making a reasonable allowance for duplication, said papers have an aggregate circulation of about 12,000,000 copies; and if each paper is read by but one household, said 16,000 papers reach about 60,000,000 of the people of the United States, or nearly two-thirds of its entire population. Because of the very limited circulation and number of copies of each issue printed by each separate one of these so-called smaller country newspapers, and because of the large expense necessary to the gathering of news and the acquisition of miscellaneous matter necessary for the composition and make-up and in the printing of such papers entire in each office, for the purpose of gathering news and miscellaneous matter more extensively, to distribute and furnish the said matter and service to all of such smaller papers in a form already made up for the individual use of each of them, and to do this at a less price for such service than it could be done individually by such papers, there have grown up in the United States two competing industries and services known in the newspaper world, respectively, as (1) plate service and (2) ready-print service.

Plate service consists in furnishing such news and general matter in the form of metal type plates cast in newspaper column lengths and shipped from the several distributing points of the plate concerns to the issuing offices of the papers using it.

Ready-print service is the furnishing of newspapers printed on one side, or on two or more pages, to the several newspapers from the distributing office or offices of the ready-print concerns. Both of the two services are generally known and frequently referred to as the patent inside of the newspaper.

This service is supplied to and this action refers only to what is known as general newspapers and does not take into account papers devoted to a special service, such as the farm and religious papers. Probably 300 out of the 16,000 of these country newspapers are issued without any of either plate or ready print in their make-up. Many use plate matter alone, in addition to what is set up in each office locally. Few, if any, use ready print alone, but nearly, if not quite, all who take a ready-print service also use some plate service for special features or for filling up. This for the reason that the ready-print service must be put out in full pages, while the plate service is put out in columns which may be used as sent out or sawed up and rearranged in the local office. Papers using the plate service only, or such combined arrangement, are known as "home-print" papers.

The defendant American Press Association, with headquarters in New York City, is the largest purveyor of plate matter in the United States, having until recently furnished nearly four-fifths of all of such plate used in the United States. The defendant Western Newspaper Union is the largest purveyor of ready-print service in the United States, supplying over 80 per cent of it. The defendants American Press Association and Western Newspaper Union, and the associations with which they have trade arrangements, supply, either with ready print or plate or both, more than 95 per cent of all the newspapers in the United States using the same, and are at this time the two largest remaining organizations engaged in this industry of gathering and furnishing news and miscellaneous matter in such form to the country press of the United States.

The defendant corporations have been and are extensively engaged in commerce among the several States of the United States in shipping ready-print papers and stereotyped plates and stereotyping matrices from their several offices to the above-described newspapers of the United States, situated in other and practically all the different States of the United States, and also in disseminating news by each of said methods and means and among the papers aforesaid and through them to the public in all parts of the United States.

IV.

HISTORY OF CENTRAL-WEST PUBLISHING CO. AND ALLIED CORPORATIONS.

In 1906 the defendant Central-West Publishing Co. was incorporated under the laws of Maine. Its authorized capital stock at this time is about $6,500,000, not all of which is yet issued. This corporation is a holding company, and now holds all the capital stock of defendants Western Newspaper Union and Western Newspaper Union of New York, which latter is a corporation having the same management as the Western Newspaper Union, having been organized only for convenience in transacting business in the State of New York.

Between the years 1906 and 1909 those controlling the Central-West Publishing Co. acquired the capital stocks and the properties and businesses of a number of independent competing corporations and associations, each of which was engaged in manufacturing and furnishing to the newspaper trade of the United States stereotyped plates or ready-print matter, in competition with the defendant corporations. The capital stock of each corporation acquired was transferred to the Central-West Publishing Co., while their properties and businesses were taken over by the working corporation, Western Newspaper Union. In some instances, prior to such acquisition, agreements were made between said defendants and said companies and associations whereby competition between them was in some respect restrained; but such agreements were unsatisfactory to the parties because they did not absolutely restrict competition between them, and said defendant therefore restored to the purchase of the stocks and the direct acquisition of the properties and businesses of said competitors with the intent and for the purpose of further restraining and monopolizing the trade and business among the States in plate-print and ready-print matter, and pursuant to such unlawful plan or conspiracy to monopolize, at a cost of over $2,500,000, it acquired the capital stocks and properties of independent plate and ready-print companies, therefore competing with said defendants except in so far as they may have been restrained by contracts with defendants.

In additional to said above-referred-to purchases, defendants have an arrangement whereby they furnish the paper matrices of the news and general matter from which the plates for sale or for the printing of ready prints are

east to the Pacific Newspaper Union, which is the ready-print department of the American Type Founders' Association, and which has offices at Los Angeles, San Francisco, Seattle, Portland, and Spokane, with the result that there is no competition between defendants and the said Pacific Newspaper Union.

For the reason that said plants have now been so absorbed and identified with the assets and plants of the defendants herein as to now render a separation and a dissolution thereof practically a legal impossibility, and for the further reason that news gathering and dissemination can best be performed for the general public through the larger agencies, if there still remains between the larger agencies fair, genuine, and substantial competition, the petitioner is not in this action asking the legal dissolution or separation of said consolidations represented by defendants.

V.

EFFECT OF SAID PURCHASES AND COMBINATIONS.

The effect of the combinations, purchases, and trade alliances set forth in division 4 hereof is that there is now remaining in the United States no competitor except the defendants herein of any substantial size engaged in furnishing either plate or ready print to the newspapers of the United States. The defendant Central-West Publishing Co., and the companies whose stock it owns, together with the Pacific Newspaper Union of the American Type Founders' Association, now furnish over 7,500 of the country papers of the United States with plate or ready-print service, or both, while defendant, American Press Association, supplies about 7,400 papers with plate, and about 600 papers with ready-print service. The smaller independent agencies supply in the aggregate less than 500 newspapers with either stereotyped plate or ready print. Possibly 300 smaller papers use neither plate nor ready print.

It is therefore of the utmost importance to the petitioner and the general welfare of the public that at least the defendants, American Press Association and the Western Newspaper Union, both be kept in the field as separate independent and actually competing institutions.

While the Central-West Publishing Co., through its subsidiary companies and officers, is in practical control of the ready-print business of the United States, and has attempted to monopolize it, and has restrained and does restrain interstate trade and commerce therein, the American Press Association does far more than 50 per cent of the plate business of the United States, and has attempted and is attempting to monopolize the same. If by any method there should be brought about a consolidation of the businesses of the defendant corporations, or if one of these competing concerns should be eliminated, there would remain no substantial competition in either branch of said industry, or of one of said branches with the other, and those in control of such consolidated interests could exact from the newspapers in need of such service such prices as they might desire, as well as furnish to them in various ways special service to the further enrichment and growth of power of such consolidated industry.

VI.

ATTEMPTS AT A COMBINATION BETWEEN DEFENDANTS AND UNFAIR PRACTICES DESIGNED TO BRING ABOUT A MONOPOLY OF THE BUSINESS.

In 1909 and prior thereto it is charged that all the defendants named frequently acted both in concert and separately to destroy competition or to prevent additional substantial competition from arising in either line of industry in which these defendants were then and are now predominant. They thus committed numerous acts of unfair competition with the design and intent either to destroy the business of mutual competitors or compel them to sell or combine or act in harmony with one or the other of said defendants. Such acts so done consisted, among others, of (1) gross underselling of their competing services in the chief field of operations of such competitors; (2) sending out traveling men with instructions to call only on the customers of such competitors and to get the trade of such customers regardless of the prices which it might be necessary to quote; (3) summoning such competitors to conferences and openly telling them they could not continue in their competing business, but that they must either get out or sell out, and coupling such demands with threats of still fiercer unfair competition, including the installation of competitive plants in

their territory, and a recitation of plants already bought out or put out, and of the cooperation between all the defendants in the campaign against them.

In the year 1909, or some time previous thereto, negotiations were begun between the officers of the defendant corporations for the purpose of either uniting the entire business of the Central-West Publishing Co. and its subsidiary companies and the American Press Association by consolidation or purchase, or of acquiring by one of said companies the entire plate business and by the other of the ready-print business. Such negotiations were had both by correspondence and by personal interviews.

Having failed to effect the desired combination, in the year 1911 the defendant corporations, through their officers, began against each other, and they still continue, a campaign of destructive competition.

It is charged by the American Press Association that the defendant Central-West Publishing Co. and its subsidiary companies are carrying on this contest by employing the following methods of unfair competition:

(1) While maintaining their old prices to political committees, and in the territory where they are not in competition with the American Press Association, they sell to their other customers stereotyped plates below cost for the purpose of destroying the trade of their said competitor. However, they refuse to enter into long-term contracts at such prices, thus showing that these prices are but temporary.

(2) They have caused certain persons to purchase small blocks of stock of the American Press Association for the purpose of harassing said association by unconscionable and unreasonable demands for examination of books, accounts, and records of said association, and for the purpose of obtaining other inside information of their competitor's business.

(3) They are either causing or permitting their agents throughout the country to persistently circulate reports to the effect that they will put the American Press Association out of business in a short time; that the American Press Association can last but a short time under this competition; that a combination by them with the American Press Association will be formed, and other similar reports; and that unless the country publishers to whom these statements are made patronize them at this time they will be made to suffer as soon as the American Press Association is out of the field.

(4) They have threatened papers located at points that can not support two small newspapers to start competing papers unless they patronize defendants.

(5) They promise to protect publishers against suits for damages that may arise because of repudiation of contracts with their said competitor.

(6) In connection with the last stated, at times they offer free paper and free plate for 30 days in order to enable customers to change temporarily to a home-print paper, and thus to avail themselves of the clause in the American Press contracts permitting cancellation of contracts by papers becoming "home-print" papers and coupling such bonus thus given with an agreement to change back to Western Newspaper Union's ready print at a cut price with free plate service continued for the home-print side.

(7) They either instruct and authorize their agents to retain or permit and acquiesce in their retention of plate metal belong to the American Press Association.

It is charged that these things are not done in the course of regular and fair business competition, but with the purpose and intent of destroying the American Press Association or of forcing it into a combination with the Union, and with the intent thus completely to monopolize the trade and commerce in furnishing the country press of the United States with its stereotyped plate service and ready-print matter.

On the other hand, it is charged by the Central-West Publishing Co. that the American Press Association is guilty of the following unfair practices:

(1) Since the 20th day of November, 1911, it has been supplying to the trade what it denominates an "adless" ready print—that is, ready print of the same character as that furnished by the Western Newspaper Union, except it contains no advertisements. This is especially injurious to the business of the Western Newspaper Union, because that company receives the pay for all advertisements contained in its ready print, which comprises a very large proportion of its entire income; and, considering this fact, the cut in the price of ready print made by the American Press Association is fully 50 per cent below the price charged by the Western Newspaper Union, and far below its cost of production.

(2) In July, 1910, it organized a bureau of foreign advertising whereby it solicits and obtains foreign (meaning businesses at a distance from the place

of publication as distinguished from local firms) advertising for country newspapers, and under the guise of a large commission divides the proceeds thereof with them in a certain proportion; and then it began and still continues to circularize the customers of the Western Newspaper Union, not only setting out the advantages of this bureau but unfairly criticizing and abusing said Union's method with reference to advertising, and advising said customers that it had undertaken this scheme for the benefit of the country press at a loss of more than $33,000 to itself.

(3) It has for many years published as a house organ a weekly paper called the American Press. This paper it circulates among all the country newspapers in the States and Territories. From the date of the Newspaper Union's refusal to sell its plate business to the association it has prosecuted, through this organ and by correspondence, a campaign of abuse and misrepresentation as to the Union's business and business methods for the purpose of taking from it its customers.

(4) It maintained for many years in different cities of the United States houses known under other names and understood by newspapers generally to be independent concerns. Its plan of operation was that if it did not desire to sell to a customer at a certain price, or if it lost a customer by reason of the prices it was charging, it would have one of these houses procure the business at such price as might be necessary to obtain it.

It is charged that these acts were and are being done for the purpose especially of driving the Western Newspaper Union out of the plate business and of acquiring a monopoly therein.

By an investigation of these several accusations, petitioner has ascertained that they are founded on fact, and that the Western Newspaper Union and the American Press Association have each previously assisted in destroying mutual competition, and that for some time past they have been and are now endeavoring by the unfair trade methods above described, under the guise of business competition, to completely destroy each other's business, which efforts are highly successful; and if they be not restrained from continuing their unlawful practices one or the other will inevitably be forced out of business, the now remaining substantial competition destroyed, and practically the entire interstate trade and commerce in plate service and ready-print matter and the gathering and disseminating of news and general matter for the country press as aforesaid will be monopolized by the survivor. As the Western Newspaper Union has assets to the value of $6,500,000 and the American Press Association's assets are only about $1,600,000 in value, it is quite probable that the latter will be the one to succumb, leaving the Western Newspaper Union in control of the entire field.

VII.

RESTRAINT OF INTERSTATE COMMERCE IN DISSEMINATING INFORMATION.

The Western Newspaper Union and its allied companies and the American Press Association are great gatherers and purveyors of news and general miscellaneous reading matter. They furnish a large amount of current reading matter for a very large portion of the American people, and especially those who live in the rural districts and do not have ready access to other character of current literature than the weekly country papers. The influence, therefore, which is exerted upon the thoughts and sentiments of the people by these publishing companies can not be estimated.

While the consolidation of the business of these two rival concerns would seriously restrain interstate trade and commerce, in that the consolidated company would have it in its power to exact unreasonable prices from its customers for plate and ready-print matter, yet that is not the most serious injury to the public that would result from such a combination. If all plate and ready-print matter were supplied by one concern, then the news thus distributed and the discussions of economic and other important questions thus supplied would all be designed to mold the sentiments of the readers to one particular view, and that presentation of diverse views and full and free discussion of important questions from different standpoints which is essential to their proper understanding and hence necessary to the best public interests would be prevented. In fact, it appears in the negotiations had between the officers of the Central-West Publishing Co. and the American Press Association, looking to their consolidation, that the expectation was that in view of the great power thus acquired in disseminating information the united property could be disposed of at

great profit to those interested in instilling certain economic ideas in the minds of the public, and that it was the design that such a disposition of it should be made. This circulation from week to week of information and of articles dealing with questions of public importance is of itself interstate commerce, and for one concern to acquire the power to distribute all of such information and to deceive the public by its perversion is itself a serious and substantial restraint upon and a monopolizing of interstate trade and commerce. Such a restraint and monopoly will result unless defendants be restrained from carrying on their warfare against each other as above described.

This suit is brought without any intention to injure the legitimate business of either of defendants and without attempting to ascertain or declare the relative character and value of the service rendered by the respective defendants to their customers. The sole concern of the United States is to prevent the destruction or a substantial crippling of the competition in the interstate trade and commerce above described and the consequent restraint or monopolization of such trade and commerce, and to continue for the publishers of the country papers the privilege, not only of negotiating with at least two concerns as to prices and terms for their supplies of plate and ready-print matter, but also of exercising a choice as to the reading matter which they will buy and circulate among their patrons.

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[Here follows prayer.]

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JAMES H. WILKERSON,
United States Attorney for the Northern District of Illinois.
GEORGE W. WICKERSHAM,
Attorney General.
JAMES A. FOWLER,
Assistant to the Attorney General.
WILLIAM T. CHANTLAND,
Special Assistant to the Attorney General.

* * * * * * *

The answers of the defendants filed each admits that the industry is correctly described in the Government's petition, and admits the importance and influence of said industry upon the readers and thought of the people of the United States. The separate answer of each denies that the illegal acts charged by the Government were done, or, if done, that they were done with the purpose or intent charged by the Government. The answer of each group of defendants asserts and alleges that its charges made against the other are entirely true and correct. The defendants, Western Newspaper Union and Central-West Publishing Co., admit the consolidations charged, but say they were legitimate purchases; "that the capital stock of each corporation acquired was transferred to the Central-West Publishing Co., while their properties and businesses were taken over by the working corporation, the Western Newspaper Union; that such acquisitions were made by direct purchase of the assets and not by combination or with any purpose to restrain trade between the States." Each defendant corporation admits that the two named corporations, to wit, the Western Newspaper Union and American Press Association, together control the great majority of the two competing industries described, to wit, that of furnishing ready-print and stereotype-plate service to the country press of the United States.

The defendant, American Press Association, in its answer alleges that numerous acts "were committed against the American Press Association with the intent and purpose of compelling said American Press Association and its officers and directors to consent to a combination or consolidation of said company with the Western Newspaper Union."

* * * * * * *

On said petition and answers the United States procured the entering of the following decree:

In the District Court of the United States for the Northern District of Illinois. United States of America, petitioner, *v.* Central-West Publishing Co., Western Newspaper Union, American Press Association et al., defendants. No. 30888. Decree.

This cause coming on for hearing on this 31 day of August, A. D. 1912, before the Hon. K. M. Landis, district judge of this court, and the petitioner having appeared by its district attorney, James H. Wilkerson, and by William T.

Chantland, special assistant to the Attorney General, and having moved the court for an injunction in accordance with the prayer of its petition, and it appearing to the court that the allegations of the petition state a cause of action against the defendants under the provisions of the act of July 2, 1890, known as the antitrust act, and that the court has jurisdiction of the persons and the subject matter and that the defendants have each been regularly served with proper process and have filed their answers to the petition, and that the defendants, Central-West Publishing Co., Western Newspaper Union, Western Newspaper Union of New York, George A. Joslyn, John F. Cramer, H. H. Fish, and M. H. McMillen, by their attorneys, J. H. Cowin, John J. Sullivan, and Charles F. Harding, and the defendants, American Press Association, Courtland Smith, W. G. Brogan, and Maurice F. Germond, by their attorney, Charles A. Brodek, have given and do now give in open court their consent to the rendition and entering of the following decree:

Now, therefore, it is ordered, adjudged, and decreed:

I. That the defendants and each of them are found, and they are hereby declared, to have been and to be now engaged in an attempt to monopolize interstate trade and commerce in the business of shipping ready-print papers, matrices, and stereotyped plates, and in the dissemination of news among the several States of the Union, all done and carried on in violation of the act of Congress of July 2, 1890, commonly known as the antitrust act.

II. That the defendants herein and each of them have both separately and in concert committed acts in unfair competition against mutual competitors, and that these defendants and each of them as to said matters be permanently and specifically enjoined and restrained from either directly or indirectly, separately, or in concert, through their agents or employees, from in any manner committing or doing any acts of unfair competition against the competitors of either of these defendants, and that specifically each be permanently enjoined from thus doing or aiding in doing any of the following acts:

(1) From underselling any competing service with the intent or purpose of injuring or destroying a competitor of either of these defendants.

(2) From sending out traveling men for the purpose or with instructions to influence the customers of such competitors of either of these defendants so as to secure the trade of such customers without regard to the price.

(3) From in any manner or for any length of time selling his or its service in either plate, ready print, or matrices, either separately or one service with another, at less than a fair and reasonable price, with the purpose or intent of injuring or destroying the business of any competitor of either of these defendants.

(4) From threatening any customer of a competitor with starting a competing plant unless he patronizes one or the other of these defendants.

(5) From threatening the competitors of either of these defendants that they must either cease competing with defendants or sell out to one or the other of the defendants herein, and from threatening that unless they do their industries will be destroyed by the establishment of near-by plants to actively compete with them or by any other method of unfair competition.

III. That the defendants Western Newspaper Union, Western Newspaper Union of New York, Central-West Publishing Co., George A. Joslyn, John F. Cramer, H. H. Fish, and M. H. McMillen be, and they are hereby, permanently enjoined from either directly or indirectly, by themselves or through their agents or employees, from in any manner continuing to do any acts in unfair competition against the other defendant company in this petition named, to wit, American Press Association, as alleged in divisions six and seven of this petition, and particularly that they be thus enjoined from doing any of the following acts:

(a) From combining or attempting to combine with said defendant American Press Association, either by purchase, stock ownership, or in any other manner.

(b) From holding out inducements, in the way of control or otherwise, to the said American Press Associations, or either of them, or any of their officers, agents, or employees, to indicate or compel a combination between the Western Newspaper Union and its allied concerns and the American Press Association.

(c) From selling any of their product or services at less than a fair and reasonable profit, or at cost, or less than cost, with the purpose or intent of injuring or destroying the interstate trade and commerce of the American Press Association, or of any other competitors.

(d) From in any manner, either directly or indirectly, causing any person or persons or company to purchase stock or become interested in the American

Press Association for the purpose of or with the effect of harassing the said American Press Association by unconscionable or unreasonable demands for an examination of its books or inquiry into its business methods, or the institution of suits with such or like purpose in view.

(e) From in any manner, either directly or indirectly, instructing, causing, or permitting their agents or employees or traveling salesmen throughout the country to circulate reports or to intimate or convey the impression that these defendants will put the American Press Association out of business, or that the American Press Association will not be able to continue in business against the competition of these defendants, or that the American Press Association intends to or is about to combine with the defendants or the defendants with them, or to intimate or convey the impression that unless publishers approached by such salesmen deal with these defendants they will be discriminated against as soon as the American Press Association shall be put out of business by the competition to which it is being subjected.

(f) From sending out traveling men for the purpose or with instructions to influence the customers of the other defendants hereto, so as to secure the trade of such customers without regard to the price.

(g) From in any manner threatening or intimating that they will start competing papers at points where customers of the American Press Association or other competitors refuse to deal with them either in plate or ready-print matter, or both.

(h) From in any manner promising or intimating to any publisher or other person who is a customer of the American Press Association or any other competitor that they will protect such customer against expenses and costs in any suit that may arise by reason of the repudiation of any contract between such competitor and such customer.

(i) From in any manner retaining or permitting the retention by their agents or employees of plate metal or other property belonging to the American Press Association or other competitor of said defendants.

(j) From in any manner offering bonuses or paper or plate service free or at a nominal price with the purpose and intent of inducing or enabling customers of the American Press Association or any other competitor to temporarily change to home-print papers, and thus to assist them in breaking contracts with the said American Press Association with lessened chance of liability for breach of contract; and, furthermore, from offering in connection with such bonus to sell their service at less than the usual price to such customer of such competitor and from offering as a part of such plan the continued use of free plate for the home-print side of the papers of such customer.

(k) From purchasing or acquiring stock in any other corporation, or interest in any other concern, engaged in the manufacture or sale of plate matter or ready prints, and not a party hereto; and from acquiring the property and business of any such company unless application be made to and permission to make such purchase be granted by this court.

(l) From in any manner unfairly criticizing and abusing the method of the said American Press Association with reference to advertising, or from doing any of said things through its weekly house organs, known as the Publishers' Auxiliary and the Western Publisher, and particularly from misrepresenting through said means the business and business methods of the American Press Association, with the intent and for the purpose of taking away the customers of the said American Press Association or otherwise injuring its business.

(m) From in any manner continuing or participating in unfair attacks upon the said American Press Association, with the purpose of injuring or depreciating or destroying the value of the property and securities of the said American Press Association.

(n) From maintaining any auxiliary plant in any cities of the United States apparently independent, but in fact the property of the Western Newspaper Union, or its officers and stockholders, for the purpose and with the intent of making the newspaper trade generally believe such institutions to be independent.

IV. That the defendants, American Press Association, Courtland Smith, W. G. Brogan, and Maurice F. Germond, be perpetually enjoined from in any manner, either personally or as officers, or through their agents or employees, from continuing to commit or assisting in the commission of any acts of unfair competition directed against the defendants, Central-West Publishing Co., Western

Newspaper Union, or any other of these named defendants' competitors, and that they be permanently enjoined particularly from in any manner doing or committing any of the following acts:

(*a*) From selling its adless ready-print or plate service for less than a fair and reasonable price, or at cost, or below cost, with the purpose or intent of injuring the business of these named defendants or other competitors of the said American Press Association.

(*b*) From in any manner unfairly criticizing and abusing the method of the said Western Newspaper Union with reference to advertising through these defendants' circulars relating to its bureau of foreign advertising, or from doing any of said things through its weekly house organ, known as the American Press, and particularly from misrepresenting through said means the business and business methods of the Western Newspaper Union, with the intent and for the purpose of taking away the customers of the said Western Newspaper Union or otherwise injuring its business.

(*c*) From in any manner continuing or participating in unfair attacks upon the said Western Newspaper Union with the purpose of injuring or depreciating or destroying the value of the property and securities of the said Western Newspaper Union.

(*d*) From maintaining any auxiliary plant in any cities of the United States apparently independent but in fact the property of the American Press Association, or its officers and stockholders, for the purpose and with the intent of making the newspaper trade generally believe such institutions to be independent.

(*e*) From sending out traveling men for the purpose or with instructions to influence the customers of the other defendants hereto, so as to secure the trade of such customers, without regard to the price.

(*f*) From in any manner retaining or permitting the retention by their agents or employees of plate metal or other property belonging to the Western Newspaper Union, or other competitor of said defendants.

(*g*) From in any manner offering bonuses of paper or plate service, free or at a nominal price, with the purpose and intent of inducing or enabling customers of the Western Newspaper Union or any other competitor to temporarily change to home-print papers and thus to assist them in breaking contracts with the said Western Newspaper Union with lessened chances of liability for breach of contract; and, furthermore, from offering in connection with such bonus to sell their service at less than the usual price to such customer of such competitor, and from offering as a part of such plan the continued use of free plate for the home-print side of the papers of such customer.

(*h*) From purchasing or acquiring stock in any other corporation, or interest in any other concern engaged in the manufacture or sale of plate matter or ready prints and not a party hereto; and from acquiring the property and business of any such company, unless application be made to and permission to make such purchase be granted by this court.

V. That each of the defendants named in this petition be specifically and permanently enjoined and restrained from combining or joining in any acts—

(*a*) Of unfair competition, either against another or against any mutual competitor;

(*b*) Looking toward a combination between any of these defendants;

(*c*) Any acts done with the intent or purpose of driving out of the industries in which they are now engaged of either of these defendants, or of any of their competitors;

And as to each of the above acts defendants, and each of them, and their officers and agents, are enjoined from doing them, either separately or in concert or conjunction with either of the other defendants.

It is further ordered that the defendants, Western Newspaper Union and the American Press Association, each pay one-half the cost of this suit, to be taxed.

When in this decree the American Press Association is mentioned, reference is had to both the American Press Association organized under the laws of New York and the American Press Association organized under the laws of West Virginia, or if such portion of the decree is not appropriate to both, the one is intended to which it is appropriate.

KENESAW M. LANDIS, *Judge.*

A Crime Against the Country Press.

FURTHER FACTS AND CONFESSIONS SHOWING HOW THE WESTERN NEWSPAPER UNION DESTROYED THE BUSINESS OF THE PUBLISHERS NEWSPAPER UNION, OF LINCOLN, NEBR., AND OTHER HOUSES.

George S. Foxworthy, who represented the Ready Print Trust in the destruction of the Central Newspaper Union, of Davenport, Iowa; the Country Publishers Co., of Omaha; the York Newspaper Union, of York, Nebr.; and the fight on the present Publishers Newspaper Union, of Kansas City, says all testimony taken before the House Judiciary Committee is true, and there is no use denying it.

The North Bros., of Lincoln, Nebr., tell of negotiations and war made on the Publishers Newspaper Union, of Lincoln; of false representations to justify cut rates made to customers of the independent house, and of the raise of rates as soon as the independent house was put out of business. They also tell of Julian's connection with the deal.

Sworn statement of W. L. Witmer, president of the Publishers Newspaper Union, of what was told him on April 9, 1913, by men connected with the war on independent ready-print houses. In the Cash Register and Bath Tub cases men were sentenced to the penitentiary for doing what was done against the independent ready-print houses.

REPORT ON TRIP BY W. L. WITMER TO LINCOLN, NEBR., APRIL 9, 1913.

Trip was made to get information with reference to the breaking up and final destruction of business of the Publishers Newspaper Union Co., of Lincoln, Nebr., at that time owned jointly by the North Printing Co., of Lincoln, Nebr., and the Publishers Newspaper Union Co., of Kansas City, Mo.

Interview with Jacob, Arthur, and Sam North, in the office of the North Printing Co., which began at 10 o'clock a. m. on April 9, 1913:

After reception and usual courtesies the Messrs. North invited me to take a chair back of the counter. Jacob North's first question was "What in the world are you doing up here? We thought you were down and out long ago—are you pushing your ready-print business? We thought you had given it up long ago." I replied that I had not, and that I was in their office to get full particulars of how and why they had closed out the business of the Publishers Newspaper Union Co.; that I was getting together all information and evidence possible to use in the investigation of the Western Newspaper Union Co. before Congress; and, further, that I believed there was sufficient evidence to warrant criminal action against the Western Newspaper Union Co., and others in the trust and their agents who were parties to the breaking up of the business of the various independent houses, including the Publishers Newspaper Union Co.'s business at Lincoln, Nebr., and that I wanted a full and honest statement from them as to who had negotiated the deal and bought them out for the Western Newspaper Union Co. after the Western Newspaper Union Co. had destroyed and taken the Publishers Newspaper Union Co.'s list from us by going into the field and cutting prices to our patrons.

At first all three of the Norths hesitated—all said that they had first closed out because they were not making money—then Sam North started to tell a story about George S. Foxworthy's connection with the Western Newspaper Union Co. and what Foxworthy had said, etc. He then changed his mind and said he would not finish because he did not want to compromise Mr. Foxworthy.

Jacob, Sam, and Arthur North all said that they did not go to the Western Newspaper Union Co., but that Mr. George A. Joslyn, president of the Western Newspaper Union Co., had written to them some days after Sam North had met Mr. Joslyn on the street in Omaha, Nebr., and wanted to buy the business, and asked them to call at the Western Newspaper Union Co. office in Lincoln and see Mr. Julian, who was then manager of the Western Newspaper Union Co. at Lincoln. Jacob and Sam North both said that they did not answer Mr. Joslyn's letter, nor go to see Mr. Julian, but that three or four days after Mr. Joslyn's letter came Mr. Julian telephoned to their office and wanted one of them to come over and see him. This they refused to do, saying that if Mr. Julian wanted to see them he would have come to their office; that Mr. Julian then came to their office, and made a deal by which the Western Newspaper Union Co. took over the business of the Publishers' Newspaper Union Co. The arrange-

ment made was that the Western Newspaper Union Co. should pay the North Printing Co. a certain price for print paper the Publishers' Newspaper Union Co. had on hand at that time, the price for the paper agreed upon being sufficiently high to reimburse the North Printing Co. for all they had invested in the building up of their interest in the Publishers' Newspaper Union Co.; that after Mr. Julian had made the deal and paid them the money they notified the customers that still remained after the cut-price campaign made by the Western Newspaper Union Co. that they, the Publishers' Newspaper Union Co., were going to stop publishing ready prints, and that they should go to whoever they pleased, and get the best price they could.

Both Jacob and Sam North said that of course there was nothing for the publishers to do but to go to the Western Newspaper Union Co., and at the old prices, as the Western Newspaper Union Co. had at once raised their prices to the country editors to the point they were before the Publishers' Newspaper Union Co. came into the Lincoln field.

The Norths said that Mr. Julian had made several trips to their office before a deal was finally closed and money paid by the Western Newspaper Union Co. for the Publishers' Newspaper Union Co.'s business.

The Norths said they could show by their books just how much money they received from the Western Newspaper Union Co. for the business of the Publishers' Newspaper Union Co., and that they would tell all about it if they were subpœnaed by the Government.

HISTORY OF THE ESTABLISHMENT OF THE PUBLISHERS' NEWSPAPER UNION CO.'S BUSINESS IN LINCOLN, NEBR., AS RELATED BY THE NORTHS.

Within a very reasonable time from the date of starting, the business was on a self-sustaining and paying basis, having on the list 90 weekly papers, all of which were well pleased, and remained firmly until the Western Newspaper Union Co. put four traveling men in the field and cut prices about 40 per cent, giving publishers many different reasons why they did and could make the reduction, such as "improved machinery," "lower cost of white paper," etc., all of which advantages they were giving to the users of patent insides, and that they were not making a fight on the Publishers' Newspaper Union Co.; that the Publishers' Newspaper Union Co. were unable to make the low prices they were, and that their prices would stand with the publishers whether the Publishers' Newspaper Union Co. was in business or not.

Under these false statements and pretenses the Western Newspaper Union Co. took almost our entire list within four weeks, after which time they came to buy the Publishers' Newspaper Union Co., and did so by paying enough for the paper they had on hand to reimburse the Norths for what they had invested in the Publishers' Newspaper Union Co.'s business up to that time.

JACOB, ARTHUR, AND SAM NORTH'S STATEMENT ABOUT BION COLE'S CONDUCT THE MORNING HE LEARNED ABOUT THE WESTERN NEWSPAPER UNION CO.'S ATTACK UPON OUR LIST IN LINCOLN, NEBR.

(Bion Cole was manager for the Publishers' Newspaper Union Co.)

They said that notwithstanding the fact that it was very serious in a money loss, it was funny to see him, and how he acted the next morning after the Western Newspaper Union Co. started their men out, and cut the prices in that territory.

The Norths said that on the Saturday night before the Western Newspaper Union Co. made the attack that they had a conference in their office—the three Norths and Bion Cole being present—that they all felt greatly elated over the fact that our list was then on a paying basis, there being about 90 papers on the list, which represented a valuation of at least $28,800, and were greatly pleased because the list had been built up within the time set, and within the estimated cost—that all parties left the meeting feeling as well pleased as any set of men could feel over success. That on the next Monday morning Sam North came to the office and found Bion Cole there, looking and feeling very blue. Sam North asked what was the matter. He said, "Well the Western Newspaper Union Co. has started a fight on us that will ruin our business." That the Western Newspaper Union Co. had cut prices to everybody, and by this plan would fool our customers into believing that they were making an honest reduction in prices, a cut that they said would remain in force whether we were in the field or not, and that we could not hold our business

against them, that we would not convince our customers that the cut price was made only to drive us out of business. This proved to be true; our customers left us for these cut prices, and were at once raised back to what they were paying before we entered the field, after they bought the Norths off and the Publishers' Newspaper Union Co. was closed up.

Immediately after they bought the Norths's interest in the Publishers' Newspaper Union Co. the Western Newspaper Union Co. raised the price of ready prints, in the territory affected, up to the old price, and in some cases higher than they were before the publishers quit them to patronize the Publishers' Newspaper Union Co.

Jacob North and Sam North both said that they did not lose any money on account of the Publishers' Newspaper Union Co.; while the Publishers' Union Co., of Kansas City, Mo., that owned half of the Publishers' Newspaper Union Co., of Lincoln, with the North Bros., of Lincoln, who owned the other half, lost all that they had invested with the Norths in the Publishers' Newspaper Union Co.'s business of Lincoln, Nebr.

INTERVIEW WITH MR. E. W. JULIAN AT THE LINCOLN HOTEL AT 2.10 P. M., APRIL 9, 1913.

Mr. J. A. Calvin, manager of the Western Newspaper Union Co., of Kansas City, Mo., had told D. W. Witmer that Mr. Julian was not manager of the Western Newspaper Union Co. at Oklahoma City. This was incorrect information about Mr. Julian, for he was manager of the Western Newspaper Union Co. at Oklahoma City, Okla.

During an interview, which lasted about one hour, Mr. Julian declared many times that he knew nothing about the deal made with the Norths with a view of closing the Publishers' Newspaper Union Co. of Lincoln, Nebr. That he had had nothing whatever to do with it; that he had no knowledge of price cutting by the Western Newspaper Union Co.; that he had not seen or talked with the Norths about the Publishers' Newspaper Union Co.; that he had not negotiated the deal as reported by the Norths; that he had not paid the cash, as the Norths reported he had; that he was at that time in the employ of the Western Newspaper Union Co. at Lincoln, Nebr., and was going to remain true to them.

INTERVIEW WITH MR. GEORGE S. FOXWORTHY, PRESENT MANAGER OF THE WESTERN NEWSPAPER UNION CO. OF LINCOLN, NEBR., FROM 3.30 P. M. UNTIL 9 P. M., APRIL 9, 1913.

I told Mr. Foxworthy I called to see him to get information about his connection with the fight made against the Publishers' Newspaper Union Co., of Kansas City, Mo., and Lincoln, Nebr., and the Country Publishers' Co., of Omaha, and the Central Newspaper Union Co., of Davenport, Iowa. He laughed and said, "Yes; I know all about it. I have the evidence taken before the Judiciary Committee in Washington, bound in leather and gold, hanging in my library at home labeled 'My criminal record.'" I told him he seemed to take the whole matter as a joke. He said he thought it was. I told him that he should not take it that way; that it was too serious a matter; that the National Cash Register people and their managers and agents who had crushed out smaller concerns had been convicted and sentenced to the penetentiary for their misconduct, and that the same was true of the Bath Tub Trust. I told him that he could help us, and asked him to do it. He wanted to know if by doing so he would be relieved from blame. I told him I did not know as to that, as I had no authority in the matter. Then he leaned back in his chair and said, "Well, I will not go back on Fish and Julian, they are my friends, and if criminal action is brought and they have to go to the penetentiary I will go, too."

Mr. Foxworthy said that all the evidence introduced before the committee at Washington was true, and there was no use denying it. Mr. Foxworthy said that he knew at the time he was employed by the Davenport Newspaper Union Co. that he was going to a house that was started for the purpose of breaking up the Central Newspaper Union, the Country Publishers Co., and the Publishers Newspaper Union, all independent ready-print houses in the field, and that he certainly did his best to take from them the patrons of the independent houses. He said that the published contracts put before the committee showed to what length they went. Mr. Foxworthy told of an incident that occurred

when Mr. Tim E. Sedgwick, of York, Nebr., was put out of business, as follows:

"A severe fight was made against Mr. Sedgwick for years, although he was partly protected through a contract with the Chicago Newspaper Union until after the Western Newspaper Union Co. bought the Chicago Newspaper Union Co. Mr. Sedgwick's list was reduced until his list lost money for him, then the Western Newspaper Union Co. bought him out, and he had to discontinue selling ready prints." Mr. Foxworthy said that owing to personal matters between him and Mr. Sedgwick he took special delight rubbing it into Sedgwick, which he said was done about as follows: "When Tim Sedgwick signed up, and was put out of business by the trust, I was one of the three men at the table—Sedgwick, myself, and the third man, whose name I will not mention. When the contract had been drawn up, and ready for signing, I took my fountain pen out of my pocket and handed it to Mr. Sedgwick, saying, 'Here, Mr. Sedgwick, sign with this pen'; looking him in the eyes all the time. He took my pen, signed the contract with it, and handed it back. Well, it was like a man signing his own death warrant, and my personal grudge had been satisfied. Sedgwick knew what I meant, for he colored up. I had the satisfaction of being one of three men to see him put out of business by the trust."

Mr. Foxworthy said that he was sorry he had to make such a hard fight on Mr. M. H. Redfield, because he liked him too well personally, and that the same feeling existed toward me, but that he had been hired by the trust to make a fight on the independent ready-print houses, and "I did my best in helping to break them up."

Mr. Foxworthy also said he had no use for E. A. Hoover, alias A. E. Hutchings; that he knew him to be a low-down sneak, and never wanted to see him again. Said that he knew when he went to work for the Davenport Newspaper Union Co. that it was a trust guerilla house; that at no time had he any use for this man Hoover-Hutchings who employed him.

UNITED STATES OF AMERICA,
STATE OF KANSAS, *Wyandotte County, ss:*

W. L. Witmer, being first duly sworn, deposes and says that he believes the foregoing statements are true to the best of his belief and knowledge.

W. L. WITMER.

Subscribed in my presence, and sworn to before me this 7th day of May, 1913.

[SEAL.] J. M. WALKER,
Notary Public.

My commission expires July 30, 1916.

COUNTRY PRESS NOT FREE.

No other line of business has grown into a monopoly surrounded by more confusion as to the true nature of the plan under which it is paraded to its customers. The literature of the business is conspicuous in proclaiming "co-operative lists," "cooperative newspapers," etc. This terminology was given plausibility by the fact that by setting the type once the ready-print side of a number of papers could be produced at the same cost as one, plus the white paper and presswork, and by making bulk contracts for advertising the overhead cost and traveling expenses were kept down, as well as the cost of imposing the type for the advertisements. But the ready-print house arbitrarily fixed the price per quire to be charged the publisher, thus absorbing the benefits of cooperation, and at the same time reserved the right to occupy as much space for advertising as the amount of business that could be written demanded. So the trust got all the money for the advertising and fixed the price per quire for the printed paper containing the advertisements. It should be remembered that the price per quire paid a living profit, and the advertising, amounting to $2.50 to $3.50 for each paper, was added to this profit.

When the ready-print idea started it was a labor saver to the country printer and enabled him to produce a better paper, but as an economic proposition it has turned out to be a trust builder in which the benefits of so-called cooperation have created a dangerous one-man power over the avenues of public intelligence.

Efforts have been made to establish houses on a basis of division of advertising receipts with the publisher; also to enable editorial association to have

control of the editorial department; but in every instance the trust has been aroused to fury, and by rate cutting, espionage, and guerilla warfare the growth of the houses that offered such reforms has been greatly hampered or destroyed.

As far back as 1890 the large ready-print houses combined together on rates to be charged the publisher and created a fight fund as necessity demanded to keep out independent competition. They could charge their own customers any price that would hold them, and rates have never been uniform.

The Western Newspaper Union, starting at Des Moines, Iowa, introduced a system of State lists, and in a few years had houses at Omaha, Detroit, Dallas, and elsewhere.

At the same time the Chicago Newspaper Union and the Kellogg Newspaper Co. extended their houses to different parts of the country, all under the protection of written so-called fence-rate agreements to protect each other, and these houses had conference committees which met periodically to adjust occasional differences which arose over a paper changing from one house to another through misunderstandings of their status on the other's lists. So carefully did each of the big houses watch its customers, that rate wars were often threatened, but the cost of such encounters was sufficient to keep them from breaking out except at rare intervals and under extraordinary circumstances. Finally the Western Newspaper Union passed under the control of one company that proceed to buy out the Kellogg Newspaper Co., a little later the Chicago Newspaper Union, then the Atlantic Coast List, and a few independent plants, one of which was at York, Nebr. It is doubtfull if there is a more complete commercial monopoly in the country than this trust.

It is true the American Press Association was forced into the ready-print business in New York, but the testimony of its general manager, given before the committee of the House, shows in effect that it was a "war measure" to protect its plate business. Since the Department of Justice brought an injunction in the Federal court at Chicago, which resulted in an order against the Western Newspaper Union and the American Press Association to prevent them from cutting rates on plates below $1 per page, the American Press Association has gradually lopped off its ready-print customers, turning them over to the Western Newspaper Union, or forcing them to use plates. "Co-operation" thus became an instrumentality for economic oppression, which is against the law of the land.

But there is another aspect to this matter which strikes at the foundation of republican institutions. If it is against the law to oppress by monopoly in the Standard Oil, Tobacco, and Sugar Trusts, which sell commodities only, what is to be said of a trust which, by combination and restraint of trade, has monopolized one of the avenues of public intelligence?

There is one general editor of the so-called cooperative ready print, paid by the trust, and under its orders. In each State there is an editor who prepares State news and matters of local interest.

The general editor and State editors are mere automatons. They are hired men, unlike the editors of the home side of the papers. They get their orders from the headquarters of the trust, and when an article is prepared by the general editor it goes on the schedule for publication in every one of thousands of papers in practically every State of the Union.

This Ready-Print Trust has been known to make big contracts with political committees and the Canadian Government, and is constantly looking for business from publicity bureaus of one kind and another. Thus the country press has been commercialized, while, by a system of monopolistic prices and rhetorical legerdemain as to "advertising on the cooperative side," it has reduced the country printing office to a dependency, until from 75 to 85 per cent of them are under mortgage. In the prosperous States of Kansas, Nebraska, and Iowa these percentages hold good. This, then, is the net result of this so-called cooperative system. Under this system how can the country press be free to serve the public and be a healthful influence in the body politic?

This country's well-being depends upon the home. The country paper is the home paper, and one side of thousands of them are in control of a trust that has power to say what shall go on the ready-print side.

We spend hundreds of millions every year to educate our children in the public and private schools to make good citizens. The freedom of the press is a cardinal American right that was handed down to us by the fathers. Thomas Jefferson said, "Error can do no wrong so long as truth is free to combat it." The Ready-Print Trust is a double menace—economic and ethical.

The last Congress passed a law providing for the registration of the names of the owners of newspapers. This was done to enable the public to know the influences that surround the sources of newspaper information, and particularly the editorial comment; are they mercenary or are they unselfish and public-spirited?

The Ready-Print Trust is purely commercial—a gigantic machine to make money—and has unbridled license to exploit the people. The prodigious power of this monopoly may be conceived by the following showing:

Atlanta, Ga., sends into the State and other States 160 papers with 600 subscribers each, or 96,000 families of 5 each, a total of 480,000 who are influenced by these papers.

Baltimore, Md., sends into the State and other States 112 papers with 600 subscribers each, or 67,200 families of 5 each, a total of 336,000 who are influenced by these papers.

Birmingham, Ala., sends into the State and other States 78 papers with 600 subscribers each, or 46,800 families of 5 each, a total of 234,000 who are influenced by these papers.

Boston, Mass., sends into the State and other States 72 papers with 600 subscribers each, or 43,200 families of 5 each, a total of 216,000 who are influenced by these papers.

Charlotte, S. C., sends into the State and other States 100 papers with 600 subscribers each, or 60,000 families of 5 each, a total of 300,000 readers who are influenced by these papers.

Chicago, Ill., sends into the State and other States 566 papers with 600 subscribers each, or 339,600 families of 5 each, a total of 1,698,000 readers who are influenced by these papers.

Cincinnati and Cleveland, Ohio, send into the State and other States 391 papers with 600 subscribers each, or 234,600 families of 5 each, a total of 1,173,000 readers who are influenced by these papers.

Dallas and Houston, Tex., send into the State and other States 296 papers with 600 subscribers each, or 17,760 families of 5 each, a total of 888,000 readers who are influenced by these papers.

Des Moines and Sioux City, Iowa, send into the State and other States 636 papers with 600 subscribers each, or 381,600 families of 5 each, a total of 1,908,000 readers who are influenced by these papers.

Detroit, Mich., sends into the State and other States 201 papers with 600 subscribers each, or 120,600 families of 5 each, a total of 603,000 readers who are influenced by these papers.

Fargo, N. Dak., sends into the State and other States 212 papers with 600 subscribers each, or 127,200 families of 5 each, a total of 736,000 readers who are influenced by these papers.

Fort Wayne and Indianapolis, Ind., send into the State and other States 260 papers with 600 subscribers each, or 156,000 families of 5 each, a total of 780,000 readers who are influenced by these papers.

Kansas City and St. Louis, Mo., send into the State and other States 744 papers, with 600 subscribers each, or 446,400 families of 5 each, a total of 2,272,000 readers who are influenced by these papers.

Omaha and Lincoln, Nebr., send into the State and other States 367 papers, with 600 subscribers each, or 220,200 families of 5 each, a total of 1,101,000 readers who are influenced by these papers.

Little Rock, Ark., sends into the State and other States 166 papers, with 600 subscribers each, or 99,600 families of 5 each, a total of 498,000 readers who are influenced by these papers.

Memphis, Tenn., sends into the State and other States 269 papers, with 600 subscribers each, or 161,400 families of 5 each, a total of 807,000 readers who are influenced by these papers.

Milwaukee, Wis., sends into the State and other States 232 papers, with 600 subscribers each, or 139,200 families of 5 each, a total of 696,000 readers who are influenced by these papers.

Minneapolis, Minn., sends into the State and other States 270 papers, with 600 subscribers each, or 162,000 families of 5 each, a total of 810,000 readers who are influenced by these papers.

New York, N. Y., sends into the State and other States 197 papers, with 600 subscribers each, or 118,200 families of 5 each, a total of 591,000 readers who are influenced by these papers.

Oklahoma City, Okla., sends into the State and other States 303 papers, with 600 subscribers each, or 181,800 families of 5 each, a total of 909,000 readers who are influenced by these papers.

Pittsburgh, Pa., sends into the State and other States 102 papers, with 600 subscribers each, or 61,200 families of 5 each, a total of 306,000 readers who are influenced by these papers.

St. Paul, Minn., sends into the State and other States 204 papers, with 600 subscribers each, or 122,400 families of 5 each, a total of 612,000 readers who are influenced by these papers.

Salt Lake City, Utah, sends into the State and other States 92 papers, with 600 subscribers each, or 55,200 families of 5 each, a total of 276,000 readers who are influenced by these papers.

Sioux Falls, S. Dak., sends into the State and other States 132 papers, with 600 subscribers each, or 79,200 families of 5 each, a total of 396,000 readers who are influenced by these papers.

Wichita, Kans., sends into the State and other States 266 papers, with 600 subscribers each, or 159,600 families of 5 each, a total of 798,000 readers who are influenced by these papers, making a grand total in the United States of 6,654 papers, with 600 subscribers each, or 3,992,400 families of 5 each, a total of 19,962,000 who are influenced by these papers, dictated to, and directed by the Ready-print Trust.

STATEMENT OF WILLARD V. KING, PRESIDENT COLUMBIA KNICKERBOCKER TRUST CO., NEW YORK.

The CHAIRMAN. Please give your name and address, Mr. King.

Mr. KING. Willard V. King, president of the Columbia Knickerbocker Trust Co., New York City.

Mr. MCCOY. Will you just proceed in your own way, Mr. King?

Mr. KING. I imagined, Judge Clayton, that your committee would want to ask questions, and I had not prepared anything in the way of a statement, but I may say this: My company is, perhaps, unique in a way, not being controlled by, but being independent of any of the moneyed interests, as they are generally known in the city. We advertise that fact. Some people have thought we brag of it a little too much. But I always regard it as important to gain the confidence of people who did not care to train with the Morgan group or the Kuhn-Loeb or any other group, and I knew that any business that was brought to us, or any loans that were applied for by our customers, would be considered entirely on their merits and without regard to any instructions we might get from anyone outside. So it is fairly well known.

Mr. MCCOY. Will you state, Mr. King, in what respect you think the provisions of any of these bills, especially the interlocking directorate bills, so far as they affect banks, would work injury in your particular case?

Mr. KING. A provision forbidding any director of a Federal reserve bank to sit on a board of a trust company, whether it was in the Federal reserve system or out of it, would work my company a very serious injury. We have on our board Mr. A. B. Hepburn, chairman of the board of the Chase National Bank, and Samuel G. Bayne, president of the Seaboard National Bank. They are both men whose banks have gone into the Federal reserve system, both men of most valuable information and of impartial point of view. I rely a great deal on them for the information we need in the conduct of our business. The worst crime, I suppose, for the head of a bank, is not to know about things until after they have

happened. They have got to know, to keep a bank prosperous and sound, about what is happening. They have got to know about who has overextended his credit in some other bank before he applies and gets more credit.

Mr. McCoy. Will you state, Mr. King, in what respect the banking laws of New York, under which your trust company is organized, undertakes to protect the public and others against actions of directors, and what penalties there are?

Mr. King. They provide that no director shall make any profit from any loan or any investment that he offers to the bank or trust company, supplementing the common-law provisions there and making it a crime for them to do so. That precludes any of our directors from using our resources for their own benefit, or in favor of any railroads or public-service corporations or any other matter in which they may be interested. Then the common law provides, of course, while this is not a criminal provision, they must declare their interest in any of these matters before they bring them up for discussion, and refrain from voting on them. A director is prevented from taking any part in any transaction from which he gets a profit, either direct or indirect.

Mr. McCoy. That, of course, prohibits the possibility of their getting any commission for bringing about the making of a loan.

Mr. King. Oh, yes. Now, the law was aimed, not at the large institutions which were being used for the benefit of large corporations. Its history is that it was aimed at the small country banks, where there was only one bank in a town, and where the individuals were entitled to credit, applied for it, and could not get it, and the borrower had to go on the outside to the president, cashier, or director and give him some little emolument on the side in order to get the loan through. That is the history of that legislation. It is drawn so broadly, however, that it covers the whole field, as I have stated to you. It only relates to the directors making profits from their own banks or trust companies, and has nothing to do at all, of course, with other questions before you—of competition or keeping banks open for the benefit of competition for the public. The proposed amendment that I have discussed with Congressman McCoy does not do that. It only reaches the large institutions. It only provides that if a man is director of a bank or trust company of $2,000,000 or more, and also director of another institution of large size, and it is found that he is blocking competition, the Federal reserve board can stop that. That does not guard the customers or stockholders of small institutions against misuse by the directors of those institutions. It would seem to me that either situation, either the original bill or the suggestion I have discussed, would rob the banking institutions of the very class of men they want to get. It disqualifies the keenest minds and the best-informed men from serving as directors. Your institution has got to be prosperous and it has got to be well informed in order to serve the public; and it seems to me that our idea ought to be to strengthen them, and not to cripple them, by giving them the best talent available instead of driving the best talent out of the field.

Mr. McCoy. You are familiar with the efforts of Mr. Stillwell and his inability to finance a certain railroad project. Will you state to the committee what your knowledge is about that matter?

Mr. KING. Arthur Stillwell some years ago started to build the Kansas City, Mexico & Orient Railroad, and stated that he intended to finance it by selling securities direct without the aid of any banking firm at all. He was going to save the bankers' commissions. He did sell a great many of the securities that way, peddling them here and there to people along the line and people that he had known before. He found that very expensive, for the reason that when he wanted to let a contract to build a few miles of road he did not always have the funds in hand to pay his men and pay for the material. From time to time people who had subscribed would back out, change their minds, and the hopes he would have would be thwarted, and he would have contracts which he would have to fulfill without funds in bank to pay for them, and he had to go to the bank and borrow money. It was a very improvident way to construct any enterprise. So that while he designed his road to run from Kansas City down across Kansas to the Pacific coast, when it went into the hands of receivers it ran a scant 700 miles, from Wichita southwestward. It stopped at a point in Texas where it had no connections. It was not earning its operating expenses, because it had no through business, and its local business had not been developed. Something like $40,000,000 of securities were issued by the enterprise and its allied enterprise, and the railroad to-day does not earn operating expenses on the 800 or so miles that are built. I was asked to go on the reorganization committee at the time of the bankruptcy. Mr. Stillwell had announced, as I said, that he was not going to get the aid of any banking house. He also announced that the banks in New York would try to defeat this enterprise, because it was going to hurt the Southern Pacific, the Santa Fe, or some other road. That was always regarded as a joke in New York. The road does not run in such direction and in such a territory that it could affect these roads. No one took that seriously. The result is that the bondholders have an incompleted railroad on their hands and the bonds are worth almost nothing.

Mr. MCCOY. Is it found that the stock or securities of that road are in the hands of people of very small means to any extent?

Mr. KING. Yes; to a very large extent. People who will foster an enterprise like that are almost always people of small means. He would sell one bond to a small man, a druggist, school-teacher, and people of that sort. He sold some very large lots in England later on, because he found he would have to finance his road on a larger scale, and went over and sold something like $10,000,000 to English firms.

Mr. MCCOY. What is found to be the value of that road at the present time?

Mr. KING. The experts vary in their estimates. Its value as a going concern is almost nothing. The bonds are selling for 20 cents on the dollar. The experts say that its physical value is somewhere between $15,000,000 and $24,000,000.

Mr. MCCOY. And it cost $40,000,000?

Mr. KING. Yes; that and the allied interests. The road is now up for foreclosure. The court has fixed a price of $6,000,000 on the entire property. We are trying hard to raise the $6,000,000 to take the road out of the hands of receivers.

Mr. McCoy. Have you any suggestions to make of the proposition of clothing the Federal reserve board with jurisdiction to pass upon alleged abuses of the interlocking directorate situation?

Mr. King. I think it would certainly result in their being badgered by statements that certain individuals had applied to the bank for loans, and somebody on the board or inside, or something else, was blocking them. Those complaints are very ordinary. We have had them again and again. I am afraid that the Federal reserve board, if it had authority to pass upon these matters, would have its hands full. Why don't you provide that directors must di-close their interests in any subject brought up for action of the board? If you think wise, go further and provide a penalty for a director to make any profit through any transaction that he has with his board. The statute in New York which reads that way is too sweeping. It has kept a very great many valuable men off boards. We have a sufficient remedy to-day in the common law. If you buy any security or make any loan to any concern in which a director is interested and should make a loss, you could repudiate the whole thing and sue him for the loss. That is what you want. What you want directors for is to bring you business, give you advice, and aid you by the prestige of their names.

Mr. McCoy. How would you cover a case in which the director of a bank is also a director of another corporation, and the other corporation made a profit on some transaction, or rather the bank suffered a loss on some transaction, between it and the corporation in which he was a director?

Mr. King. If he announces to the board when the matter is under discussion that he is a director in the other corporation and therefore can not vote on the subject, his interest is declared, and the other directors are grown men and ought to pass upon the subject according to their own intelligence.

Mr. McCoy. But in case the deal is between a bank and the director, as an individual, as I understand you, if there is a loss the transaction can be disclaimed and the loss recovered?

Mr. King. Yes.

Mr. McCoy. Would it not be the same in case a man is a director in two corporations, a banking and an industrial corporation, and through a deal between the bank and the industrial corporation a loss was suffered?

Mr. King. If he procured it; if it was done on his advice, you could recover now.

Let me give you an instance. Frederick Eaton, the president of the American Car & Foundry Co., is one of my board. The American Car & Foundry Co. builds a great many steel cars for railroads. If the railroad has not ready cash, very often the American Car & Foundry Co. will take the equipment obligation of the road, secured by lien on the cars instead of cash. It is a wealthy corporation, has a great deal of capital, and they can afford to take these things and hold them. Then the money market gets easy and equipment obligations rise in price, and Mr. Eaton very often sends word to me that they have got several hundred thousand dollars of the equipment obligations of the Erie Railroad that he would like for me to make a bid on. If we have money idle and we would like

to buy some, we make a bid, say, on a 4¾ interest basis. I have bargained that way with Mr. Eaton a number of times. His interest, then, of course, is as president of the American Car & Foundry Co., and he is a very close trader, and I very seldom buy them at a profit. Suppose we did buy at a profit. We would buy on our individual judgment. He would be acting not as a director of my company, but of the American Car & Foundry Co. Why can he not sell these to us? I do not see. It is attractive business, and we would like to get it. If we buy it of him and pay too much for it, it is because we are not properly equipped with officers.

Mr. McCoy. Why should not the American Car & Foundry Co. come in the first instance to the Knickerbocker Trust Co. and deal with it for these certificates?

Mr. King. That is what they do, practically. Mr. Eaton, the president, sends in word. He is a very active executive officer.

Mr. McCoy. He is handling them for the American Car & Foundry Co.?

Mr. King. Yes. Those instances are very frequent, and in every case that I know the director stands very impartial. I find it a very easy thing to keep directors in such shape that they stand impartial. I do not see how you can frame a statute that would not deprive us of a great deal of our business, and business we ought to have and which we ought to get.

Mr. McCoy. Then your suggestion would be no legislation on the question of interlocking directorates in banks and trust companies?

Mr. King. Providing the national banking law or the Federal reserve bank law covers the fact that a director should disclose his interest in any subject under discussion.

Mr. Nelson. Do you not see any evils in the interlocking of all these business concerns, fostered by the same kind of interests, and do you not think they should be met by some kind of legislation?

Mr. King. There have been a number of evils. There is no doubt about that. I have tried again and again to think how you could improve conditions by legislation which would not sweep away what was proper.

Mr. Nelson. But you advise us to do nothing, do you not?

Mr. King. No; I would not quite advise that. I think if you require directors to disclose their interests that you cover the point of a director making profit out of his stockholders. As I said a little while ago, that does not cover the point of permitting and encouraging competition between banks. In the Morgan interests the alleged danger was that people who were entitled to accommodation would go to New York and find so many banks in the control of the Morgan interests that they could not get an accommodation.

Mr. Nelson. Not only banks, but industrial concerns and railroads, all interlocking.

Mr. King. Yes. The banks would all be covered and practically are covered to-day by the common law.

Mr. Nelson. If that is true, why do they escape the common law all the time?

Mr. King. Because people do not avail themselves of their present resources. Stockholders do not regulate their affairs here the way

they do in England. I think we have got to jack ourselves up and insist upon our personal rights and take advantage of the laws we have to-day.

Another trouble is this, after we do bring a suit and you get a director up for malfeasance your jury begins to get sympathetic after a while. First they denounce and then they get sympathetic and let him off on the general idea, "Why punish this man for what everybody else is doing?" After you got a conviction of Charles W. Morse, what happened? A million and a half petitions were signed and sent in for his release. Why? You have an emotional public. They will not study securities or investments. In this very bill where you try to forbid bankers buying all the securities of railroads and public-service corporations your idea is that the banker is going to take all the securities at a low figure and sell them at a profit. People will not buy securities that are not issued through a banking house, as is illustrated by the case I just mentioned of the Orient Railroad. Only a few bought them. You can not raise enough money that way to build any public enterprise to-day. People will not buy securities unless some banker's name is on them.

Mr. NELSON. Do the banks ever secure these investments?

Mr. KING. No; but John Jones says, "Morgan is back of this thing. We know J. P. Morgan, and we know this is all right, we know he has his lawyers, who are expert in these matters," and if it goes wrong he can say, "Well, Morgan's name was on it; it looked pretty good." People will not buy securities to-day unless they are recommended by some bank. They want somebody to blame. That is why these big banking houses sell these securities throughout the world, and especially through this country.

Mr. MORGAN. Is it not true that these banking houses have built up a reputation for integrity, upon which the people rely for their information regarding investments and they are able to market their securities where other people could not do it?

Mr. KING. That is just the point. If a man sells bonds that turn out well, he will have a following anxious to buy anything he wants to float. You can get a man who would worry for weeks over paying $50 for a horse when he needs a horse and had no reason to suspect you at all, and he will put $3,000 in an enterprise he reads of in the papers just because some man's positive statement recommends it.

If you pass a law that Morgan shall not be the director of a public-service corporation board, a bank board, and a railroad board, you are going to make it impossible for those concerns to raise money they need to serve the public, and you are going to make it especially impossible for firms of inferior credit to do so. Take the Missouri Pacific Railroad to-day, a road that is serving an important part of the country. It has got to raise some money. How is it going to raise it? It has got to go to some banking house that will take its securities and say to the public, "We have been through its books and its properties and we have examined the whole situation. These things are good. We will recommend them." If they do that they will sell them; if they do not, the Missouri Pacific will go into the hands of receivers. Why should any firm buy Missouri Pacific securities and say that to the public? They certainly could not afford to do it if they did not stand in some position where they can watch

what the Missouri Pacific is doing, control its business, and say, "You have got to put so much money in your railroad and ballast and provide for future needs." Exactly what Kuhn-Loeb did a few weeks ago for the Chesapeake & Ohio. They furnished money for them on inferior security and sold that security and provided in the deed of trust that the Chesapeake & Ohio had to put a certain amount each year back into its property, out of its earnings.

If your object is to help industries and to help the country develop you have got to make it possible for bankers to serve or these boards.

Mr. NELSON. You said in your opening statement that you had been accused of advertising too much that you were independent of these institutions and groups.

Mr. KING. Yes, sir.

Mr. NELSON. I should infer from what you said that you saw some very great evil in combination.

Mr. KING. Yes, sir.

Mr. NELSON. And that is the evil we are trying to reach.

Mr. KING. Yes, sir. I think that is an evil that is hard to reach by statute.

Mr. NELSON. If we had no interlocking directors and leave the stock ownership as it is, do you believe we would accomplish very much? Are there many people that will be reached by preventing interlocking directors, leaving stock ownership as it is?

Mr. KING. I think you would only prevent some desirable things and open a way to deceit, because a man then would not go on the board, but would have a dummy on the board and would thereby evade responsibility himself. As a matter of fact the way things are now you make them evade responsibility and they do not go on these boards, but a man will put his counsel on the board, or some dummy, and thereby he escapes all responsibility. I have seen that so often, and in a definite case, in a liquidating trust company where that was exactly the case. A man who wanted to loot the company saw that the statutes ran against him and after a while he dropped off the board and put his counsel on. That exempted him from all liability whatever. You would have boards of dummies and you could not put your finger on the responsible man.

That is all I have to say, Mr. Chairman, unless you have something you want to ask me.

The CHAIRMAN. We are very much obliged to you.

(The committee then went into executive session.)

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

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HENRY G. DANFORTH, New York.
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TRUST LEGISLATION.

SERIAL 7, PART 34.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, March 26, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. A motion was adopted at the last meeting of the committee that we hear Mr. Ingersoll this morning for one hour; and that is the business now before the committee. We will be very glad to hear from Mr. Ingersoll.

STATEMENT OF MR. WILLIAM H. INGERSOLL, OF NEW YORK.

Mr. INGERSOLL. I represent Robert H. Ingersoll & Bro., of New York, commonly referred to as the Ingersoll Watch Co. I am very grateful to the gentlemen of the committee for allowing me this opportunity. I have felt that my interest is sincere in showing why this country should adopt the method of getting goods from factories to consumers in the best, most wholesome, and most inexpensive way that there is, and I have desired to come before you and show you some of these specific injuries that the company I

represent is suffering from and show you just how certain practices of the market are operating.

We make an article known as the dollar watch. In the New York Evening Journal of March 12, 1914, is an advertisement—it was in other papers, too, but I picked out this one—and that newspaper has a circulation in the vicinity of Greater New York of over 800,000 copies. It has a tremendous power for spreading any message that anyone wants to publish in it. Now, here is an advertisement of a man named Reiter, and the advertisement says: "Genuine Ingersoll's famous dollar watch, 69 cents. The biggest value you ever saw in your life." Then it goes on with some other articles. The next item I want to refer to is "link cuff buttons, 25 cents each; 5,000 pairs extra heavy gold-filled link buttons, in 12 different styles, as illustrated, values up to $1, special, 25 cents each." I sent a young woman to the store of this man to buy one of those watches, and the experience she had was this: She went to that store; she asked for the dollar watch that was advertised; the man told her that he had two other watches, both of which were better, and which he could sell at the same price. One of those, the affidavit of the young woman states, was the Pathfinder watch and the other was the National Ansonia watch. I also had a set of these cuff buttons purchased at the same time these watches were recommended as being better than the Ingersoll watch. Those watches can be bought from 5 to 15 cents less than they pay for the Ingersoll watch, although they sell them for $1, at the same price, but they make more money than they do on the standard article, which is published everywhere and everybody knows what its price is, what it is, what its general merits are, who made it, who guarantees it, who they go to if they have any trouble with it, and all that sort of thing.

One thing typifies the principle of price standardization in the selling of goods and the other typifies that earlier stage of business when there was no such thing as a standard article, when you went into a grocery store to buy soap and they cut it off of a big bar. You carried it home, but you did not know who made it; if it was good soap you could never get it again, because there was nothing to enable you to identify it; and if it was bad soap there was nothing which enabled you to shun it, because, as I say, you could not identify it. The grocer himself did not know who made it, and he never could give you two batches alike. The system of selling that unknown watch at the same price by decoying buyers there through the method of advertising something that people do know about is kindred to the system that was in existence before what popularly became known as the one-price system of merchandising was adopted.

Now, what happened when the customer got there, aside from the watch situation? This young woman insisted on buying one of these watches, and she finally got it, but for everyone who would get it there would probably be 50 persuaded by the dealer that this other thing was better.

Now, take the cuff buttons, said to be worth up to $1—from 50 cents to $1 the advertisement reads, I think. Those cuff buttons were said to be heavily gold-filled, you understand, and I had them assayed, and here is the assayer's voucher that the gold value is 2

cents per cuff button. They are commonly sold at from 10 to 15 cents a pair to the dealers.

Now, this man who advertised that watch in that way is very anxious that his statements should be believed. If he came out in the newspapers and said, "I am selling dollar cuff buttons for 25 cents," people would say, "That is unreasonable; it can not be done." But when side by side he says, "Here is an Ingersoll watch for 69 cents," they say, "That man certainly has some magic ability to deliver values to the people." Now, the thing that is back of that, it seems to me, is this: He is trading on another man's name. I think nobody would object to him selling any watches for which his guaranty and his name was sufficient to cause people to buy them. If he had said, "Reiter's watch for 69 cents," there could not have been any objection. But it was because he used another man's name that he was able to draw a crowd there. He did draw a good crowd, and he does it day after day.

Mr. CARLIN. What did he have to pay for that Ingersoll watch?

Mr. INGERSOLL. Sixty-seven and one-half cents is the lowest price that they can be bought for by the retailers. The wholesale jobbers pay 60 cents for the watch. He could not possibly be selling it for any wholesome and natural purpose, because he loses money—about 15 or 20 cents—on every one of them that he sells. However, that is a common thing. I must hurry along on this——

Mr. CARLIN (interposing). You do not manufacture your watches, do you?

Mr. INGERSOLL. No; we do not manufacture them.

Mr. CARLIN. You buy them from a manufacturer?

Mr. INGERSOLL. I did not quite get that question.

Mr. CARLIN. Who makes your watches?

Mr. INGERSOLL. The Waterbury Clock Co.

Mr. CARLIN. And the wholesaler gets your watch at——

Mr. INGERSOLL (interposing). Sixty cents.

Mr. CARLIN. And the consumers get it at $1?

Mr. INGERSOLL. Yes, sir.

There was a statement put in by a Mr. Bloomingdale, who appeared before your committee a short time ago, calling attention to the financial standing of our company and drawing the inference that we were not sufferers from this price-cutting evil. I simply want to say to the members of the committee that the figures which were put into the record were not correct; they were misread. But at those figures the number of watches that we have sold would give us a profit of 3 cents per watch. That is what we would have made at the figures which were somewhat misread—as they were put into the record. It has taken 37,000,000 watches—the sale of 37,000,000 watches—to build up our showing of something a little over $1,000,000, which is about 3 cents per watch. Our profit for inventing—you might say finding a market, placing the goods, and doing all of those things that were necessary to give this vast public of the United States 37,000,000 of them—an implement for keeping track of time—the stuff that their lives are made of—giving a watch to millions that never had a watch before and never could have had a watch, and our profit has been only 3 cents apiece.

Now, I have pointed out this occurrence. This was on One hundred and twenty-fifth Street, in New York. Within a few blocks of

that store are some other dealers selling Ingersoll watches, and I would like to show you the effect of that practice on these people, these eight dealers. I have their signed statements, telling us that their sales have dropped off a total of 53 watches per week, 2,500 watches per year. That is the extent to which this one man's practice has injured us.

Mr. FITZHENRY. I do not recall just what you said, but did this man sell any Ingersoll watches at 69 cents?

Mr. INGERSOLL. He did sell a few; I do not know how many. The young woman that I sent there to buy a watch had great difficulty in getting it. He first offered one, and then he offered her another; but finally, when she insisted on this, he did grudgingly let her have it.

Mr. FITZHENRY. But there were very few of your watches sold at that price?

Mr. INGERSOLL. Yes.

Mr. CARLIN. He had a profit in doing this of 9 cents?

Mr. INGERSOLL. No, indeed; he had a loss of about 15 cents.

Mr. CARLIN. They cost him 60 cents?

Mr. INGERSOLL. No; he is a retailer. It is the wholesaler that buys at 60 cents. This man is a retailer, and the lowest price at which he can buy them is 67½ cents.

Mr. CARLIN. He sold at 69½, so that he had some profit.

Mr. INGERSOLL. Well, I am afraid you would not like to pocket his profit and conduct his business, pay his rent, pay his advertising, pay his clerk hire, lighting and heating, and those things, in operating his business.

Mr. FITZHENRY. Did not that sort of advertising eventually hurt the man who did it instead of you, or fully as much as it did your concern?

Mr. INGERSOLL. I do not suppose it hurt him as much, sir, because a man's reputation and his name are the most sensitive things that he has. You see this man—I do not like to so characterize him—is what I regard as a fakey dealer; he moves from one place to another.

Mr. GRAHAM. And as far as he was concerned it would not be a permanent effect, but it would permanently affect you by disorganizing your price?

Mr. INGERSOLL. Yes. He says, "Ingersoll watches, 69 cents." Now, all the people, not only in his little neighborhood, but all over Greater New York, hundreds and hundreds of thousands of them, see the newspapers carrying that story and that puts in the minds of the public the idea that Ingersoll watches ought to be sold for 69 cents, because here is a man doing it. It sets the idea in their minds that under ordinary circumstances the dealer who wants a dollar for the watch, the honest, legitimate retail merchant, the neighbors of many of you, is extorting an unreasonable profit. Now, that is deception, and it hurts my company, because none of the people who see that will ever be satisfied again to pay the price that they must pay if they are permanently to get those things which we believe—and we have thousands and thousands of testimonials from the public—it is good for them to get.

I have shown what happened, that these dealers in the community have had their business in our goods cut down by the sale of 53

watches per week, and they are going to go out of our goods; they are going to sell out their stock and they will not reorder, and when a man comes to buy Ingersoll watches they are going to do just exactly the thing that this man is doing; that is, say, "Here is something better." Now, they have to do it to live. Men are not going to die, gentlemen, nor go out of business. If you force on them a system of trading that makes them crooked, they have got to be crooked; there is no other way out of it. You can set these things one against the other. It has been pretty well demonstrated that the one-price system of doing business is wholesome and honest.

Think of the publicity feature. What is the greatest corrective of all the wrongs we suffer in public life. It is publicity; is it not? Anything that will bear the light of day or anything that will throw light on the conditions that are going on is the greatest sterilizer of all the rottenness and crookedness that may exist in the business world.

Now, take watches or any other article. I have used watches, because I know more about them and they are in my mind a great deal. But take any article. When a manufacturer is compelled to publish his price to the public and let every man know what the price of that thing is you can see that he has got to buckle down and put that price just as low as he possibly can put it, because if he makes a mistake and sets it higher than he ought to set it he is making an opportunity for some other fellow to come in and set the price lower and take the business along so long as you have competitive conditions.

I would like to jump over to Philadelphia——

Mr. DANFORTH (interposing). Does the company that makes your watch make watches for any other company?

Mr. INGERSOLL. They do not. If there were time, and if it were essential, I would delight to go into the relations of our company with the Waterbury Clock Co. The watch was our ideas; they never had any notion of making watches. Robert Ingersoll, the founder of our company, was going along the street and he saw a little clock in the window one day. He had for years been thinking—he was a little merchant before or quite a sizable merchant, a wholesale and retail merchant—and he always wanted to get something that had a wide public appeal, that was useful, and that was staple. He spied that little clock, and the thought came to him, why can it not be made a little smaller, so it can be put into the pocket and carried as a watch. And he went into the store and bought the thing. He took it around to clock companies and gave them his idea and they said it was impossible. He puzzled over that thing a long while, until he did find a way to compress it into a beautiful little thing like that [indicating]. You can hardly crowd it into your pocket, but that was the first model of the first Ingersoll watch.

Through all the years since then, some 20 years, the watch has been coming down in size, until to-day, as you will see, we have a watch that is quite a convenient and decent little article. Twelve times during this period we have improved the article. In the face of rising cost of almost everything in the world we have delivered to our customers more and more and have maintained the same price.

I do not think there is anyone who could ever claim that there was any exorbitant charge in the price of that article at $1.

Mr. WEBB. What has become of the old Waterbury watch that we used to have as boys?

Mr. INGERSOLL. That is in the graveyard of the price cutters. That watch was sold all over the country by every Tom, Dick, and Harry at any price that the dealer might take a notion to sell it at, and it went into the hands of a receiver because nobody would sell it. It came to be a stench in the nostrils of every decent, self-respecting merchant in the United States. The public was deprived of the privilege of purchasing the Waterbury watch from the time that the thing became so demoralized that nobody would handle it. Now, that is the trend of this whole open-price system.

Before I close I hope to come to an understanding with you gentlemen, because I can see from a reading of some of the records of your hearings that your idea of what we who make these standard brands of goods want is not what we do want. If you will allow me, I would like to tell you something about Philadelphia. We never had any price cutting until this so-called Sanatogen decision, or the decision in the case of Bauer versus O'Donnell, was handed down last May. Theretofore we had been able, by availing ourselves of the patent law, to prevent people from selling our goods at cut prices. In this so-called Sanatogen decision the Supreme Court held that a patent could not be used for the purpose of protecting prices. Since that time we have done our very best to keep people from ruining our reputation and cutting our prices, but, of course, we have no power to do that, or, at least, we are not at all sure that we have any power to enforce what we believe to be decent and proper business methods in the sale of our own products. We can only ask the dealers not to cut the price, and point out to them that if one of them does it others will follow, until finally all of them, as to that article, will be operating without profit. The sale of the goods will then cease, because dealers will not work for nothing, and any public that tries to get anything from anybody for nothing will get what people deserve to get who try to do that thing.

Mr. DYER. Have you had trouble of that character, particularly since that decision was rendered?

Mr. INGERSOLL. Yes, sir; we have had a great deal since then, and it is getting worse every day. At first the dealers were reluctant to go into the fight; but when one dealer does it, how can his competitor afford to keep out of it? If a merchant across the street from you advertises Ingersoll watches at 69 cents, you can not brand yourself as being a high-priced merchant by holding them at $1. You must come down to the reduced price, and as soon as you come down to 69 cents, you lose all interest in the sale of that article, and you run around to find something that you can buy for a little less and sell for the same money. That is just what happens.

Mr. WEBB. Did you have any trouble along this line before the decision of the Supreme Court in the case of Bauer versus O'Donnell?

Mr. INGERSOLL. We had a little bit of trouble 15 years ago, but it was stopped immediately. The entire trade knew that we could enforce our price.

Mr. WEBB. How did it happen, then, that the price cutters consigned the Waterbury watch to their graveyard, if the manufacturers of that watch had the power to protect their price? They had that power then, did they not?

Mr. INGERSOLL. Yes, sir; they did; but I know that you gentlemen want to look at the actual conditions. You are not defining any economic theories, or anything of that sort, but you want to know what is going on. I am trying to present the actual conditions as they existed then and exist now. It is probable that if at that time anybody had devised a system of protecting prices by the aid of the patent law, the Waterbury Clock Co. would have done it; but nobody had tried it. It was not the practice of that day, and the thing went down and out.

Mr. WEBB. Is that the same company that manufactures your watch?

Mr. INGERSOLL. No, sir.

Now, over here in Philadelphia there is one man selling our goods at 59 cents. The name of the concern is I. Press & Co., and they sell our watch at 59 cents. I do not know what they have to pay for them, but presumably they pay 67½ cents, 70 cents, or 72½ cents, because those are our prices. This dealer buys them from a wholesale dealer and not from us.

Mr. NELSON. You would not sell to a retailer, would you?

Mr. INGERSOLL. We do sell to retailers. They can buy them from the wholesalers or from us direct.

Mr. NELSON. Would they pay the same price if they purchased them from the wholesaler?

Mr. INGERSOLL. They would pay the same price to us as to the wholesale dealer.

In Philadelphia there are 14 dealers right close by this price cutter and another one named Kerstein. Now, I have some letters here bearing on this subject. Here is one from a man who says, "I can not sell your goods at a profit any more. I used to buy them by the gross"—that is, 12 dozen at a time—"but I can no longer buy them by the dozen." Now, gentlemen, that is the way it affects us. The man who cuts the price down on articles like this does not want to sell them, and, under those conditions, nobody else can sell them. The result is that the public after a little while has great difficulty in getting those things. If that is not restraint of trade, I do not know what is.

Mr. DYER. How does the sale of watches by your company now, under these conditions, compare with your sales prior to this decision by the Supreme Court that you spoke of?

Mr. INGERSOLL. That decision——

Mr. DYER (interposing). How do your sales now compare with your sales prior to that decision?

Mr. INGERSOLL. I understand your question. That decision was handed down last May, and our sales for the first three months of this year, or just about up to date, as compared with the sales during the first three months of last year, are short in the neighborhood of 12 per cent. We have suffered that loss, and it is mostly in the communities where this price cutting goes on.

Mr. NELSON. May not that be the result of these Democratic times?

Mr. INGERSOLL. I am not student enough——

Mr. WEBB (interposing). It may be the result of your having supplied everybody generally throughout the United States. You say you have sold 37,000,000 watches, and I presume you do not expect to sell as many now as you did 12 years ago.

Mr. INGERSOLL. Unfortunately a man who is not in business is likely to reason that way, but business experience teaches us that we do not in the course of 20 years work up to the point where with one year after another showing a gain of 10, 12, and 15 per cent, we shall suddenly come to a time when everybody has purchased a watch and stops buying. It does not so work out in human experience.

Mr. VOLSTEAD. Maybe they do not carry as cheap watches as they formerly did.

Mr. INGERSOLL. They can purchase them at higher prices if they want them. If we are sincere, there is no need to try to avoid the issue that is involved. There is no doubt about it, and there is plenty of evidence to support my contention in this. In these 14 stores in the neighborhood of these two price cutters our loss in sales amount to 109 watches per week, or 5,688 watches a year. That loss is sustained just because of the cupidity of those two men who want to trade on our name.

Mr. DYER. In stating your loss in sales in that neighborhood do you include the sales of those two men who are cutting prices?

Mr. INGERSOLL. As nearly as we can ascertain them; but they sell almost none, because they try not to sell them. They have something else to sell, and why should they want to sell our watches if they have something else to sell on which they can make more money? They offer our watches at cut prices only for the purpose of drawing a crowd. I have here the advertisement of a store in Chicago offering to sell Ingersoll watches at 37½ cents. That is a bigger bargain than I ever heard of anywhere; but when we tried to buy one of those watches we found that we could not get it for 37½ cents. We had to buy with it a chain, which appears to be worth about 5 cents, and pay 75 cents for the watch and chain. But they can use our name and reputation and over 20 years of hard labor for the purpose of pulling a crowd into their store, and when the people get there they tell them, "You can not get the watch without buying something else."

Mr. DYER. Could not that situation be relieved by a law providing for the punishment of people for publishing fake advertisements?

Mr. INGERSOLL. I wish to goodness it could be done, because that has been one of my labors during the last three or four years as the head of the Advertising Men's League of New York, to prosecute fake advertisers. For instance, we won a verdict against this man Henry Siegel, who has since gone up, and who defrauded his bank depositors and got away with the wage-earners' benefit fund in the store and all that sort of thing. A year ago we got a conviction against him; but the trouble is, gentlemen, that there are so many little crooks and turns that they can take that no law you could write would reach them.

(Thereupon, the committee took a recess until 1.30 p. m.)

AFTER RECESS.

The committee reconvened pursuant to the taking of recess.

STATEMENT OF MR. WILLIAM H. INGERSOLL—Continued.

The CHAIRMAN. You may proceed, Mr. Ingersoll.

Mr. INGERSOLL. The reason I wanted to appear before this committee was the fact that you have introduced and have had referred to this committee, bills which embody provisions that would prohibit a business system that I believe to be essential to clean and decent business methods and to the economical distribution of goods from the factory to the consumer. There is one thing that most of us have not realized, and that is that while nearly all of the attention of our public men has been devoted to the gigantic trusts and railroad corporations the fact remains that after all is said and done the biggest business in this country is the business that is conducted by more than a million small retail merchants. For instance, there is not a manufacturing industry in this country, no line of business, that could stand the entry of a corporation doing a business of $100,000,000 a year without causing great disturbance in that industry. Now, in the retail market, within the last few years we have had such a concentration of business that there are a number of corporations with a business of $100,000,000 a year or more, and it hardly causes more than a ripple on the surface. The market is so immense, it is such a tremendous field that its importance has escaped us simply because it has been divided among such an enormous number of individuals.

Now, I understand that the purpose of this committee is to frame legislation which will tend to prevent monopoly and not to have concentration of business and a few overlords for whom the rest of us shall work. In the retail market the exact opposite tendency prevails to-day, but at this time there seems to be a feeling for open competition and absolutely no restraint; dog eat dog; let us go to the limit. And it means just what it has meant in the past, namely, that the big fellows, the men with capital, are going to knock out the small men and the individuals are going to have to work for a few great corporations. That is not a fancy, but it is the logic of what has been. Where did we get our trusts, gentlemen? The Standard Oil, the Tobacco Trust, and all the other trusts grew out of a condition where there was not restraint but practically open and free competition, where it was possible for the big fellows to go into a territory, cut prices, and take away the business of competitiors, jacking the price up somewhere else, and all that sort of thing. Now, to-day we have this concentration going on in the retail business. For instance, in New York City the United Dry Goods Co., a corporation, owns about 50 department stores. The big stores in some 40-odd cities are controlled by one company. They are department stores and they handle everything that all of the other lines of business handle. I do not refer to this corporation in particular, but there are certain sensational department stores which make it a practice to take one department at a time and make such cuts in prices that it affects that line of business throughout the city.

They will take the hardware business and they will shake the hardware business in that community until the little fellows can not hang on; they can hardly make a living. In the meantime that department is being supported by other departments, just as the trusts in the past have gone into one territory, cut prices and put competitors out of business, and supported the losses there by revenues from other territories. Now, that is a condition which must be met, and unless some means of restraint are exercised the little man is going to be put out of business.

There is another aspect of that thing. Everywhere confidence in the ability of the small man to serve is being broken down. I have before me a little treatise called "Trusts, Good and Bad," by Louis F. Post. Now, Mr. Post wrote this something like 10 years ago, and here is one paragraph showing a popular misconception, which has often been evidenced, I think, by some of the questions asked by certain members of your committee. He says:

> But now appear the department stores. These keep in stock or store all kinds of goods, from testaments to playing cards, from soda water to whisky, from a paper of pins to a bicycle, a piano or a set of furniture. Almost anything you want you can get here, in any quantity, and at prices which are not only lower than ordinary retail prices, but lower than ordinary retailers themselves can buy the same goods for from the manufacturers. Inevitably, therefore, the department store must be prejudicial to the business of all ordinary retailers, and destructive to the business of many.

And then he goes on and tells, by an elaborate argument, that we must not waste any sympathies on these small men, because it is evolution, it is progress. That simply expresses a very prevalent misconception. The big stores can not and do not deliver superior values to the small ones; that is, not as a rule.

There are certain other kinds of stores, however, that are also showing this tendency toward concentration. In New York we have a large system of drug stores and a large system of cigar stores. It is the same in almost all the other cities of this country. The cigar stores and the drug stores are commonly understood to have been merged recently. That was preceded by a price cutting war in which each of them took well-known brands of goods, and they would quote prices that were lower and lower until they were both selling without profit and even at a loss. And what could they do? There was only one of two things that could happen, and that one thing was to go out of business or combine. Now, what did they do? They did combine, as I understand it. Now, here is this vast market; these chain stores; these department stores, and, perhaps, above all, the mail-order houses. I do not speak against them as a class, but I do say there are a few fundamental things that we can do that will put competition on a fair and square basis and let the best man win, but not to permit anyone to win because he has more money.

Mr. VOLSTEAD. Suppose you did this: Compelled the manufacturer and the wholesaler to sell at the same price to every person instead of——

Mr. INGERSOLL (interposing). To every person of the same class, I assume you mean. To all retailers and to all wholesalers?

Mr. VOLSTEAD. Would you not come nearer reaching the situation than you would by simply fixing the retail price?

Mr. INGERSOLL. Yes; I have not said that I was satisfied with fixing the retail price. If I can have five minutes or so I will de-

velop my thought. I think the greatest reform that is before this country, and the thing we have got to do if we are not to lose our democracy and become clerks for a few big men, is to abolish the quantity price. Here is the same situation which existed in the industrial field a few years ago, and this immense market, that I have explained to you, is open to be plucked by those with money. It is not any longer a mercantile process, because it is just what they could do with the railroads and with other things a few years ago. They did not operate them as railroads; that is, the men who owned them. It was a stock-jobbing proposition, a matter of manipulating stocks so as to get some money out of the thing and let it go into bankruptcy, if you please. But the manipulators got the money and the properties were ruined, and the public paid the price and it always will. Look at the opportunity of a man with money in the retail field. He can go and buy a few stores, or open them if he does not want to buy them. Immediately he has a larger outlet than the individual; he commands lower prices; he is in a position to undersell, and as soon as he can undersell, of course, he can attract trade from the smaller competitor. That process, of course, is like rolling a snowball. The more such a man controls the bigger he is and he gets lower prices. The logic of the thing is that there are only three or four corporations in the United States that are able to sell at the right price at retail.

Then there is another consideration that comes into the thing. This popular misconception that these big fellows can deliver such values overlooks certain inefficiencies which creep into their business, because as their business become unwieldly they are unable to do the things that the little man can do. The operating expenses of such stores are higher than the operating expenses of the little men, and the things on which they cut prices, singularly enough, are those on which they have the least advantage in the matter of price, because the standard products that have reputations are more generally sold at a level price than the nondescript commodities where they can go to the factories and use their buying capacity to compel a lower price.

In System, a magazine, the December number is an elaborate table of the cost of doing business, ascertained by them after an elaborate investigation. It shows that the ordinary retail store has a cost of doing business from 17 per cent on up. Some of the stores in some lines of business, such as jewelry stores, going as high as 26 per cent. But in the department stores it is shown that the percentage of operation is nearly 30 per cent, that it averages 10 per cent higher than the small stores.

Mr. VOLSTEAD. Ten per cent of what?

Mr. INGERSOLL. Of the selling price. All of this is based on the selling price of the goods. Now, we do not want these small men put out of business, and particularly we do not want them put out of business by methods that are discriminating.

Mr. VOLSTEAD. If what you say is true, it would seem to me that these large concerns will have to go out of business.

Mr. INGERSOLL. No; not if you allow them to have certain privileges, and they are nothing more than privileges if you allow them to deceive the public or to take advantage of their smaller competitors. For instance, if I give you a preferential discount of 25

per cent you would soon be able to put the other man out of business, would . not?

Another thing is that money begets certain opportunities to practice deceptive trade methods. Quantity buying, as I have said, puts this great retail market at the mercy of the capitalists, because they can go in and operate on a scale that the small man can not, and take the business of the country. You have stopped these things in the industrial field mostly, and this is where capital is now putting its money; that is, in the retail business. If you will examine the lists of stockholders of these great retail corporations you will see that is a fact, and it is the next big market where we have got to settle our public questions, because it comes right to the door of the household.

Mr. VOLSTEAD. You seem to have given considerable study to this, and I would like to submit this proposition to you: A few days ago I saw a statement to the effect that the cost of distributing from the factory to the consumer was about 50 per cent of the price—that is, in Europe—and they claim that in this country it is 100 per cent. Now, why is there this difference, assuming that is a correct statement?

Mr. INGERSOLL. I will have to say that I would question the premise. In Europe the watch that retails in this country for $1 has to be sold for $1.25, sir, because the facilities for distributing it are less efficient than they are in America. We have no Bradstreet's book to look at there in order to ascertain what a man's credit is. We have got to take chances and take the report of our salesmen, and they are very fallible, and all that sort of thing. We go into most all of the European countries, and our goods command higher prices than they do in this country, not because we are trying to make more money, but because we can not sell them as cheaply as we can in this country. I question your premise.

Mr. DANFORTH. What do you think of the New Jersey law fixing the price—that is to say, saying they must be sold at the same price throughout the State?

Mr. INGERSOLL. I think that is a good law, in so far as I understand it, sir. I think it is precisely the same principle that I advocate with regard to these standard products, a standardized price for a standardized product. Why should one person buy something for less than another person does? That is not the American doctrine, which is that of openness and publicity.

Mr. DANFORTH. Do you know how it is working? Have you had an opportunity of studying it at all?

Mr. INGERSOLL. I have been studying it in all the spare time I have, apart from business, for the last three years.

Mr. DANFORTH. The law has only been in force about a year.

Mr. INGERSOLL. Oh, I beg your pardon; I misunderstood you. No; I do not know how it is working, but I do not think it has caused any radical change. I live in New Jersey, but I have not observed any radical change, although I have not watched it.

Mr. DANFORTH. I have just come in, and I would like to ask whether you have made any suggestion as to how the end you desire can be attained by legislation?

Mr. INGERSOLL. I have some ideas, although I am not a lawyer. I am a business man.

Mr. DANFORTH. I know; but we can get as good ideas from a business man—and perhaps better—than we can from lawyers, especially about business. I do not want to interrupt the thread of your argument, but if this is a convenient place, I would like to hear what practical suggestions you have.

Mr. INGERSOLL. Well, I shall come to that, I think, if you will permit me to go on.

Mr. DANFORTH. Take your own time.

Mr. INGERSOLL. I will refer to another thing or two here. Now, the unfortunate thing, I think, is the fact that we have broken down confidence in our small merchants everywhere, notwithstanding that they are more efficient than the big ones, and if they had a fair show, under fair conditions, the big ones could not succeed and would not.

Now, you see, gentlemen, it was found that in producing goods or manufacturing them, involving mechanical operations and the doing over and over again of the same thing, quantity was made an economy, and that idea has thoughtlessly been followed in distribution; that is, that the same economy came from large operations. But it does not work out so. I have cited some facts to show that it does not prove out. For instance, take the chain stores; they are coming back to the individual store system of management. We get our orders from individual stores and we are asked to deliver to individual stores. They have abandoned their scheme, and they hold together on the proposition that they can buy cheaper, as they can compel the bigger manufacturers, at least, to give them a lot of accommodations that they do not give to the little men. A chain store will come to us and ask us to send three watches a distance of 50 blocks and expect to get the lowest price on them. Now, we used to do that, until we reasoned the thing out and found that such practices as that were undermining the very people that we were relying on to distribute our goods fairly and honestly. The large centers have their daily papers and these stores can blanket the country around day after day and every day with their advertisements. They carry all sorts of bargain announcements. I have a a lot of them here, and I am sorry I can not because of lack of time show all of them to-day. You will find here instance after instance where they start off with some well-known thing at a cut price, and then they offer all kinds of other things that nobody ever heard of; but they are all set down in the same ratio, as goods offered below the market price.

Now, what is the effect of that on the country people around these centers? They immediately get the idea that they can not buy at home; that they have got to go where these wonderful bargains are advertised, to these great bazaars, etc.; or they will send their money off by mail to the catalogue houses. The people do not trade at home, and, naturally, the business conditions at home are bad. What opportunity do the merchants have in their home towns to do business? There is no business there for them, and they have got to go to the city where the people spend their money and do their business. They must do that in order to find an opportunity. Therefore, I say we are furthering that tendency to congest the population in large centers. I have figures here to show that tendency, but I will not stop to read them now. I have figures to show that 1,700 towns

in Pennsylvania, which is the great mail-order State, went backward in population between the two censuses last taken.

Mr. WEBB. You can not stop the advertisements of these mail-order houses, can you?

Mr. INGERSOLL. You could stop the fraudulent element in them. There are three things which enter into that: In the first place, we give them a subsidy to work on in the form of a quantity discount; in the next place, we give them the privilege of buying space in the publications that are carried through the mails, and of printing almost ad libitum anything they please; and, in the third place, we let them bolster up their exaggerations and misrepresentations by putting in something that everybody knows to be worth so much money and quoting a lower price on it. Thus they make use of the manufacturer of these special standard articles as implements for the destruction of our own small customers and for the destruction of the small towns throughout the country. You would thus make our reputation available to men who would use them unscrupulously. No good can possibly flow from any such condition as that, and you have got to limit the competition. It is claimed that competition will solve these business problems, but that is just what we have been struggling with for years in this country, because when you say "let them compete and go the limit," of course the big man is the one that survives on that basis. I am satisfied entirely if you will leave it on the efficiency plane, and let those who can really serve, serve and prosper, and let those who have to have some form of special privilege in the way of an inside price, or in the way of making fraudulent and misleading advertisements, or in the way of what is equally fraudulent—the deceptive cut price—let them adopt better ways and see if they can still survive.

Mr. DANFORTH. That brings up the question I asked you—that is, what is your suggestion?

Mr. INGERSOLL. My suggestion is to induce the legislators to curb the unnatural tendency toward the concentration of business and that you do away with quantity prices. Now, I do not think that you can do that at one fell swoop. It is too big a thing to do all at once. It will require time. It will require 3, 5, or 10 years, but not more than 10 years, I think. It will not require more than 10 years, because the whole business community is waking up to the thing.

Mr. VOLSTEAD. Why should it take so long?

Mr. INGERSOLL. It requires public education.

Mr. VOLSTEAD. Suppose we passed such a law, is there anything to prevent the people from complying with that law?

Mr. INGERSOLL. No, sir; I do not think so, but I think that such pressure would be brought to bear upon you that you would not pass such a law.

Mr. DANFORTH. If it were passed at one fell swoop it would upset business, would it not?

Mr. INGERSOLL. I think so. My idea is that there is a place to begin and then there is a gradual process that could be followed in getting at this situation. In the first place, here is this one class which is now being victimized, as I showed you this morning, and is being made the tool of the price cutters. First, you should exempt the small dealers from this merciless and unscrupulous competition.

Take the standard, take the trade-mark, I think that is a matter of name and reputation and good will. Take that situation and say: "Here, we will stop the quotation of these misleading cut prices which deceive the public into thinking that a whole series of goods advertised and offered in connection with these standard articles are sold on the same basis." Do that by providing that the maker of that thing shall set the price to the public and publish it. Have him to file it with a Government bureau. It would affect a relatively small proportion of the goods on the market at best. Then, when you have done that, you will have removed one of the most pressing obstacles that the small merchant finds in his way. In the next place, do what you can through the postal laws to get at this dishonest advertising. That is a matter, as I understand it, which must be mainly handled by the States. I have myself been active in securing the passage of honest advertising laws in several of the States. I procured the introduction of such a law in the State of New Jersey, and it was passed. I have been at the head of the Advertising Men's League, in New York City, and under the very imperfect laws they have in New York State we have successfully prosecuted some cases, but there are opportunities in too many instances to escape through the meshes of the law.

There are in 15 States of the Union now laws against fraudulent advertising. I wish I could stay here indefinitely and tell you about some of the conditions we are up against in the business world which I know have never been presented to you, and your experience has not brought you in contact with them. But if you will, in so far as the National Congress can, make dishonest advertising risky through the post office part of it, I think that ought to be done. In the third place, I think it would be very wise to couple with it a provision that would allow these trade-marked wares to be sold at a published price everywhere, and make it a condition that those products must be sold without a quantity discount. You see, you would there make an important entry into the field, and you would make a long step in the direction we have got to go, if we do not lose altogether the opportunity for the individual in this country. I believe it is a practical step, and that it will do an immense amount of good. I would like for you to think of it in this way, for instance, if you will: A gentleman this morning referred to the business depression, if there is such a thing. All of the goods in this country, or nearly all of them, are sold at retail to the consumers. The small merchant of this country, however, has everybody against him. Nobody seems to think that the small merchants can deliver value. That is the result of deceptive practices against them, and they have not the money to meet their competitors with the same kind of tactics. They can not buy space in the newspapers to advertise that they are selling $10 suits of clothes for $19, and offer a $1 watch for 49 cents to bear out the statement. They have not the money with which to do that sort of thing, and they are discouraged. They feel disheartened. These decisions by the courts they take to be decisions against them, and there are several decisions that prevent them from having protection in the prices on their well-known goods. If you want brisk business times in this country, show the small merchants that you will give them a fair and equal chance and a million of them will throw their

weight into the situation and sell so many goods that the wheels of the mills will start.

Mr. DANFORTH. Would you have the price limited, so that one article would be sold at the same rate at which a gross would be sold?

Mr. INGERSOLL. By the dealer; yes, sir.

Mr. DANFORTH. By the retail dealer?

Mr. INGERSOLL. Yes, sir.

Mr. DANFORTH. Would you make a different price to the wholesaler?

Mr. INGERSOLL. Yes, sir.

Mr. DANFORTH. But you would fix a limit which would constitute the wholesale price, and that would be the wholesale price whether 100 gross were sold or 100,000 gross?

Mr. INGERSOLL. Yes, sir. I think that is the thing to do, and I think it is practicable. I have studied this question for several years, and I believe that is the only course that will keep us, at the rate things are going now, and at the rate capitalists are discovering that there is a retail market subject to exploitation—as I say, it is the only thing that will keep us from becoming a nation of employees. At the rate these things are going, it will be only a few years when there will be such a concentration of business in the hands of a few people that we will be a nation of employees. There are 10,000 systems of chain stores in this country. Most of them, it is true, are in the nebulous state, but in every little community you will find chain stores being opened. A man with sufficient capital in any one of your districts finds that he can buy up three or four stores and get a lower price on the goods he purchases than if he operated only one store. So he does it, and prospers for a time. In the next tier of cities above his—I mean larger cities—a merchant will want to expand his business and take in the small towns, so they take in the chain-store proprietor in the smaller town or buy him out. That practice is going on very rapidly, but our public men have not seen it yet. It has not been brought to their attention, but if something is not done pretty quickly we will wake up with another monopoly situation on our hands that will be most depressing and most difficult to deal with. Now, I am speaking, of course, among other things, for a price standardization on standard articles.

Mr. WEBB. Do you mean a standard price on articles that are patented and copyrighted?

Mr. INGERSOLL. I do not think it should be compulsory. It should be permissive, Mr. Chairman. The manufacturers of certain brands of goods, for instance, find that the abuses that I have described to you are injuriously affecting the prices with respect to their goods. Now, if they do find it so—and most of the important ones do—then I think they ought to be permitted, by filing their price schedules with a Government bureau, showing what they sell the goods to the public for, what they sell them to the retailers for, and what they sell them to the wholesalers for——

Mr. MITCHELL (interposing). And showing, also, what it costs to produce the articles?

Mr. INGERSOLL. I do not think that would be essential, though I would have no particular aversion to it. I do not think it would be essential to the scheme. I think what you want to do is to see that one man does not get a better price than his competitor and that we

do not have favoritism in our system of distribution. It does not matter what the thing costs, so far as I can see, but the object of the system is to provide that there shall be no discrimination practiced as between competitors; the object is to preserve competition. We want competition in this country, but we have also got to have cooperation between men or we can not have efficient and economical distribution of goods. As I look at it, the whole endeavor of your committee, as expressed in the bills you have introduced, is to reconcile the extremes. On the one side you have monopoly, and the opposite of monopoly is unlimited competition, is it not? And, singularly enough, unlimited competition leads to monopoly.

Now, how can we get goods from factories to consumers, preserve competition and yet have that necessary cooperation that will mean low prices? If we set men in the field fighting each other like cats and dogs they can no more carry goods from the makers to the users inexpensively than I could pass a bucket of water without spilling it along this row of grappling men. Unless a company is as big as the Standard Oil Co., or pretty nearly as big, it can not market its own goods to the consumer. Take the Standard Oil Co. with its vast capital. It can and does sell to the consumer out of its own wagons and, of course, it gets from the consumer whatever price it sees fit to charge. You can not compel anyone to part with his property at a price that is not satisfactory to himself except by competition. But very few of us can meet the consumer direct. The country is too big.

Now, the present system has another aspect of what we call unlimited competition, unrestrained or unlicensed competition, such as gives an advantage to a company with large capital over a small company. I represent a relatively small company. We have to rely on about 100,000 stores——

Mr. WEBB (interposing). What is your capital?

Mr. INGERSOLL. $200,000. We have to rely on about 100,000 stores to get our goods to the consumers. We have about 15,000 watches a day to market; every day we have got to find a place for that number of watches. There are employed about 2,000 or 3,000 people in the making of those goods. And the only way we can do it is to have a certain amount of cooperation between ourselves and the wholesalers, because we can not afford to go to every retail dealer in the country. We can go to the wholesalers, but in the retail market there are 300,000 or 400,000 stores that we would have to call on, and it would take away a great deal from our profits and we can not afford to do it.

Now, you take Mr. Floyd's district, if I might use that. There are many towns there of 200 or 300 population; the trains run once or twice a day to many of those towns. The possible sale in that community might be six watches and that would take about half a day of a man's time. The profits would be about 60 cents; his railroad fare, meals, and his salary would amount to $5, and you can see that it would be impossible for us to get our goods to his district in any other way than by using the wholesaler who assembles not only our goods but thousands of other manufacturers' goods. He goes there with almost everything that those little towns in that district need, and he distributes that charge over a great many things.

The present open-price system makes it so that if we can not have the cooperation of those dealers we can not get our goods there, and

we can not have their cooperation unless they can make some money on selling those goods; and the more willingly, easily, and freely they sell them the cheaper we can sell them and the lower price they are willing to accept. Now, you take our goods. They will sell them on a profit of 27½ cents a watch—the dollar watch—and in order to do it they do not have to argue with a man. He knows what the watch is very well; he is satisfied; he comes in and asks for it and walks away with it. There is no great labor on the part of the retailer and no explanation—nothing of that sort. Take another thing that he has to spend a lot of time arguing about, and he can not afford to sell it at a small ratio of profit, and he does not, and that is an established fact. One of the gentlemen who appeared before this committee made certain statements; one of them was that our company puts out another watch which it sells for a little less money than its dollar watch. But it does not bear our name; it does not carry our guaranty; it is not regulated so closely at the factory; we take no risk or responsibility for its performance after it goes out. We can afford to sell it for a little less because it is not so good a watch and it is not so desirable from the standpoint of the consumer.

Now, it was represented that that watch sells for about 69 cents, and that it was a great advantage to the public to get it at that price. Since that gentleman appeared I have had an investigation carried on among a couple hundred stores where those goods are sold. I just sent men who were not known to find out what the goods sold for, etc. Those goods were found to average 98½ cents apiece, not 69 cents, as was represented. You see the public gets a poor article, without a guaranty, and at practically the same price. Now, there are competitive watches. The Ansonia watch, the Pathfinder watch, and the New Haven watch, all of which we consider to be somewhat inferior, although general competitors of ours. They sell for 5 or 10 cents apiece less than the dollar watch, and that amounts to 12, 15, or 20 per cent less than it costs to get the dollar watch. But right along they get the same price. We found in 43 stores that the average price was $1.03¼ cents. That is what the public pays to the dealers for those goods which the dealers pay less for. My point is that the scheme that I recommend to you is an economical scheme of getting goods transported. You all know that from the standpoint of an economist a piece of goods is not really produced until it is delivered to the user. The distribution of it, the sale from the wholesaler to the retailer is a part of the process of producing the thing, because a watch is not really a watch in the box; it is a watch when it gets into a man's pocket and he starts to use it. Now, to complete that process of production, and to get it into the pocket of the user, the most efficient, the less wasteful, and most economical scheme is to let noncompeting people cooperate. When we first broached this question it was widely misunderstood. It was confounded with price fixing, whereby a lot of competitors would get together and agree on prices. My proposition is that for the public to get goods cheaper we have got to have a certain amount of cooperation among men and yet not eliminate competition.

Mr. NELSON. How many are there who are more or less called competitors of yours in the business—that is, approximately, how many sell dollar watches?

Mr. INGERSOLL. There are, I think, five others that manufacture them, sir.

Mr. NELSON. If we permitted you to fix the price to the jobber and the retailer, what would prevent you and the five others, by either a gentleman's agreement or by their following your lead, from fixing a price and having a uniform price all the way through, which might, in your case, only be $1, and yet, if we started the practice, you might raise it to $1.25, and then we would have price combination legalized?

Mr. INGERSOLL. Well, is there not a hole in your proposition? We do not permit combinations between competitors. Of course, if a man wants to evade the law by a gentleman's agreement, or something of that sort, I suppose he will continue to do it until you catch him.

Mr. NELSON. Suppose there is no agreement, but they say, "Let Ingersoll start out with his price, and we will simply follow."

Mr. INGERSOLL. But they would not do it. We started this business. There were no dollar watches until Mr. Robert Ingersoll figured out how there could be a watch produced for $1. Now, no one else thought of that; but it had not been out a year, hardly, until there were imitations. It is somewhat peculiar, but we find the people prefer the original; and the other fellows could not get the business at the same price, and they had to take a lower price, which they did, and cut down their product.

Mr. WEBB. Do the companies that manufacture the Ansonia and Pathfinder watches advertise as extensively as you do?

Mr. INGERSOLL. No; they do not advertise to the public very extensively, although they do advertise to some extent. If I could have only one advertisement, I would take the dealer's window. I would rather have my goods where they can be sold than in a newspaper or magazine, where they can not be sold. You see what I mean. A man is in front of the store with $1 in his pocket; and if I can get the goods in the window I will get his dollar; but if he has a paper in his hand, he has got to read the thing and then go away off somewhere to buy the watch. So they do very extensive window advertising, and things of that sort. But ours, of course, is the leader; it was the first known. I will show you that the policy we have followed has given us a very large share of the business in that field, and that we have it by merit. We started out and established our business and our article in the minds of the people. It was, of course, a big, expensive task. Everybody laughed at such a thing as a dollar watch. When it first came out they did not think it could be any good. We had to fight that a long time, and then finally it was accepted and used. Now we find just as many men among the well-to-do as among the poor people who carry our goods. We have operated on this policy for good business reasons—that we always have tried to deliver just as much as we could for the money. We have always had the biggest production and we have always had the call from the public.

Every time we could, we have improved the quality and always kept the price down to a dollar; although almost everything else has gone up in price, we are delivering a much finer thing, as I showed to you this morning, than we did 12 or 15 years ago. That, naturally,

has made less temptation for competition than if we had said $2; if we had done that, we would have brought people right in, but, you see, the public was safeguarded. But as it is, we have five good and strong competitors. The people that make the Big Ben clock make a watch that retails for $1. The New Haven Clock Co., a very large corporation, makes a watch that retails for a dollar. I say it retails for a dollar, but it retails all the way from 47½ cents to $1.50. The public gets no particular protection on it. Some fellow may get the thing for one-third what another man gets it. But the average price in 43 stores was $1.03½, which is higher than the standard original article, and the one that the trade generally and the public consider to be the best one. It—price standardization—is the best system, because it allows cooperation between men who have to cooperate to sell the thing, but it preserves competition between those who produce the goods and those that distribute them all the way along the line.

Mr. McCoy. The Stevens bill provides expressly, does it not, that the right to fix the retail price shall not be given on any article when the people producing the article monopolize it in any way?

Mr. Ingersoll. I think it does. I have only read that bill, and I am not well qualified to discuss it. However, I believe it does.

Mr. Volstead. How would you enforce that antimonopoly provision?

Mr. Ingersoll. As I understand it, the Stevens bill makes this provision: In the first place, the manufacturer must himself maintain an equal price to his customers, dealers and wholesalers. In the next place, as I understand it, it provides that he must not have a monopoly of any kind, and that any man can cut the price and claim that it was a monopoly. As I understand it, he can do that and say, "You are not entitled to the protection of this act, because you are a monopoly," and then the burden is put on the maker to prove that he is not a monopoly. If he can not prove it, he can not have the benefit of the provisions of the Stevens bill. As I said before, I am not a lawyer, but it seems to me if I were a lawyer and I had a trust for a client, I would tell them that any law that compelled them to go into court and prove on every contract that they were not a trust was about the worst kind of law that could be put on the books from their standpoint. It seems to me that the Stevens bill, so far as I understand it, is admirably drawn.

Mr. Webb. I should think that the person who alleged that a particular corporation was a trust would have to prove it.

Mr. Ingersoll. Could a provision be inserted in the bill providing that the maker would have to prove it?

Mr. Webb. I doubt that very much.

Mr. Graham. Do you think that provision should be made that where they are suing to recover on a contract and that defense is made, they should be required to prove affirmatively that they are not a monopoly?

Mr. Ingersoll. That is the way I understood it.

Mr. Floyd. I want to ask Mr. Ingersoll some questions. Who pays the freight on these goods? Suppose you ship 10,000 watches—which might not amount to much in your business—from New York to San Francisco, who pays the freight?

Mr. Ingersoll. I suppose you want to know the real situation. We do not ship them that way. We have distributing points at San

Francisco, so that any one on the western coast buys the goods f. o. b. at San Francisco.

Mr. FLOYD. Then, so far as the freight between your factory and San Francisco is concerned, you bear the freight?

Mr. INGERSOLL. Yes, sir.

Mr. FLOYD. Now, who pays the freight from the distributing point in San Francisco to the retail merchant who sells it?

Mr. INGERSOLL. The retail merchant pays it.

Mr. FLOYD. Now, is it not a fact that under that system you have to make the retail price so high at remote points in the country that it will give the retail merchant in that locality a good profit or a reasonable profit?

Mr. INGERSOLL. I do not know for sure that I understand you.

Mr. FLOYD. Is it not a fact that if you have a uniform price throughout the United States—throughout a great country like the United States—that, in order to induce the retail merchants to handle your goods, you have got to fix the standard price high enough to give him a profit, or a reasonable profit?

Mr. INGERSOLL. Of course, we have to set that price at a point that will give all those who perform any labor a return for their labor.

Mr. FLOYD. What do you mean by that?

Mr. INGERSOLL. It must be sufficient to yield that return.

Mr. FLOYD. That is the point. You concede the point that you will have to fix the price high enough to justify the merchant at the remotest point in the country to handle your goods?

Mr. INGERSOLL. You do not do that exactly. You put it at a point that fits average conditions. It is like the 2-cent postage.

Mr. FLOYD. Is not the effect this, that when you sell a watch in the vicinity of your factory, or in the State of New Jersey, all of the additional cost that is paid on the watch that is sent to San Francisco or other remote points comes back in the shape of a rebate to the manufacturer; is it not saved to him in the nature of a rebate? In other words, if you sell a watch at a reasonable profit to yourself as a manufacturer and to the jobber as a distributing agent, and to the retailer as the final dispensing agent of the watch, so as to bring a profit at the remote point in California; and then sell them direct immediately in or near the point of manufacture at the same price, is not your profit increased on those that are sold closer to your factory in exact proportion to the cost of transportation to the remote point?

Mr. INGERSOLL. Our profit, of course, is not, but the dealer's profit at the remote point must be allowed. We get the same price, but the dealer who pays transportation from any distance——

Mr. FLOYD (interposing). The effect of it is this: You discriminate against the consumer, because the man at the factory door can buy your watch no cheaper than can a man 3,000 miles away. Is not that the effect?

Mr. INGERSOLL. In a degree; yes, sir. You are raising the same point that could be raised against the 2-cent postage system.

Mr. FLOYD. The 2-cent postage system is a public matter.

Mr. INGERSOLL. And all of it is a public matter.

Mr. FLOYD. No, sir; we are dealing with private concerns. Now, of course, in the case of watches that element of freight would amount to but little, but suppose we take such trade-marked goods

as Armour hams or other weighty goods. Suppose such goods are sold to the consumer at Chicago at the same price at which they are sold to consumers at some extremely remote point in Maine or California. Of course the freight on heavy goods amounts to a considerable sum. Now, assume that Armour & Co. pays the freight, but if they place a uniform standard price on the article would they not have to fix a price to the dealer at the point most remote from the place of manufacture that would give the retail dealer a reasonable profit, and would not the effect of that be to get a rebate equal to the amount of the transportation upon those sold in Chicago and nearby points?

Mr. INGERSOLL. Of course the manufacturer wants to do business everywhere, and competitive conditions will compel him to make a price that will be low enough to meet competition everywhere. This, as I have said, is a permissive thing. You are not going to provide under this law all at once that every manufacturer must come under its terms. Let him follow this law if he wants to. It should be made permissive. Now, the manufacturer operating in New York establishes, we will say, a uniform price throughout the United States. If the nature of his goods is such that they are not patentable under a system of this sort if he puts his price so high that it would cover California then it is simply going to foster a competitor in California, because somebody there will be able to undersell him and he will not have that business. He will not ship goods to California, but he will do business where he can do it, and somebody else will do it where transportation charges make it impossible for him.

Mr. FLOYD. But if your company is the sole manufacturer of Ingersoll watches nobody else in the United States can manufacture them

Mr. INGERSOLL. Nobody else manufactures anything that only one concern manufactures.

Mr. FLOYD. So far as your particular line is concerned, nobody could get Ingersoll watches unless he bought them from your factory?

Mr. INGERSOLL. That is right.

Mr. FLOYD. Then, is not the general effect of that system to stimulate prices to the consumer?

Mr. INGERSOLL. There are other watches, and there are a great many things that enter into the price.

Mr. FLOYD. If you insist upon a uniform price, would the fair way be for the consumer to pay the freight?

Mr. INGERSOLL. We have no objection to that.

Mr. MCCOY. Is not all f. o. b. factory business open to the same objection?

Mr. INGERSOLL. Yes, sir.

Mr. MCCOY. Automobiles, as I understand it, are sold f. o. b. at the factory?

Mr. INGERSOLL. Yes, sir.

Mr. MCCOY. And if a man lives a thousand miles away from the factory, and is the agent selling for that automobile, he will not make as much as the man who is only 500 miles away?

Mr. INGERSOLL. Or else he must charge the consumer more money to pay for the transportation.

Mr. MCCOY. You can not annihilate space.

Mr. INGERSOLL. No, sir; not at all. The tendency of it is to foster local industry if there is waste in transportation; but we must not forget that there are many things that enter into the price to the consumer. Now, really, as you well know, there are only two principals in a transaction of this sort; one of them is the maker of the thing and the other is the user. The maker and the user are essential, but you could still have business and not have the middle man. Besides these two, the maker and the user, all others are middle men. There are a great many things that enter into the price. One of them, in the manufacture of the thing, is the question of how many can be made. It may be that there is economy in production that would make to the advantage of that business out on the coast there. It may be that here is an economy in production that would enable us to make a price, on account of having the business, that would enable us even to sell the goods lower out there than any local man could do. Then, there is a difference in the efficiency of different organizations, though it is not so great as some men imagine.

Mr. McCOY. One of these bills pending before us provides that there shall not be any discrimination in prices, except sufficient to allow the difference in the cost of transportation. That is exactly the thing in point.

Mr. INGERSOLL. That is the exact point. It is incomprehensible to me sometimes, when I come to think about it, how a man will support such a bill as that in New Jersey—a bill which also exists in Wisconsin and a number of other States—saying that the dealer shall not discriminate in price between different communities, and yet will turn around and say that it is indefensible to propose, for example, that a department store shall not discriminate between different articles that it sells, when it sells one for less money and makes it up on some other line of goods. It seems to me that the principle of the thing is in conflict.

Mr. FLOYD. Here is where the principle comes in: We concede to you the right, as a manufacturer, to sell that Ingersoll watch at $1, or $2, or $3, or $5, but when you have sold it and received your money for it, we think the man you sell it to has a right to dispose of it according to his own judgment, it being his property. We concede to the retail man the same right that we are willing to concede to you; but not the right of the manufacturer—although he has probably more interest than anybody else—to control the property after the title to it has passed from his possession.

Mr. INGERSOLL. I am very grateful to you for bringing up that point, as I want to say something about it.

Mr. FLOYD. That is the point some of us have in mind.

Mr. INGERSOLL. Now, what interest has the maker in the thing after the title has passed to somebody else? Your new purchaser owns the goods. He can do as he pleases with them; and yet, as I understand it, we consider public policy as above any right of an individual, and he shall not use those goods, even though he owns them, to the detriment of the public. The department store buys these goods (Ingersoll watches) and it utilizes them to deceive the public and to injure us. There is another theory of the law, as I understand it, that for every wrong there must be a remedy. I have shown you here—and no man could stand up and deny that I have shown you—where serious injustice has been done to our company

through certain practices and how our goods are discredited in the public mind. The people are made, by improper practices, unwilling to buy them at the price they have got to pay for them if they are to continue to get them. No one can say that we are not suffering a serious injustice, and yet the theory of the law that for every wrong there must be a remedy seems not to cover the situation here, because you say the man owns the goods and he can commit an injustice; he can deceive the public; he can take business away from the small dealer; he can send his advertisments, full of misrepresentations all over the United States, and make people dissatisfied with their home localities and trade. He can discourage the enterprises there and make it impossible for the young children growing up there to find business at home, thus making it necessary for them to go off to the city, and all that sort of thing. I say that there is much to be considered when you say a man owns those goods and can do with them as he pleases, because I believe he must use them with all due consideration to the public interest. I can sell a piece of real estate and I can put into the deed a provision that the purchaser shall not, in this community of homes, erect a stable and the purchaser must abide by that, because human experience has proven that we have to have those restrictions and provisions. Now, in another way public policy demands this because the degree of civilization that we have attained——

Mr. GRAHAM (interposing). Have you not a stronger answer in that if the law permits you to sell your goods under such a restriction a man then acquires only a qualified title?

Mr. INGERSOLL. Yes; I would like to lead up to that, because I think I can amplify a little what you have suggested. You see, the system that some of you apparently contend for is this: A thousand men in a given territory may buy goods; they do not buy those goods to use them; they buy them to sell them; and yet any one man can jeopardize the business of all. A crazy man can demoralize prices and reduce the value of those goods on the shelves of the other 999. That is the system that some of these fellows who come here in the name of freedom are contending for. We consider that we sell not only the goods, but with them we give our guaranty and a certain recognized standard of quality. Everyone knows exactly what he is getting when he buys under our trade-mark. Now, since they are sold under our brand and are called for by the people under this brand, we feel that we ought to have the right to sell the goods with reservations as to how they are to be resold. No one need buy them under the restrictions unless he chooses, but if he buys he must abide by his agreement. It is the only protection possible against vicious practices by certain retailers for the public and the manufacturers of reputable products.

Mr. FLOYD. Now, Mr. Ingersoll, let me ask you another question. Under the system that has been in practice, but which has been held illegal by the Supreme Court recently—that of the resale price—do you not think the fact that it was known to the public that the manufacturer fixed an arbitrary price and that the retail merchant could not go below that is what has built up this competition that you are complaining of—these mail-order houses and these chain stores—and is not the sentiment of the public with them and not with you on the proposition?

Mr. INGERSOLL. I have said to you that the public confidence in the individual store is broken down, in my judgment, but to my knowledge it is unjustifiable.

Mr. FLOYD. Well, I think that is correct to a considerable extent. But that has been going on for 10 or 15 years, covering the last census period. What you have stated in regard to some localities is just as true of many other localities, that the retail store has been going down, but the very system for which you contend was in force during that time.

Mr. INGERSOLL. I think you are very much misinformed.

Mr. FLOYD. I do not mean entirely in force; but has it not, to your knowledge, been in force on a great many commodities during that entire period—a uniform, resale price?

Mr. INGERSOLL. To my knowledge on 15 or 20.

Mr. FLOYD. Well, say, 15 or 20.

Mr. INGERSOLL. Now, then, let me say that if it had not been for those things it would have been a great deal worse than it is to-day. This is a proposition that the entire business community wants, with the exception of possibly a few hundred men who have particular reasons for not wanting it; but every retail merchant knows that his future almost depends on it; the entire business community favors it. Now, the public does not understand the issues. As John Wanamaker says, there are things the purchaser does not know anything about, and that is what accounts for the public sentiment as it exists to-day, but it is being very rapidly rectified. I do not know whether this Congress is going to give us relief or not, but I do know that some Congress very soon is going to have the honor and distinction of seeing that dishonesty and all of the old strains put upon conscience, which existed before we had the one-price store, are put another degree in the background.

I can see it from so many sides because I am circulating around the country a good deal; I am reading the public prints a good deal; I can see the great public education that is going on, and the recognition of the fact that this competition, to the last degree, which we have had has built the trusts and is putting the small man out of business to-day, and is stealing away our democracy, and that the only way to preserve it is to establish equality of dealing and put dickering and all of these deceptive practices behind us; to say that we stand for publicity of prices; that we stand for an equal deal to all, and the other provisions that are embodied in the Stevens bill, as I understand the bill.

Mr. MCCOY. There has been a whole body of common law, so to speak, built up in the last 15 years, principally on this question of unfair trade, regardless, I mean, of any question of price fixing.

Mr. INGERSOLL. Yes, sir.

Mr. MCCOY. And decisions have been multiplying in the last 15 years, decisions that we did not know anything about 20 years ago to any extent, which are aimed at and which are preventing unfair trade practices—is not that so?

Mr. INGERSOLL. Yes, sir. What are all of your bills for if they are not to accomplish something in that direction? And if we are willing to look to other countries we can get light. We are not a world sufficient unto ourselves here. In Denmark they have an admirable law on this subject. We do business in most of the

countries of Europe, and there is not one where we can not protect ourselves from the depredations of those who want to use our name and reputation to deceive the public and who take business away from our small merchants, who are the only ones who will handle our goods fairly. And if you would look, if you have not, at the unfair-trade law of Germany, it is very illuminating, and especially the enforcement of it. Over there they enforce their laws; over here we make laws and forget them. In the 15 States where we have honest advertising laws there have not been 15 cases brought; they passed the laws and thought the laws were going to do the thing; they did not appoint people to look out for them, and they are on the statute books as dead letters.

A great many of our business men say that the honesty of commerce and the future of individual opportunity is going to be taken away unless we do prevent these things whereby the big-moneyed interests can buy space extravagantly and use it for all those things. Now, Germany puts honest advertising first of all, and if you do not regulate it here and have it honest what do you open the way to?

Mr. WEBB. On that point, suppose your corporation were a $5,000,000, $10,000,000 or $20,000,000 corporation and you had the power to fix the final retail price of the watch and you concluded it ought to be $1.50 and that every man must sell it for that price; that there might be on the market a $1 watch that would probably be as good as yours, but that with your tremendous power through the use of the advertising mediums of the country, the magazines and newspapers, you were able to make your advertising so attractive and your watch so seductive as to make the public buy your $1.50 watch, which is not worth more than $1—would not that be jumping from the frying pan into the fire, as the old saying is? Would not your big corporation have an advantage over the little fellow because you would have more power to advertise and, therefore, more power to compel purchases?

Mr. INGERSOLL. I hope you will give me a chance to answer that.

Mr. WEBB. I really think that is the important part of all the argument we have heard for the last eight weeks, the question of advertising. I think that is one of the big questions to consider.

Mr. INGERSOLL. Yes, sir. Now, you will admit, of course, that there were a number of ands, ifs, and buts in your premise.

Mr. WEBB. I think I put my question clearly, but the condition is conceivable, that there might be a $5,000,000 corporation that might have the power to advertise extensively, and you say that you now advertise more extensively than any company selling a dollar watch?

Mr. INGERSOLL. Yes, sir; of course we do.

Mr. WEBB. And therefore you sell more watches?

Mr. INGERSOLL. The other fellows could not exist if we did not advertise. We created the industry in the first place and have popularized the market for one class of goods and carried the main burden of creating public demand.

Mr. WEBB. And do you not depend more largely upon the advertising than upon the merit of your watch?

Mr. INGERSOLL. What kind of a man do you think I would be to answer that?

Mr. WEBB. Is it not true?

Mr. INGERSOLL. It is not true; of course not.

Mr. WEBB. Suppose you did not advertise; would you sell as many as you do?

Mr. INGERSOLL. No.

Mr. WEBB. Then you do depend more upon your advertising than upon the merit of the watch?

Mr. INGERSOLL. I certainly would not say that. It followed that we depended more upon our advertising. We use it to call attention to the merits of our goods.

Mr. WEBB. It strikes me that way from seeing your many advertisements on the billboards while riding along on the trains, "Ingersoll's Dollar Watch." It is advertised everywhere, and the fact that you do advertise extensively helps the sale.

Mr. MCCOY. But that is not all of the advertisement, because it says, "The watch that made the dollar famous."

Mr. INGERSOLL. Thank you. If you had the patience to go into this question I would like to talk on that point, because it is important, and I do not know a group of men in this Nation that it is more important to have understand it and there is none, I suppose, which has had less opportunity to understand it from the experiences you have had during your lives. Advertising is relatively a new force in business. It has grown in the last 20 years. I can speak with some authority because I happen to be the president of the Advertising Men's League, as I mentioned before, of New York. I have studied and written a great deal on the subject.

Now, advertising, when efficiently done, means great economy and the saving of a great many salesmen. Do you suppose it would have been possible, Mr. Chairman, for us to have sent men out over this United States and notified everybody in the country, as we did by advertising, that we had a watch for a dollar? How long do you think it would have taken to get the message to the eighty or ninety million of people that here was a new thing and that it could be bought for a certain price? If it had not been that we could spread that message very quickly we could not possibly have gotten a production that would have enabled us to produce the thing to sell at the price at which it is sold. It was a very great economy that we could instantly publish to the world that there was a new thing. When a new invention comes out that is very necessary for success. Suppose that one of you were to invent to-day a dish-washing machine. You know this, that the women of this country, or at least a large proportion of them, spend about one-third of their time in the treadmill of dish washing, a terrible drudgery and a terrible tax on human time. Suppose one of you should invent a machine that would enable them to get rid of their dishes in 10 of 15 minutes, and that is a conceivable thing.

We want every woman to get the benefit of that, just as we labored hard for her to get the benefit of the sewing machine to save her from spending half of her time with the needle. Now, how would you get that message to the great mass of women and emancipate them and get them to devote their lives to something more socially useful than the repeated and wasteful operation of dish washing? You can see there that advertising possesses a potentiality for great economy. Advertising is a referendum. You go right to the people of the country with your message. I do not know whether you gentlemen like the referendum or not, but we go direct to the people

and tell our story and rely upon our goods to back up our story. If our goods disappoint; if they are not what we say about them——

Mr. McCoy (interposing). They can apply the recall.

Mr. Ingersoll. Yes, sir; they can apply the recall. Now, gentlemen, suppose you take a well-known thing worth a certain amount in price and try to determine what it is actually worth. Recently I exhibited three shirts to a group of gentlemen. For one of the shirts I paid $1, for one I paid $2, and for the other $3.50. I took the marks and tags off and put them on a table and said, "Now, you see these things before you; let us see if they will find their own level." I asked them to pick out the $3.50 shirt, but they could not do it, and if they had worn them they could not have done it. It was an intangible element. One man advertises a pair of shoes for $3 worth $5, but we forget the date on which we bought them, and all that sort of thing. We do not keep track of it and can not tell whether they were actually worth $5; but if there is a trade-mark on them, if they are a trade-marked brand of shoes, the case is different. The trade-mark is something by which we learn the goods. If the goods are not right the trade-mark helps us to avoid them.

Mr. McCoy. Is it not a fact, also, or likely to be, that you can perhaps misrepresent articles less on the whole in advertising than is done in cases where individual salesmen are employed in the selling of the goods?

Mr. Ingersoll. Yes, sir; because you get yourself on record in print.

Mr. McCoy. Suppose you had to send out individual salesmen to get your watches on the market; there would be danger of a great deal more of misrepresentation and overpersuasiveness employed than there would be in advertising your watches in the magazines?

Mr. Ingersoll. Yes, sir. Without wishing to draw any distinction between classes of people, I think it is not improper to point out that the advertising of manufacturers in a magazine is very much more reliable in quantity and quality than the advertising of this nature in the newspapers. Almost all of the magazines have taken a pretty high ethical stand on the question of what advertising they will accept. The newspapers, with the exception of about half a dozen shining instances, throughout the United States take anything that anybody will offer and pay for. Now, in time these things will be corrected, perhaps, but you gentlemen ought to accelerate the process. I think that the German law on the subject of unfair trade is an admirable thing, and I wish our system of Government enabled us to utilize it in this country.

Mr. Volstead. Have you a copy of that German law?

Mr. Ingersoll. That was printed on page 1491 of the hearing.

Mr. Danforth. Did you say there was a Danish law on this subject?

Mr. Ingersoll. There is a Danish law, but it is not exactly an unfair competition law. There is one section in it relating to unfair competition. The Danish law simply provides that goods bearing brands and labels shall not be sold at a cut price if the manufacturers establish a system of price standardization on them. In other words, they recognize the thing that I would like to emphasize again, and that is the question that Mr. Floyd asked. We sell goods—yes—but do you realize that when we sell a piece of goods, we do not

literally and simply sell so much metal, or stone, or wool, or whatever it may be. If you will refer to the product which our company puts out—watches—a man buys a watch from us; then he buys, not only the material watch, but he buys a guaranty with it; he buys an assurance when he gets it that it is a thing of a certain quality, and that thing has a fixed place in his mind. He knows what he is getting and that is a satisfaction, an assurance, and a certainty to him. He does not have to shop around and test it a long while, because he knows what it is. Now, when we sell that watch to a dealer, we do not sell him our good will in the business; we do not sell him our name, but, to all intents and purposes, we appoint him our agent to meet our customers.

Mr. WEBB. You can do that now. You can appoint him as your agent.

Mr. INGERSOLL. We can if we are financially able to do it, but a little company like ours ought not to have to do that.

Mr. WEBB. Are you not about the biggest company in this country manufacturing $1 watches?

Mr. INGERSOLL. I think we are, but we are not big enough to enable us to carry the load of having a stock of goods without receiving the money for them from every store throughout the United States that handles them. It would take a reasonably sizable company to do that, and if there was a company that was big enough to do it, they could put us out of business. That is the reason I think you gentlemen ought to give the small companies like ours and some others a chance to compete and to take advantage of some things that the other man does not technically possess. Why raise these technicalities, that do not mean anything, about the title passing and all that? It is a pure theory of law.

Mr. WEBB. Don't you think that if you have the right to fix the retail price that everybody who purchases it ought to have the same right? Wherein is the distinction, if that is not true?

Mr. INGERSOLL. That has been explained so many times that I can hardly improve on what has been said.

Mr. WEBB. I would like to have your explanation of it.

Mr. INGERSOLL. It is a trade-mark question, and it is a name and good-will question.

Mr. WEBB. Would you confine it to trade-marks, and not apply it to patented and copyrighted articles?

Mr. INGERSOLL. No, sir; I would not apply it to patented articles.

Mr. WEBB. Nor to copyrighted articles?

Mr. INGERSOLL. I do not think I would apply it to copyrighted articles. I am not endeavoring to avoid anything, but I really do not know about the copyright question. I would not extend it to patented articles. A patented article can have a trade-mark if it is desired. It is a matter of character that we are dealing with.

Mr. McCOY. The patented article has a monopoly anyhow.

Mr. INGERSOLL. Yes, sir; although it is not always a real monopoly. It is a monopoly on only a particular little thing in a good many cases.

Mr. WEBB. Is it any more of a monopoly than an article protected by trade-mark?

Mr. INGERSOLL. The answer to your question is that it is not the article. It is the good will on which the question hinges. Let me

explain that, because it is a very important matter, if you really want my view on it; all over the United States people go into stores and ask for Ingersoll watches. They do not do that because the dealer has made that watch or anything of that kind, because he didn't do it. They do it because a certain quality has been embodied in the product. They know what it is; they know its reputation and its good will. It means certainty, saves time, experiment, and disappointment. The customer goes in, and he does not care whether it is Smith's store or Brown's store or Jones's store, and he says, "give me an Ingersoll watch." He knows what he is calling for, and the reason he asks for the Ingersoll watch is because it is known as a reputable article, and all that constitutes good will to us. Now, the thing that the department stores and price cutters in general victimize is that good will.

The department stores proprietor says, "By borrowing from them, without asking, a little of the reputation that they have built up and a little of the skill they have embodied in the manufacture of these articles—by borrowing a little of that, I can draw a crowd of people into my store." Now, he is entitled to the same credit for giving that bargain that I would be entitled to if I walked into your potato patch and took potatoes which your labor had planted and cultivated and walked off with them. Then, of course, I could sell them a little cheaper than the man who must go to the expense of planting and cultivating potatoes. Naturally I could sell potatoes more cheaply than he could, because I have stolen them, and, of course, the great public is benefited because I sell them cheaper than can the man who produces them. But these are the sort of "savings" that no public can afford to accept. Such savings, paid for by the labor of others, are immoral, and the American people wouldn't touch them if they understood the process.

Mr. WEBB. You are not a manufacturer—you are a distributor.

Mr. INGERSOLL. I beg your pardon, we are manufacturers.

Mr. WEBB. Then I misunderstood you. I thought you had this Waterbury Co. to manufacture your watches.

Mr. INGERSOLL. We have a factory at Trenton, N. J.

Mr. WEBB. To manufacture the dollar watch?

Mr. INGERSOLL. We do not manufacture the dollar watch at all.

Mr. McCOY. Suppose you did not have a factory in New Jersey, what difference does it make in your argument whether you get somebody to make the watch you create a market for, or whether you make the watch and create the market too?

Mr. INGERSOLL. There is no difference. That is a thing that simply beclouds the issue. There is no question there except a technical one. Mr. Robert Ingersoll originated the watch. It was wholly immaterial whether he had money enough to build a factory or whether he took his idea and specifications to some existing factory and contracted for the manufacture. Making and selling are two entirely different functions, and many manufacturers are now separating them and incorporating their manufacturing and selling departments as separate companies, with contracts between them for exclusive rights to each other's goods and services. They do it for efficiency, because if a man's mind is on the manufacturing problem there will be waste on the selling end, and vice versa. We have con-

fined ourselves to the sale of our goods and contracted the manufacturing.

Mr. CAREW. Do you generally or ever try to protect the public from being victimized in this way?

Mr. INGERSOLL. Yes, sir.

Mr. CAREW. How?

Mr. INGERSOLL. We use every endeavor we can to get them to use our goods. We do not sell them, but we write to them and ask——

Mr. CAREW (interposing). I have never seen any advertisement by the Ingersoll watch people warning the public against going into such stores and warning them that they are being deluded into the stores for the purpose of having something else sold to them. Why have you not started a campaign of that sort?

Mr. INGERSOLL. I am here as a part of that campaign, sir, and I have spoken——

Mr. CAREW (interposing). There are only 21 men here on this committee who will hear you.

Mr. INGERSOLL. I have spoken from many platforms and written many articles.

Mr. CAREW. Without effect.

Mr. INGERSOLL. And I have gotten others to do the same thing. You speak as though it was a joke to buy a page in the Saturday Evening Post and pay $4,000 for it to exploit a public policy that is no more ours than hundreds of others.

Mr. CAREW. A great many others have advocated this proposition here; have they not done something to help themselves?

Mr. INGERSOLL. We have done something to help ourselves. A great many articles have appeared and a great many more are going to appear.

Mr. CAREW. Do you not think you will be able to remedy this situation if you go out and exert yourselves?

Mr. INGERSOLL. Absolutely not, for here is the situation on One hundred and twenty-fifth Street, which I spoke of this morning. We sent our representative to talk to that man and to reason with him. He said, "I know I am a bad egg, but there is money in it for me." Just as long as there is money in it they are going to do it.

What are our laws for if they are not to give protection to us, and what do we have a Congress here for if it is not to deal with that sort of a situation? Why is it our duty any more than yours? You are our representatives.

Mr. CAREW. You will do a great deal better if you will help yourselves; you will get stronger if you help yourselves.

Mr. INGERSOLL. That may be true.

Mr. CAREW. If you rush here to Congress for help all the time, the first thing you know we will be taking care of you entirely. The people of this country have been able to do some things for themselves.

Mr. INGERSOLL. They are going to do some more things for themselves, I hope, and I do not see that when a question becomes large enough to be a real public issue to the extent that the Secretary of Commerce takes it up in his reports and the Bureau of Corporations of the Department of Commerce starts its investigation, but that then we have been carried a great distance and have done a great duty.

Mr. WEBB. Do you sell your watch to any dealer who deals in the Ansonia or Pathfinder watch?

Mr. INGERSOLL. Yes, sir.

Mr. WEBB. You do not sell to only one dealer in a town?

Mr. INGERSOLL. No; we do not. It is not to our interests to do that. We advertise in the papers, and we want a man to be able to get our watch in whatever store he may go.

Mr. WEBB. You do not compel a dealer to handle your goods alone?

Mr. INGERSOLL. Oh, no. There are circumstances under which that is justifiable in some businesses, but we do not do it.

I am very grateful for the hearing you have given me. I desire permission to put into the record one or two things which I believe will be of interest to you. One of them is an article from a newspaper, covering an investigation of jugglery in food prices. This was carried on by the Association for the Improvement of the Condition of the Poor.

The CHAIRMAN. Without objection, the article will be printed as a part of your remarks.

(The article referred to is as follows:)

A. I. C. P. UNCOVERS JUGGLERY OF FOOD PRICES AT EXPENSE OF POOR.

Many New Yorkers have yet to learn that a grocer may also be a prestidigitator. With all the skill of an artist in legerdemain taking a rabbit, a mess of scrambled eggs, and a hundred yards of near-silk ribbon from a hat, he can extract from a canister of 22-cent tea leaves of the 40-cent or 70-cent flavors. By some mysterious means he can turn 18-cent Santos coffee into 25, 28, and 38 cent kinds, possessing all the aroma of the top price original. With equal success he can juggle with other staple articles and take out of the appropriate container almost any grade you may order. It is more profitable, as may be imagined, than taking dimes out of persons' noses and ears, an occupation which a certain little lad thought most profitable and very desirable.

All this was discovered last year by investigators of the A. I. C. P. (otherwise known as the Association for Improving the Condition of the Poor). Of course, improving the condition of the poor when the condition to be improved is impoverishment of body due to starvation means the feeding of nourishing food. The investigators have been trying to find out about food supplies and the nourishing qualities of those articles they were buying. In the process they discovered this slight-of-hand capacity of the grocer.

They were buying from the stores of a well-known New York chain when they found that you could buy split peas for 8 cents in two of the stores which cost at wholesale 4¼ cents a pound, the profit being 90.5 per cent, and in a third the same peas at 9 cents, the profit being in this case 114.3 per cent. They they learned that prunes, whose wholesale price was 8 and a fraction cents a pound, could be bought by the consumer in two of the stores at 10 cents and one of these also at 15 cents, a case of not letting the left hand know what the right hand was doing. In one of the stores you could buy Santos coffee, costing at wholesale 18½ cents, for 28 or 38 cents, according to your order, whether it was for the lowest or highest grade, the range of profit being from 51.4 per cent to 105.4 per cent. So they also found that tea in two grades could be extracted from the same can of 25-cent leaves, the prices being 40 and 52 cents a pound, with profits ranging from 61.3 per cent to 100.2 per cent. Such jugglery, they concluded, was so profitable that it ought to be studied further. They took up the study, with interesting results.

The investigator went about as if she were ordering for some poor family in the neighborhood, directing that certain goods be sent to the address of the family. She would go to one store in the chain and order a quantity of supplies, such as canned salmon, corn, peas, sardines, prunes, codfish, tea, and coffee, invariably choosing those articles of lowest price, and specifying that the coffee and tea should be of the cheapest grade. Then she would go to another store in the chain and give the same order, this time, however, choosing the best qualities offered for sale, or at least those to which were attached the highest

prices. This she did in the case of three of the best known of the chains of retail stores, repeating the process in the stores of each, ordering high-grade and low-grade goods for the sake of comparison. The samples thus obtained were submitted to four of the leading wholesale grocery firms of the city, with a request that they submit estimates for providing goods of similar quality. In this way the wholesale values were learned.

The results were astonishing. For instance, it was discovered that the canned corn, which one of the chains was selling at the rate of $1.08 and $1.50 a dozen, could be bought from one of the wholesalers for 80 cents a dozen. There was, in other words, a big profit, regardless of whether the can was sold as a low-grade product or a high grade.

It was the same with farina, the quality found in the different stores having a wholesale price of 3¼ cents a pound. The selling prices were different, ranging from 8 to 15 cents, one store selling from the same lot at both 10 cents and 15 cents. A druggist could hardly expect a higher profit than this. In the case of flour, it did not seem to make any difference whether you asked for a low or a high grade, it all came out of the same barrel and at such prices as 11, 12, 13, and 15 cents a pound. Lentils rarely netted the retailers as much as 200 per cent profit, although in one instance it almost equaled that, but you could get the same lentils for a great variety of prices, ranging from 6 to 10 cents a pound. A curious thing happened in the stores of one of the chains, however. The price for the lowest grade in one was 9 cents a pound, while in another the price for the best grade was only 8 cents. Actually there was no difference in the quality of the lentils.

The history of the purchases of lima beans was similar, the different grades coming out of the same container and being the same in all the chains. Macaroni assisted in paying the running expenses of the business by contributing a profit of 150 per cent in all the stores. Salt was another of the profit producers. The profits were more than 200 per cent, and one of the chains filled orders for different grades from the same receptacle. Soap was less profitable, but you could have different grades from the same box. You could do the same in the case of starch.

It was especially interesting to observe what could be done with a single grade of tea. Here the grocers were particularly expert at their juggling. The tea which one wholesaler offered to supply at 22 cents a pound, and the three others at approximately 25 cents, could be made to satisfy customers ordering at 30, 40, 50, 60, and 70 cents. Its adaptability in quality to fit the requirements of the customer were remarkable. Even before the grocer put his brass shovel into the canister it seemed to know what kind of tea it was impersonating and came out dressed for the part. Coffee was equally able to take the stage and "play many parts."

In the language of A. D. Woodruff, special investigator of the bureau of food supply of the A. I. C. P., who had charge of the investigation, "there proved to be a greater variation between the chain-store retail prices and those of the average store than the difference in the wholesale cost warranted. * * * We found that the gross profit to the retailer—that is, the average grocery retailer—ranged from 24.3 per cent on flour and bread and on meats, fresh and smoked, to 70.6 per cent on beverages, such as tea, coffee, and cocoa. Canned goods showed a gross profit of 37 per cent; cereals, 48.1 per cent; and the average gross profit on all articles, including sugar, which is generally sold at wholesale cost or less, was 35.9 per cent.

"A surprising thing was that there was no fixed price for the same article at various stores of the same chain system, but one store differed from another in charging. * * * We found that the gross profits of the chain-store system ranged from 30.5 per cent on the orders for the cheapest goods to 50.2 per cent on the highest priced, with a mean average gross profit of 40.5 per cent; that is to say, that the gross average profits to the chain-store system appear to be nearly 15 per cent higher than those of the store we have classed 'average.'"

This habit of selling the same goods at different prices, according to Mr. Woodruff, is widely practiced in the chain stores and quite generally done in the average grocery store, where the proprietor and members of his family wait on customers. In stores where there are several clerks it is not so often done, except in a few commodities, such as coffee, tea, or cocoa, about the qualities of which the consumer knows very little. In the chain stores the managers may not be aware of the fact that they are selling the same thing for different prices. They receive the goods from the headquarters of the company, the commodities for which different prices are to be charged being in different containers, although the goods may all be of the same quality.

As a result of the investigation the chain stores came in for the chief castigation. "The unpleasant fact is," says Mr. Woodruff's report, "that some poor food has been purchased by this association. Our investigation shows that an average of 0.8 per cent of all the food purchased by the relief department of the association was of poor quality, and we mean by that word 'poor,' food that was not fit for human use. * * * The question arises at once as to the source of this poor food."

In their supplies they found beans combined with such choice "filler" as dirt and stones; bad codfish; canned meats, fish, and vegetables which had fermented; wormy prunes; coffee flavored with dirt, chickory, grains of cereal, and ground roasted beans; dirty rice and bad eggs. "Often the eggs were bad, and this in spite of the fact that in every case our visitors were instructed to buy the very best obtainable in the stores they visited. The evidence led us to believe that many chain stores were guilty of selling the same grade of eggs at varying prices. In this opinion we have been strengthened by the result of subsequent investigations. The producer would find it very difficult to market much food unfit for use unless the total control of that food, until it reaches the ultimate consumer, were actually in his own hands. Now, that explains in part why the chain-system store is most frequently guilty in supplying poor food, for the companies which manage these systems are often in that very position. They are producers, they are the wholesalers, and, of course, they are the retailers. They handle the food alone.

The moral is, watch for the grocery juggler.

The CHAIRMAN. What is the next thing you desire to insert?

Mr. INGERSOLL. The next matter I desire to insert is a table which I prepared two years ago, and which was printed in the issue of Printers' Ink of June 27, 1912, showing the relative amount of profit which the dealers make when they sell goods at standardized prices and at open prices. Take, for instance, the case of hats; this table shows that on a standard brand of hats they make about 50 cents apiece, and less than that on nonstandardized goods.

The CHAIRMAN. Without objection, that table will be incorporated in the record as a part of your remarks.

(The table referred to is as follows:)

Representative list of goods sold by various lines of retail stores, some of which have the resale price restricted and some unrestricted.

[Arranged to show the comparative profits on the restricted and unrestricted articles as they are sold ordinarily by the average stores throughout the country. The percentages of profit given are only approximate, since the terms on which the goods are sold vary from time to time and in different sections of the country. Most manufacturers allow a cash discount off the invoice prices here given.]

Articles.	Restricted.			Unrestricted.		
	Price paid by retail.	Consumers' price.	Approximate per cent profit.	Price paid by retail.	Consumers' price.	Approximate per cent profit.
Beech Nut bacon (per jar)	$0.25	$0.30	16⅔			
Beech Nut beef (per jar)	.25	.30	16⅔			
Beech Nut peanut butter	.20	.25	20			
Beech Nut chewing gum	.03	.05	40			
Mother's Oats	18 packages, $1.45			$0.081	$0.10	19
Franco-American soup, tomato:						
½ pint				.075	.10	25
Pints				.14½	.18	21
Quarts				.25	.30	16⅔
Franco-American plum pudding, No. 1 size				.25	.30	16⅔
Campbell's soups	1 doz., 81 cents			.067	.10	33
Kellogg's corn flakes	36 to a case, $2.80					
	.077	.10	23			
Kellogg's rice flakes	.076	.10	24			
Post Toasties	2 doz. at $2.80			.117	.15	23½
Maple wheat flakes	36 packages for $2.80			.077	.10	23
Coffee				.21	.28	25
Coffee out of another bin				.21	.30	30
Do				.21	.35	40

Representative list of goods sold by various lines of retail stores, etc.—Con.

Articles.	Restricted.			Unrestricted.		
	Price paid by retail.	Consumers' price.	Approximate per cent profit.	Price paid by retail.	Consumers' price.	Approximate per cent profit.
Cinnamon				$0.28	$0.60	53½
Brighton salt, 3-lb. bag	100 bags in a barrel			.037	.05	26
Brighton salt, 2½-lb. bag	115 bags in a barrel, $3.75.			.033	.05	34
Crosse & Blackwell's pickles	½ pint, dozen $2.10			.175	.25	30
Worcestershire sauce				.141	.25	43½
Royal baking powder				.071	.10	29
Royal baking powder, 1-lb size				.387	.60	35½
Another baking powder, similar formula	Doz. cans $3.75			.312	.60	48
Dutch hand soap	48 10-cent pack. in case $3.40.			.07	.10	30
Dutch hand soap, smaller size				.038	.05	24
Fels Naptha soap (West of Mississippi dealers' price is slightly higher.)	100 in box $4.00			.04	.05	20
Can corn, 10c. straight	Dozen, 80 cents			.067	.10	33
Premier Brand corn				.096	.15	36½
Premier pineapples, No. 2				.167	.25	33½
Premier Lemon Cling peaches, No. 2½				.25	.35	29½
Tea				.50	.75	33½
Toastettes, No. 2 size (2 doz. to the case)				.104	.15	30½
Cracker Jack	100 packages $3.25			.0325	.05	37
Huyler's Triscuit	Doz. 10c pack. 88 cents.			.073	.10	27½
Walter Baker's cocoa, ½-lb. tin	6 lbs. to box			.18	.27	33½
Walter Baker's chocolate, ½ lb	24 ½-lb. to the case			.14	.20	30
Hershey's milk chocolate	48 5-cent pack. $1 60			.033	.05	34
Continental sardines	1 doz. to case			.07	.10	30
Salada tea, ½ lb				.45	.60	25½
Postum Cereal No. 1	24 to case, $2.70			.112	.15	25½
Jello	3 dozen to case, $2.70			.075	.10	25
Snider's catsup, ½ pt	New York City prices			.104	.12-.15	13½-17½
MEN'S FURNISHINGS.						
Beacon shoe				2.25	3.00	25
Do				2.60	3.50	25½
Do				2.85	4.00	28½
Cross gloves				1.18	1.50	21½
Do				1.24	2.00	38
Warner's rust-proof corsets				.71	1.00	29
Do				1.00	1.50	33½
Silver brand collars				.09	.12½	28
Silver brand shirts				.75	1.00	25
Ide brand shirts				1.04	1.50	30½
Do				1.12½	1.50	25
Do				1.37½	2.00	31
President suspenders				.35½	.50	29
Neckwear				.37½	.50	25
Paris garters				.33½	.50	33
Do				.15	.25	40
Pajamas				.71	1.00	29
N. B. umbrellas				.75	1.00	25
B. B. bathrobe				2.50	3.50	28½
Monarch belts				.35	.50	30
Do				.37½	.75	50
Onyx hosiery				.15	.25	28
Do				.23½	.35	33
Merode underwear				.35½	.50	29
Do				.70	1.00	30
HARDWARE.						
Gem Jr. razor	$0.75	$1.00	25			
Carborundum stones	.75	1.25	40			
Ever-Ready razor	.75	1.00	25			
Moore pushpins, doz.	.75	1.20	37½			
Asbestos sadirons No. 150	1.50	2.25	33½			
Asbestos sadirons No. 80	1.00	1.50	33½			
No. 3 Stanley plane				1.00	1.35	26½
Starrett caliper				.48	.64	25
Starrett micrometer				4.05	5.00	19
50-foot steel tape measure				1.87	2.62	28½
Cotton waste				.07½	.08½	14
Dodge pulley				4.32	5.70	24
No. 14 Stillson wrench				.57	.81	30
No. 3 Blount door check				3.00	3.75	20
½-inch manila rope				.07½	.12	37½

Representative list of goods sold by various lines of retail stores, etc.—Con.

Articles.	Restricted.			Unrestricted.		
	Price paid by retail.	Consumers' price.	Approximate per cent profit.	Price paid by retail.	Consumers' price.	Approximate per cent profit.
HARDWARE—continued.						
Philadelphia lawn mower				$4.00	$6.00	33⅓
Rubberset brushes				1.00	1.50	33⅓
Atlanta wash boilers				1.00	1.50	33⅓
Three-In-One oil				.15	.25	40
Major's cement				.10	.15	33⅓
Liquid veneer				.33⅓	.50	33⅓
Japalac	$0.27	$0.45	40			
Yale night latch				.92	1.25	27
Yale locks				1.00	1.35	23⅓
Welsbach mantles				.06	.10	40
Do				.09	.15	40
Do				.18	.30	40
Le Page's glue				.08	.10	20
Do				.15	.20	25
Do				.12	.15	20
Do				.20	.25	20
STATIONERY.						
Venus pencils				.05½	.10	45
E. Faber Mongul				.04	.05	20
Spencerian pens.....gross				.72	1.00	28
Stafford ink.....quart				.42	.60	30
(In the West the price of ink per quart is usually 75c.)						
Simplex pencil sharpener	.06	.10	40			
Alexis bond				.15	.19	21
Alexis ledger				.15½	.19½	21
Stratford cover				3.75	5.00	25
Y. & E. cabinets	2.10	3.00	30			
SPORTING GOODS.						
Spalding league ball	1.00	1.25	20			
Peck & Snyder skates	.40	.75	46⅔			
Smith & Wesson revolver	13.00	15.50	16			
3 A kodak	13.33	20.00	33⅓			
Kodak films	.13½	.20	32½			
W. & D. tennis ball.....doz.	4.25	5.00	15			
W. & D. tennis racket	6.00	8.00	25			
Edison phonograph	10.50	15.00	30			
Columbia graphophone	15.00	25.00	40			
Iver-Johnson revolver	4.00	6.00	33⅓			
Gillette razor	3.75	5.00	25			
Seed dry plates.....doz.				.80	1.10	27
Stanley plates				.50	.55	9
Photo albums				.50	.85	41
Stereopticons				39.00	65.00	40
C. C. tennis ball.....doz.				1.80	3.60	50
Tennis racket				4.25	7.00	39
Eureka golf ball				.15	.35	57
Ansco camera, No. 1				3.34	5.00	33
Cyko paper				.20	.30	33⅓
Ansco films				.15	.20	25
Union Hardward skates				1.00	1.25	20
Electric flash light				.21	.30	30
Fishing rods				.85	1.25	32
Thermos bottles	1.50	2.00	25			
Keen Kutter knives	4.00	6.00	33⅓			
Keen Kutter camp ax				.33	.50	34
Ktaxon warning signal	26.25	35.00	25			
Ktaxonet	15.00	20.00	25			
Ingersoll watch	.75	1.00	25			
DRUGS.						
Alcohol stove				.33⅓	.50	33⅓
Sanatogen	.75	1.00	25			
Miles medicine	.66	1.00	34			
Vinol				.70	1.00	30
Williams shaving stick				.16	.25	36
Jersey cream soap				.11	.15	26⅔
Prophylactic toothbrush	.164	.25	34			
De Wilbus atomizer	.66	1.00	34			
Sanitax brushes	.70	1.00	30			

Representative list of goods sold by various lines of retail stores, etc.—Con.

Articles.	Restricted.			Unrestricted.		
	Price paid by retail.	Consumers' price.	Approximate per cent profit.	Price paid by retail.	Consumers' price.	Approximate per cent profit.
DRUGS—continued.						
Eskay's food (large size—list price 75 cents, but sold in some places as low as 60 cents):						
In dozen lots				$0.541	.60-.75	10-28
$12 worth at a time				.467	.60-.75	22-38
$25 worth at a time				.454	.60-.75	24½-40
Palmolive soap				.07	.10	27
Hot-water bottles	$1.00	$1.50	33⅓			
Fountain syringes	1.00	1.50	33⅓			
Ice bags	.90	1.35	33⅓			
Lyon's tooth powder				.153	.25	38
Belladonna plasters				.08½	.15	43½
Inf. syringes	.37½	.50	25			
Box paper				.30	.50	40

Mr. INGERSOLL. I have here a little bit of testimony taken in the case of United States *v.* The Keystone Watch Case Co. This testimony is eloquent on one point, that this price-cutting practice is indulged in by some people and that the cut price is made up on other things. This is part of the testimony given by Mr. Charles A. Keene, who appeared before this committee a short time ago, and who also appeared in this Keystone case.

The CHAIRMAN. I think that testimony has already been printed.

Mr. INGERSOLL. I do not know whether it has or not.

The CHAIRMAN. If it has we do not want to duplicate it.

Mr. MCCOY. I think that has not been printed. I think Mr. Keene's attorney read one or two things out of the stenographic transcript, but he did not have anything like that.

Mr. INGERSOLL. In this testimony Mr. Keene said:

The WITNESS. I had here yesterday a 23-jewel Howard watch, one that the retailer is supposed to sell for $150; I had here a 23-jewel Sangamore, made by the Illinois Watch Co., of the same style and quality of case, with the exception that the case on the Sangamore contains about 2 pennyweights less in gold, or $1.25 in value, roughly speaking. That watch complete cost me a few cents under $45. That watch comes up to the requirements of all the railroads in the country, which stipulate that a watch, in order to pass inspection, should run within 30 seconds per week. As a timekeeper I consider it as good, if not better, than the Howard. As I said before, it cost a few cents less than $45, and I think as a rule the retail trade over the country would be pleased to sell it at much less than $150, or even at much less than $100 (p. 15).

And then the following testimony was given by Mr. Keene, the examination being conducted by Mr. Hyneman:

Q. Now, Mr. Keene, I understood you to say that for that watch which you produced yesterday you paid $45?—A. It figures a few cents less, I believe.

Q. Your selling price for that is $86?—A. Yes.

Q. And the profit on that watch would be something over $40?—A. Something like that.

Q. Which is a profit of ninety-odd per cent?—A. Whatever it is, it is a fine profit.

Q. You regard that as a legitimate profit in the watch business?—A. That is rather high.

Q. Now, Mr. Keene, have you ever sold goods at a profit of 175 per cent?—A. Possibly; yes.

Q. Have you ever sold goods at a profit of 190 per cent?—A. Possibly; yes.
Q. Isn't it a fact that when you sell your goods at cut-rate prices, and at prices which you say engender competition, that somebody pays to make up your business, and isn't that illustrated by the very fact that on the watch you produced yesterday you made 90 per cent profit, and you say you make 175 per cent and 190 per cent profit on other goods?—A. May be that is correct, sir; I can't dispute (p. 22).

Mr. McCoy. That is the part you wanted to get in this record?

Mr. Ingersoll. Yes, sir.

Mr. Danforth. What concern did you say you were president of; what publicity organization?

Mr. Ingersoll. The Advertising Men's League of New York.

Mr. Danforth. Does Mr. Brandeis have any relations with your organization?

Mr. Ingersoll. No, sir.

Mr. Danforth. He has been publishing some articles on the fixation of prices.

Mr. Ingersoll. Yes, sir; he has been sympathetic with us, because he is opposed to monopoly, and he contends that this present open-price condition is leading to monopoly, which is what I have contended.

Mr. Danforth. He has no financial arrangements with you?

Mr. Ingersoll. Absolutely none. He has given us advice, but has never accepted any retainer or pay of any sort.

There is one other thing I would like to embody in my remarks. I would like to put in the New Jersey law, which is the eighth sister of the seven sisters of New Jersey.

The Chairman. Has that not already been printed?

Mr. Ingersoll. I do not know about that.

Mr. McCoy. It is not very long.

The Chairman. Very well, then, you may insert it as a part of your remarks.

Mr. Ingersoll. I am very much obliged to you, gentlemen.

(The law referred to is as follows:)

STATE OF NEW JERSEY (1913).

AN ACT To prevent unfair competition and unfair trade practices.

Be it enacted by the Senate and General Assembly of the State of New Jersey: 1. It shall be unlawful for any merchant, firm, or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade-mark, reputation, or good will of any maker in whose product said merchant, firm, or corporation deals or to discriminate against the same, by depreciating the value of such products in the public mind or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale or a sale by a concern going out of business.

2. Any person, firm, or corporation violating this act shall be liable at the suit of the maker of such branded or trade-marked goods, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages directly or indirectly caused to the maker by such practices which said damages may be increased threefold, in the discretion of the court.

3. This act shall take effect immediately.

(Thereupon, at 3.20 o'clock p. m., the committee adjourned.)

LETTERS.

BOOTHBAY HARBOR, ME., *January 20, 1914.*

MY DEAR SIR: I am writing what I think is the unanimous opinion of the people who own American sardine industries extending the entire length of the Maine coast from Portland to Eastport, Me. This industry represents an investment of about $3,000,000, employs about 10,000 laborers, and produces from three to five million of this product annually. Up to within three years we have had a trade agreement which prevented the different packers of sardines from cutting prices. We were able under these conditions to pay better wages and make better goods, as we were assured that fair prices could be maintained. Some one made a complaint to the Department of Justice that we were a trust; we were summoned before the United States grand jury and our case thoroughly looked into. No element of trust was discovered and we were acquitted. The district attorney wrote the Department of Justice that in his opinion we were in nowise violating the Sherman trust law, but the department took the view that we were or might be developing a mild form of trust, and at their suggestion we gave up the agreement regulating prices.

Since that time our business has been ruinous, our working capital has been absorbed by our losses, and hundreds of dollars worth of sardine property is lying idle, and it is only a question of a year or two before we shall have to abandon the business for lack of profit.

We do not, neither could we, increase the cost of American sardines to consumers; it has always been 5 cents per can throughout the country. We were willing to pack these goods for 3 cents per can, as there is a small profit at that price, and that leaves 2 cents to the wholesaler and retailer, which, we think, is a fair proportion of the profits. Occasionally, through some unfavorable condition, such as lack of supply of fish, the present price of sardines will go up to $3 per hundred cans, but ordinarily the price is $2.50.

This condition of things pleases the middleman and dealers, because it gives them a larger margin of profit; they render every assistance possible to get the price down below cost with the resulting condition prevalent to-day, namely, all the factories are doing business at a loss at certain times when fish are abundant, and also sometimes when they are not overabundant.

We have tried to get a definition of what the court meant by "a reasonable trade agreement." That word reasonable is vague in so far as it relates to our cause. We have written for a definition of it from the department, and the only satisfaction we received was: "That they did not care to make a ruling, as they feared their successors might not take the same view of the matter as they did," so we have been drifting along on a losing basis, and shall continue so to do if not otherwise relieved by special legislation.

It means a discontinuation of the entire business in the near future. We honestly believe that a reasonable trade agreement that would not increase the cost to the consumer would remedy the trouble.

Very truly, yours,

LUTHER MADDOCKS.

ELLIS & DONALDSON,
Washington, February 6, 1914.

HON. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives.

DEAR SIR: I inclose herewith copy of a letter which I have addressed to Mr. Adamson, chairman of the Committee on Interstate and Foreign Commerce, and to which he has been good enough to reply that he will have the same incorporated in the hearings which the committee is now conducting on the subject of the "interstate trade commission" bill.

The subject matter of my letter has to do with the language of section 9 of the proposed measure which is referred to in the public press as the "trades relations" bill, and I am not sure whether this properly comes before the Interstate Commerce Committee or the Judiciary Committee. I therefore take the liberty of calling the matter to your attention, for it seems to me of serious public importance that the language used in the tentative draft should not be incorporated in the permanent act. As pointed out in the inclosed letter, the bill in its present form would not only produce grave confusion as to its mean-

ing, but would entail results not necessary to the objects desired, and wholly inconsistent with them.

If I may do so without impropriety, I should like an opportunity to see you whenever it is convenient, to point out more specifically the matters to which I have called attention.

With assurances of sincere respect, I am, very truly, yours,

WADE H. ELLIS.

FEBRUARY 3, 1914.

Hon. WILLIAM C. ADAMSON,
Chairman Committee on Interstate and Foreign Commerce,
House of Representatives.

MY DEAR SIR: Please let me make a suggestion, entirely in the public interest, with respect to the phraseology of section 9 of the so-called "trades relations bill," as it appears in the tentative form.

The language used is that it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, "for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor," etc.

As the bill reads it is thus susceptible of the construction (which I am quite sure was not intended) of making it unlawful for any person engaged in interstate commerce to discriminate in price, even though the goods are not sold in interstate commerce. This possible misconstruction could be avoided by a slight transposition in the words used so that the section would read that it shall be deemed an attempt to monopolize, etc., for any person to discriminate in price between different purchasers, etc., in the sale of goods in interstate or foreign commerce.

In another respect also the bill is susceptible of a construction which may work a result not necessary to the object desired, although such result may have been intended. The proposed measure makes unlawful a discrimination in price "between different purchasers of commodities in the same or different sections or communities," etc. This might be held to mean that one engaged in interstate commerce and shipping goods all over the country must sell them at the same price in New York, Chicago, and San Francisco, whereas transportation charges or local expenses or competition might make this impossible. Of course, there is the qualification that such discrimination must not be made "with the purpose or intent to thereby injure or destroy a competitor," etc., but this might turn out to be a rather vague protection to the manufacturer or jobber, if his competitor began cutting the price, and if he were obliged to either abandon the competition or meet the price, without injuring the competitor.

It is respectfully suggested that such a situation may be fairly covered by adopting the form used in the decree entered in October, 1911, in the case of the United States *v.* The General Electric Co. et al. in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. I conducted this case for the Government, and one of the paragraphs of the decree is as follows:

"That the General Electric Co. and the other defendants are each enjoined and restrained from offering or making more favorable prices or terms of sale for incandescent electric lamps to the customers of any rival manufacturer or manufacturers than it at the same time offers or makes to its established trade, where the purpose is to drive out of business such rival manufacturer or manufacturers, or otherwise unlawfully to restrain the trade and commerce of the United States in incandescent electric lamps: *Provided*, That no defendant is enjoined or restrained from making any price for incandescent electric lamps to meet or to compete with prices previously made by any other defendant or by any rival manufacturer: *And provided further*, That nothing in this decree shall be taken in any respect to enjoin or restrain fair, free, and open competition."

In conformity with this general principle, and shortening the statement by the use of terms more appropriate to legislation, it is submitted that the following phrase would accomplish all that is apparently intended with respect to price restrictions in this proposed bill, and would at the same time avoid any result not apparently intended:

"It shall be deemed an attempt to monopolize trade or commerce among the several States or with foreign nations, or a part thereof, for any person selling goods in interstate or foreign commerce to offer or make more favorable prices or terms of sale in such commerce to the customer of any competitor than such person shall at the same time offer or make to his established trade, where the purpose or intent is to injure or destroy such competitor: *Provided*, That it shall not be unlawful for any person selling goods in interstate or foreign commerce to make or offer any price or terms of sale in order to meet or compete with any price or terms previously made by any competitor, whether such competitor is or is not selling in interstate or foreign commerce."

Such an enactment as this would, it seems, accomplish all that is desired in preventing a more powerful manufacturer or dealer in any commodity of interstate commerce from destroying the business of rivals by a system of unfair selling, which, I take it, is the particular evil at which the provision in the proposed bill is aimed. On the other hand, it would not have the effect of enforcing a restraint of trade in the statute itself by forbidding manufacturers or dealers to meet the prices of competitors, or permitting them to do so at their peril. Further than this, it would not give an advantage—which would serve no useful public policy—to those engaged in purely local or intrastate trade over those shipping their commodities from one State to another, as the bill in its present form seems to do. For example, the measure as now drawn, assuming that the words "for any person in interstate or foreign commerce to discriminate in price," etc., mean to discriminate in the price of goods sold in interstate or foreign commerce, does not limit the "competitor" to one who is also selling in interstate or foreign commerce, but leaves the term broad enough to include one who is engaged only in intrastate commerce; so that, apparently, one selling goods in interstate commerce would be unable to meet the competition in the same market of another engaged only in intrastate commerce, for, while the latter could cut prices with impunity, the former could not do so without being answerable to the law.

I take the liberty of making these suggestions because I understand your committee is willing to hear from anyone, at least in writing, who honestly desires to contribute to the formulation of measures that will, in a just, reasonable, and effective fashion, free the business of the country from the real evils of monopoly, and I shall be glad further to present this matter in any way you may desire.

With personal esteem, I am, very truly, yours,

W. C. BRADLEY CO.,
Columbus, Ga., February 13, 1914.

Hon. H. D. CLAYTON, M. C.,
Washington, D. C.

MY DEAR MR. CLAYTON: I am very deeply concerned regarding the proposed antitrust legislation, as set forth in several bills now pending before Congress. Not that I am a trust magnate or in sympathy with their methods from any standpoint whatsoever, but I am interested in quite a number of corporations in this State doing a strictly legitimate business; and I am an officer or director in practically every corporation in which I am a stockholder, which would be in conflict with the proposed bill against "interlocking directors."

I feel that it would be a hardship and an unwise policy for the Democratic Party to father any measure that would prevent a competent business man from being a director in a national bank and a savings bank or trust company operating under a State charter, the character of whose business is entirely different. I also feel that it would be an injustice to prevent any reputable business man from being a director in a bank and a railroad or other transportation company, provided, of course, he was not a grafter and did not use the funds of the bank or banks for speculating in the securities of the railroad or doing any other unlawful act. There are some of us in this section who are in exactly this position, and we do not like the idea of turning over our affairs to "dummy directors."

I am also very much opposed to the appointment of an interstate trade commission, provided it has for its object the supervision of comparatively small commercial and manufacturing corporations like the ones in which I am interested. These concerns are owned very largely by the men who run them as officers and directors, and I feel that it would be manifestly unfair to put them

under the control and supervision of a Government commission who know absolutely nothing regarding the character of their business.

I sincerely trust that you will give these bills your very close personal attention and amend them in such manner that they may not conflict with the legitimate business interest of the country. In fact, I sincerely hope that the Democratic Party will not attempt to do too many things that are calculated to disturb present methods of conducting business throughout the country. I am firmly of the opinion that the antitrust bills now pending before Congress are the most important measures considered within my recollection, and I feel that they should be amended in such manner as may be necessary to safeguard and protect the business of the country from unnecessary annoyance by Government officials. In fact, I feel that our party has already done quite enough along these lines, and that the country should be given at least temporary relief from legislation of this character

Thanking you in advance for your usual promptness in matters of this kind, I am, with kind personal regards,

Yours, very truly,

W. C. BRADLEY.

BIRMINGHAM & SOUTHEASTERN RAILWAY CO.,
Union Springs, Ala., February 25, 1914.

Hon. HENRY D. CLAYTON,
Washington, D. C.

DEAR SIR: I have before me a copy of the bill introduced by you in the House of Representatives "to prohibit certain persons from being or becoming directors, officers, or employees of national banks, or of certain corporations." I most respectfully ask your careful consideration of the following, which seems to me to be the leading objections to the bill as prepared:

The drastic provision of the bill which undertakes to limit a man to solely one field of endeavor would, according to my experience and observation, be a backward step in the development, especially of the South,

For instance, to prohibit an individual, say, an officer or director in a railway company, engaged in part in interstate commerce, who also happened to have invested some of his moneys in the stocks of a national bank, from being an officer or director of that bank, would be unwise, and at the same time unfair.

It would be unfair to the individual, and the tendency of such a prohibition would stifle, to some extent at least, the development of business along legitimate lines.

Numerous illustrations could be cited to show the far-reaching and throttling effects of the measure as prepared.

I am heartily in favor of all measures looking to the proper regulation of public service and other corporations, but I think you will agree with me that the passage of this bill will be the swinging of the pendulum entirely too far the other way.

I trust that further investigation may lead you to the conclusion that the adoption of this measure will retard the progress of the country, and that it may not become a law.

With great respect, I am yours, very truly,

W. M. BLOUNT.

BIRMINGHAM & SOUTHEASTERN RAILWAY CO.,
Union Springs, Ala., February 25, 1914.

Hon. HENRY D. CLAYTON,
Washington, D. C.

DEAR SIR: My attention has been called to tentative bill No. 2, now pending before the Judiciary Committee of the House of Representatives. This bill provides that the antitrust act shall be deemed to prohibit any combination or agreement for the following purposes as to interstate commerce:

First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

Second. To limit or reduce the production or increase the price of merchandise or of any commodity.

Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

Fourth. To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

These provisions are far-reaching in their effects, and make unfair acts which under the antitrust act are now perfectly legal.

In my opinion, its provisions would work a great injustice, and now existing enterprises would be unable to carry out the purposes of their incorporation, and the law would preclude the idea of the further extension of railroad enterprises.

It seems to me that under the terms of the bill any short line of railroad, no matter how immaterial the competition, would be prevented from selling to a larger system, and this same thing applies to all industrial enterprises.

I trust that you will be in a position to consistently use your efforts to prevent the passage of this bill.

Yours, very truly,

W. M. BLOUNT, *President.*

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
Denver, Colo., February 26, 1914.

Hon. EDWARD KEATING,
House of Representatives, Washington, D. C.

DEAR SIR: My attention has been called to the three tentative antitrust bills introduced in January by Mr. Clayton in the House of Representatives. The purpose of these bills, as set forth in President Wilson's address of January 10, 1914, to Congress, is to state explicitly and in such terms as will eliminate uncertainty the practices forbidden under what has been heretofore known as the Sherman Act, with the idea of assisting the business world by removing all doubt as to what is or is not lawful. While there is little difference of opinion as to the wisdom of this purpose, there is much question as to whether it is well expressed in the measures as proposed or whether they will not increase rather than diminish the present difficulty and confusion.

The whole matter is so important to every business enterprise, small or great, that I take the liberty of inviting your attention to sundry features of the three bills heretofore published, which I submit are likely to do more harm than good.

I. The bill known as No. 1, committee print, tentative bill, adds sections 9, 10, 11, 12, and 13 to the original Sherman Act.

1. Section 9 includes in the monopolization of trade and commerce a discrimination in price demanded from different purchasers of commodities in the same or different sections or communities, "with the purpose or intent to thereby injure or destroy a competitor either of such purchaser or of the seller." It then continues: "*Provided*, That nothing herein contained shall prevent discrimination in the price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation."

Is this proviso intended to mean that discrimination in price within the restrictions of the proviso is legitimate, even though it be "with the purpose or intent to thereby injure or destroy a competitor either of such purchaser or of the seller," or is any discrimination made with such purpose or intent illegal under all circumstances? I think the act should be clarified in this particular.

2. The proviso above quoted allows discrimination in price under certain enumerated conditions, thereby, under ordinary rules of interpretation, forbidding such discrimination under all other conditions. It seems to me, however, that market conditions of supply and demand might well and properly justify a marked difference in price. For example, suppose a wholesaler ships eggs to a large city and also to a small country town; might not a higher price be justified on the eggs shipped to the city, on account of the demand there exceeding the supply, even though a much larger quantity was sent to the city than to the town? The town market might be locally supplied to a large extent, thereby naturally making the price lower than the price for the same commodity in the city.

This is apparently not allowed for in the proviso, and yet it is one of the commonest reasons why prices are higher in one place than in another.

3. The further proviso in section 9 allows merchandisers to choose their own customers, but prohibits mine owners from refusing arbitrarily to sell mine products to any responsible person who applies to purchase. Is there any sufficient reason for making this distinction between mine owners and dealers in oil, lumber, tobacco, or any other natural product?

4. The proposed section 12 appears to me unnecessarily to subvert the ordinary rule which makes evidence taken in one trial inadmissible in another, except where it is impossible to retake the evidence by reexamining the witnesses.

Even if it should be thought that this criticism is too technical, I yet believe that the act goes much too far, when it makes the evidence taken in a trial between the Government and a defendant accused of violating the act conclusive in favor of any other party who brings his private suit against the same defendant. It might well be that in the subsequent suit the defendant might be able to produce fresh evidence, unavailable at the first trial, either by reason of the absence of witnesses or of defendant's ignorance of all the facts, or for many other reasons, which evidence might entirely change the situation as between the parties. It ought to be sufficient for the purposes of the act to make the evidence, or any part thereof, taken at the first trial admissible at the second trial. It is very unfair to make it conclusive at the second trial.

5. Section 12 ends with a proviso suspending the running of the statute of limitations in a case where anyone has a cause of action "under the provisions of the act entitled 'An act to protect trade and commerce,'" &c. (describing the original Sherman Act). Is it intended to restrict the cause of action to one arising under the original Sherman Act, or is it intended to include one arising under the act as amended by this proposed bill?

II. Bill No. 2 is intended to define combinations, conspiracies, and monopolies, as those words are used in the Sherman Act. I respectfully submit that the bill as drafted is bad in toto. Everyone agrees that a certain amount of industrial combination and a certain degree of restriction of competition is necessary in order to produce the highest industrial efficiency and economy and to give the lowest possible prices to the consumer. The total abolition of business combinations and the enforcement of an absolute individual competition would bring us back near to the age of barter. This has been recognized both by the recent and the present administration. In the American Tobacco case the brief of the Attorney General expressly disavowed any attempt to support such extreme construction of the Sherman Act as would make it unlawful for two rival express drivers to combine forces by forming a partnership and operating a single line, and President Wilson, in his address to Congress on January 27, 1914, advocated the desirability of disintegrating enterprises "which have passed the point up to which combination may be consistent with the public interest and the freedom of trade," showing clearly that, in his opinion, there was a point up to which combination might exist to the advantage of the public.

Looking at bill No. 2 from a railroad standpoint, if any combination whatever existed between any two railway companies, no matter how trifling or incidental, the acquisition of one line by the other or the formation of an operating agreement would probably be criminal, even although the advantages from the standpoint of efficiency and economy, as well as of improved public service, would be very great. We are all familiar with the spectacle of some small railway line, but to open up new territory or, perhaps, some far less legitimate purpose, such as profit to financiers and bond dealers, which struggles on through successive receiverships, with returns hardly ever equaling its outlay, and which, by reason of its crippled financial state, is unable to give safe or adequate service to the public. We have seen such lines acquired by and made a part of some large system, with the result of the speedy construction of better grades, the laying of heavier steel, the running of better and more frequent trains, and a general increase of efficiency in every department, without any increase in cost to the public.

Is it wise to pass an act which will permanently put a stop to anything of the sort?

If two grocers in a small town engaged in interstate traffic, in so far as they choose their supplies from other States and perhaps distribute them to other States, should agree to unite their resources and combine their two shops into

one large establishment, thereby giving them the advantage of increased capital, enabling them to carry a larger and more varied stock of goods, thus better serving the community in which they operate, their conduct would be criminal under the third and fourth paragraphs of section 1 of bill No. 2. Surely no one wishes to accomplish this result.

Still further, if railroads wish to establish fair rates, free from discrimination, into the same territory, which shall give an adequate return to the carrier without imposing an unjust burden on the shipper, they must either confer and interchange views in this connection or else revert to the old days of rate cutting and rate wars; yet, under the fourth paragraph of section 1 of bill No. 2, such conferences and agreements would be illegal. This whole matter of rate establishment is now fully provided for by the interstate commerce act. The commission can and does annul all rates which it considers unfair and prescribes new ones in their stead. So far as interstate carriers of all sorts are concerned, this measure trenches upon the ground covered by the interstate commerce act, which has been found ample to protect the public against encroachments or injustices of any nature whatsoever proceeding from carriers.

A considerable degree of uncertainty has already been removed as to the scope and application of the Sherman Act under the decisions of the courts interpreting it. Bill No. 2, if passed, will undo everything that has been done in this direction. There can be no possible need or justification for this bill, unless it is the intent of Congress to prohibit everything whatsoever except for each existing business to go on absolutely by itself, without acquiring or allying itself with any other business, without entering into relations with any other business of the same sort, and without even exchanging views with any other business. Surely this would be a relapse into economic barbarism, and I can not believe that it meets the approval of a learned economist like the President.

III. There is no doubt that the abuses which have arisen and the virtual monopolies which have been created through interlocking directorates should be curbed. Bill No. 3, however, goes too far. It certainly should be modified so as not to prohibit identity of directors in cases where a railway system is made up of various associated corporations legally leased or owned. Common directors on the various boards could do no harm in such a case, while their presence would facilitate efficiency and responsible operation.

A vast amount of uncertainty is created by the use of the word "natural," in the expression "natural competitors," in section 4. The idea of natural, as distinguished from actual competition, introduces a very extraordinary uncertainty into the situation and leaves corporations entirely at the mercy of an unfriendly court or jury, and, as well, exposes them to a variety of discordant opinions as to what does or does not constitute "natural competition." I think the act should restrict itself to actual competition.

Further, it seems to me going very far to prohibit an individual partner or director, engaged in any of the businesses mentioned in section 1, from serving even as an employee of a public-service corporation conducting an interstate business.

The foregoing criticisms are made after an examination of these measures, which lack of time has necessarily made brief. Doubtless there are other objections which your acumen will discover. The foregoing, however, are respectfully submitted for your consideration.

I have the honor to be, very truly, yours,

HENRY T. ROGERS,
By GEORGE A. H. FRASER.

PUEBLO, COLO., *February 27, 1914.*

Hon. EDWARD F. KEATING,
Congressman from Colorado, Washington, D. C.

DEAR SIR: There is now before the Judiciary Committee of the House three tentative bills, as amendments to or in aid of the Sherman Antitrust Act.

Upon an examination of said bills, the thought occurs to me that the Congress is going too far in its regulation of business. As attorney for corporations doing interstate business, and as an interested party in such business, I accept the invitation of the President and of Congress to express my views, and as I can not appear before the committee, I address this letter to you.

Section 9 of the first bill is intended to create and sustain competition, yet it prohibits or restricts the very thing upon which competition rests, to wit:

Perfect freedom in making such prices to a customer as the seller sees fit to make in order to meet or defeat his competitor. Competition means—beat the other fellow. Yet said bill makes it a crime to do so. Natural business is not a crime, and Congress should not make it a crime.

Under the second bill it is proposed to make it an offense against the law for a railroad or an industrial company or business, to acquire the property of a competitor, or to unite their existing businesses or companies. Thus one embarked into business must ever remain so, or fail. No enlargement, except within the unit itself. This will destroy initiative, and make the little railroad ever remain a little railroad and the country mill ever remain a country mill.

This bill also destroys the free interchange of business views in kindred business. Railroads will not be permitted to exchange views as to experiences, and as to results obtained under actual operation. Nothing could be more hurtful to railroad business.

In addition to the above, it seems to me that this bill will cloud the business atmosphere rather than clarify it. It brings in more uncertainty and doubt The sole question as to this antitrust legislation should be, Does it or will it benefit the consumer?

By the third bill it is proposed to prohibit an individual from being actively connected with kindred business institutions.

There are many large railroad systems made up of smaller systems, and the same is true of other business institutions, wherein the different systems or institutions are not in actual competition, and the whole makes one complete system under one master mind or minds handling the system as a unit. This promotes efficiency and economy and is not and should not be made a crime. Such systems at times require that the same parties act on different boards. No harm can come of this if the several companies are not in direct competition. The question is, as heretofore stated, Does it or will it benefit the consumer?

To go as far as provided by the tentative bill would have the effect of limiting the production of wealth and would not bring down the price of anything except service. Genius in the production of wealth is stimulated by opportunity, and these bills in many ways seem to destroy opportunity without saving anything to the consumer. Big business should not be permitted to become our master, but, on the other hand, big business should not be destroyed just because it is big. All should be regulated with simple and plain laws to the end that the consumer gets the best results.

Believing that you will give these matters serious consideration, I am,

Respectfully,

W. L. HARTMAN.

ANALYSIS OF TENTATIVE HOUSE BILLS BY MR. CLAYTON, SIXTY-THIRD CONGRESS, DESIGNATED AS NOS. 1, 2, AND 3.

[By S. P. Bush, president Buckeye Steel Casting Co., Columbus, Ohio.]

Bills Nos. 1 and 2 seek to define unlawful restraint of trade.

Bill No. 3 seeks to prohibit certain so-called interlocking directorates.

Bill No. 1 deals with discriminations which may restrain trade.

Section 9 of this bill stipulates that discrimination with intent to injure or destroy in the making of prices is unlawful. This I assume now to be unlawful, having been so determined by the decisions of the court, and that a specific statement of this may be desirable. Competition necessarily results in injury to competitors at times, and although there may be no intent, it may be difficult to discover, as it often is, but of course the fact is that intent to injure should be prohibited.

If this section intends that any discrimination in price between a sale in different sections of the country or the same section, for the same quantity or quality other than difference in transportation charges shall be evidence of unlawful discrimination, then I believe the purpose and effect of this section is ethically and economically wrong.

ILLUSTRATION.

A factory, in order to operate with the greatest efficiency, must necessarily have to operate continuously, and in order that it may do so, the management may find it necessary or advisable to sell a portion of its product at times at

a lower price than the then prevailing one, so as to induce a sale, and thus prevent a shutdown, complete or partial.

If this is not permissible it is certain that costs would in many cases be increased and thus be a distinct disadvantage to workman, producer, and consumer.

Again, a factory having the benefit of a location distinctly economic, can reduce its costs and selling price oftentimes by extending its market and thus increasing its business. To restrict the market would serve to impose a higher price to consumers, which is uneconomic.

Again, revisions of the tariff affect prices in certain territories, and if the domestic product is to compete in such territory it may be excessively burdensome to a domestic industry if the restriction of a uniform price is imposed.

The foreign competitor may make his prices reasonably uniform in this country at any particular time, but it is probable that his prices will fluctuate with conditions prevailing in his own and other countries.

Again, if it is desired to advertise any goods or commodity in any section of the country by selling samples at a reduced price, a practice that is not infrequent, it will be impossible and thus retard trade.

CONCLUSION.

It is recommended that this section be confined strictly to "intent to injure."

Section 10 makes it unlawful to fix a price conditioned on one party selling only and exclusively the goods of another party.

As monopoly is unlawful except through patents, as there can be no extortion as a result of such a contract, a purchaser being free to purchase or not, in his discretion, and as to sell at all it must be to the economic gain of the purchaser, and as anything sold at a large profit is certain to induce successful competition in time, the restriction imposed by this section seems hardly logical. It interferes with the right of free contract without being an essential public policy.

The fixing of a price is often desirable as a guaranty of quality and makes for stability.

This section is apparently aimed at those of large financial resources and high efficiency cooperating with others who may be efficient in position and operation, so that this cooperation of forces would eliminate the less efficient.

Such a cooperation of forces seems to be a natural and logical development of competition.

The free right to contract seems to be essential to the prevention of monopoly, and it is the abuse of such only that should be prevented.

The abuse to be prevented under such a condition of cooperation arises when prices are reduced a point where only the most powerful and efficient can survive, which brings about a condition of destructive and uneconomic competition.

The point at which destructive and uneconomic competition begins is found when the selling price is reduced to cost without a necessary economic profit.

Sales at anything less than average cost plus a necessary profit are against the national welfare.

BILL No. 2.

This bill states that any restriction of competition by monopoly or otherwise shall be unlawful.

It intends to compel unlimited competition, whereas bill No. 1 seeks to restrain competition.

These two do not seem compatible in a sense, and it is believed that No. 2 should require only that competition which is fair and economic, namely, competition free and unrestricted down to average cost plus an economic and necessary profit, beyond which competition, as heretofore stated, becomes wasteful and against public policy.

(NOTE.—The question of cost and economic profit is spoken of hereafter under general remarks.)

To establish by statute that which is or is not in restraint of trade, in all details, seems well-nigh impossible, and it is therefore believed that the law must remain more or less in general terms, and further, that the rule of reason, as established by the court in its interpretation of the Sherman law, should continue.

It appears very doubtful if anything will be gained by amending the law in any way other than as indicated above, with reference to intent to injure and by insertion of the term "unreasonable," as applying to restraint of competition.

BILL No. 8.

The prevention of interlocking directorates, as outlined in this proposed measure, while presenting some disadvantages, may provide sufficient advantage to warrant its enactment.

PENALTIES.

The penalties provided in all of these measures seem rather harsh and vindictive, and it is suggested that they be modified.

GENERAL REMARKS.

The old adage, "Competition is the life of trade," requires some modification to fit the conditions of the present day.

Quotation: The age of unrestricted competition passed with the passing of the age of trade facilities limited to the use of physical power and the contact of trade and business by the individual.

The advent of the corporate body, the use of steam power, and the economic necessity of large undertakings, have developed abuses in competition.

A new adage might read: "Dishonest, ignorant, and unrestricted competition kills trade."

It has been amply demonstrated through recent years, that unrestricted competition makes for monopoly, works unjust hardship on labor, and destroys values. It impoverishes the individual and effects a large national ecomomic loss.

Competition that destroys the ability to earn a true profit is uneconomic and ethically wrong.

Hard, savage competition makes for dishonesty and hatred more than any other influence.

Quotation: The hope of honestly earning an economic profit inspires every effort to develop trade.

These are facts based on long and hard experience.

Quotation: An investigation of the moral and economic soundness of business methods should have for its objective point the elimination of conflict between business methods or statutory laws and moral and economic laws.

The natural instincts and forces which operate for the conservation of a living and for a necessary economic profit should not be restrained.

An economic profit consists of enough more than cost or a living to induce or promote development of industry.

Abuses only should be prevented.

As previously stated, abuses from competition commence when service or commodities are without the economic profit.

Cooperative effort among individuals, such as labor, or among competitors in trade, to conserve a living or cost, including in such cost a per cent on active investment necessary for the maintenance of the industry, should not be unlawful.

All cooperative efforts of this kind, carried out by agreement or contract, should be with the full knowledge of a department of the Government.

An opportunity for individuals to cooperate readily with the Government, for the elimination of dishonest and uneconomic practices, will, it is believed, be more effective in eliminating abuse than any other influence.

Competitors in business and purchasers discover unfair practices very quickly, and if such can be readily reported to some department of the Government which has the power and facility for investigation, the law as it now stands and interpreted by the courts with the rule of reason, should be sufficient to reduce to a minimum abuses arising from competitive forces.

If it is right and necessary, as it is believed it is, that labor should cooperate for a decent living, it is quite as true and necessary in the furtherance of this effort that business should be permitted to cooperate for a decent living. This desire, so much developed during recent years, springs from a sound national economic necessity. It is a normal, natural force, entitled to operate freely, but not to develop into abuse.

RADCLIFFE & Co.,
New York, March 2, 1914.

Hon. HENRY D. CLAYTON,
Chairman House Committee on the Judiciary, Washington, D. C.

SIR: In addressing this entirely friendly communication to you I feel that I will have the sympathetic ear of a countryman. One of my most cherished possessions is a little iron cross presented to me as the son of my father by the Daughters of the Confederacy. We therefore had the same start as born Democrats. Presumably our differences of opinion are chiefly those of environment.

Forty-five years' residence in this busy community has given me a cosmopolitan case for my southern temperament. By hard work I have been able to achieve moderate success as a small manufacturer and merchant in spite of the paternal solicitude of my Government for several years past. I have been able to secure the influence of a college president for my son, to employ newspapers to advertise my wares, and to retain lawyers when I needed them, and can also command the courtesy of editors when I have anything to say; but it has never occurred to me to ask any of these gentlemen how to run my business. I have also been able to pay my taxes, the cost of my constitutional guaranty of protection to life, liberty, and property.

I have been running my business at a loss rather than reduce wages and stop advertising, in the hope that Congress might adjourn after one, or certainly two, great achievements and might be induced to spare us an anticlimax.

Now I find the judiciary department in my garden without invitation. It has already trampled down my flowers and is now rooting up my potatoes and onions. In explanation I am handed a handsomely bound volume in faultless English which tells me that this demoralization of my affairs requires patience in the interest of posterity. I need my potatoes and onions to feed the first generation of posterity, and I love my flowers.

I regard this well-meant intrusion of my Government as a violation of my constitutional guaranties. I have tried argument and persuasion. Anticipating the present condition, I wrote the President on March 17, 1913. That letter is as sound to-day as then. I have written to several Representatives, including my own, Hon. John J. Fitzgerald, of New York (who is, of course, in no way responsible for my views). I have published a number of articles. That which appeared on the editorial page of the New York Herald February 21 states the exact business situation, in my judgment, and I think I know. It did not, however, say that February was the worst month we have had for years, and that our collections all over the country show real distress, not entirely confined to small merchants. The statements you have had from "calamity howlers" on the floor of the House, which you do not believe, are not without foundation.

I feel that I am being suffocated by well-intended and ill-timed altruism. Radicalism has reached its limit with me; the pendulum must come back unless you want to smash the clock. Personally, I propose to fight, if I must, and now, with the weapon you so strongly recommend—publicity.

Unless I mistake the present temper of the business world, it would not surprise me if a long, clear blast on the bugle should wake a storm of indignation from Porto Rico to the Philippines. If the next Congress is to be Republican it is very important to me as a business man that the issue should not be confused. I don't want the tariff opened up again. I want the country to clearly understand that you are beaten, like Taft, on business agitation.

I am, sir, with great respect and fraternal regard,

Sincerely,

J. A. RADCLIFFE.

BOSTON, MASS., *March 2, 1914.*

DEAR SIR: Referring to my appearance before the Committee on the Judiciary, on February 10, 1914, I undertook to prepare for the committee a tentative draft of a proposed bill which would protect the public against destructive price cutting in established trade-marked articles. I inclose an amendment to section 9 of tentative bill No. 1, by Mr. Clayton, which, it seems to me, will accomplish the desired result. In view of the decision of the Supreme Court under the existing Sherman Act, to accomplish the desired purpose a further amendment to section 5 of tentative bill No. 2 seems necessary. In fact, the latter amendment would appear necessary if any legislation is to be enacted by Congress to amend or extend the operation of the present law.

I do not think an elaborate statute is necessary to accomplish the results I have in mind in respect to the maintenance of resale prices on trade-marked

articles. The committee either discussed with me or has before it in other draft bills provisions as to the following points on which I feel that specific legislation is unnecessary.

Penalties: It is unnecessary for Congress to establish penalties in connection with this subject. If resale prices are to be effectively maintained it must be done by contract between the manufacturer and the distributors. These contracts will provide their own penalties. It is not expedient to go further, as the penalties must necessarily differ in each individual case. Criminal penalties, or too drastic civil penalties, might result in discrimination against all trade-marked goods.

Price registration with the Department of Commerce and Labor: This seems to me to be unnecessary in the absence of Federal regulation of prices, which nobody advocates at the present time. It means a certain amount of red tape, and involves the Government to a certain degree in transaction with which it has no direct or real concern or control.

Sales of damaged goods or liquidation sales: These matters will all take care of themselves. In my experience there has never been any difficulty in arranging as between the manufacturer and the distributor for sales of damaged goods.

This is not a subject on which elaborate and detailed legislation is necessary. What the public requires, and all that is now needed, is a permissive statute under which a manufacturer of a trade-marked or branded article can fix, for the protection of the public, a resale price at which the article shall be sold and can determine fair terms and conditions for its distribution.

It should be borne in mind that the establishment of resale prices benefits the vast number of users over the country by giving a stability of quality to everyone, whether a day laborer in the streets, a farmer, or the ten millions of employees in the stores of the country, and the very much larger number of employees in factories who need protection.

Very truly, yours,

FRANK W. WHITCHER.

[Amendment proposed by F. W. Whitcher to tentative bill No. 1. Committee print. Mr. Clayton.]

Amend section 0 by adding at the end of said section the following:

"*And provided further*, That nothing contained in this act or in the act approved July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' shall be construed as preventing the manufacturer of goods marketed under trade-marks or brands from establishing by contract, notice, or otherwise, uniform resale prices thereof to jobbers, retailers, and consumers, but such prices and other terms and conditions of sale shall be everywhere uniform for given quantities except that transportation charges may be prepaid or allowed by the vendor."

Amend section 5, tentative bill No. 2, by inserting after the word "act," in line 14, the words "except as herein otherwise expressly provided." So that as amended the said section 5 shall read:

"SEC. 5. That nothing contained in this act except as herein otherwise expressly provided, shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of the act approved July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'"

FRANK W. WHITCHER.

BOSTON, MASS., *March 2, 1914*.

PORT BLAKELY, WASH., *March 12, 1914*.

Hon. H. D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

MY DEAR SIR: In asking that a distinction, if necessary, be made in the application of the amendments to the Sherman Act to export and domestic commerce, my statements are based on the following reasons:

First. That any law, and especially a regulatory one, must be warranted by moral or legal obligations to those for whom the laws are enacted.

Second. That the laws covering the restraints of trade in all civilized nations are specially qualified, allowing reasonable restraint and the securing of reasonable profits.

Third. That it is not immoral or dishonesty, nor should it be illegal to conduct commercial transactions in those countries under the conditions and in conformity with the laws of those countries.

Fourth. When we endeavor to compete for the commerce of the world, we are entitled to and must compete under the laws and customs of other nations. If we are deprived of the fair freedom allowed our foreign competitors, we will either have no foreign trade, or that we do have will be so unprofitable as to be valueless.

I purpose to confine myself in this statement to our own trade, with which I am at least most familiar. Our export shipments of lumber have doubled in the past 10 years, and still, with the exception of the years of 1906 and 1907, due to the San Francisco and Valparaiso disasters, and about a year from the middle of 1912 to July, 1913, due to purchases ahead of the abnormal advances in ocean freights, we have not been able to secure even a fair cost for our commodities. It can be proven that, except when causes arise similar to those stated, which are entirely beyond our control, the result of unchecked competition with normal supply and demand simply means commercial cannibalism. I make this assertion with entire confidence, as it can be verified by the most superficial investigation.

Within a year the prices have declined $4 per thousand in the f. o. b. value and about $6 in freight rates. We could and should have retained a fair portion of this reduction, which represents nearly the entire value of the f. o. b. prices we are receiving now. Such violent fluctuations occurring so frequently create an unhealthy condition for the manufacturer and his employees, and is unwelcome to the purchasers, as it converts an ordinary wholesome business into one of wild speculation. The present export prices will not net the average export manufacturer $1 per thousand above the actual cost of the labor for the production and manufacture of the timber into lumber. Many of the manufacturers have carried this timber with the risk of fire and cost of taxation, as we have, for a great many years. The Forestry Department will estimate the value of all standing timber reasonably adjacent to the market at not less than $3 per thousand.

After investing large sums in railways, logging equipments, and manufacturing plants we are absolutely giving away to our foreign purchasers a natural resource that can never be replaced. The loss incurred to the States in which this resource lies and the labor and capital invested is unconscionably large and this devastation should not be continued. If we should charge, say, 6 per cent interest on our necessary investment we would have a standing loss on our books without any consideration of the waste of the raw material.

It is impossible for any mill or group of mills (under the proposed amendments it would be illegal) to maintain competent representatives in the foreign markets to enable us to secure our fair portion of the trade, as we would bear the burdens of expense and other manufacturers would take the orders at some concession in price if necessary. The only means we have of knowing the price and competition in the foreign markets is through the advices of the purchasers, and that is not a very dependable source of information you may be sure. As an illustration, within the past month two steamer cargoes aggregating about 8,000,000 feet have been sold in Buenos Aires at at least $4 per thousand less than essential to meet any but the competition of the manufacturers on this coast. This not only demoralizes our trade, but has an equal effect on competitive lumber shipped from the Southern States to the same markets.

During the past few years export firms, having no interest whatever in manufacturers' investments and returns (any more than the members of the board of trade in Chicago in the farmers' costs), have been gradually assuming control of the markets until now they are making sales in all foreign ports for shipments next fall and spring and at the ruinously low prices prevailing to-day. So long as they are competent to fill these shipments, the manufacturers are unable to sell, as the buyers will not duplicate their purchases, and we are debarred by these distant speculative sales from practically any participation in determining the prices or conditions of sale of our own commodities. These exporters are quite as well satisfied to sell at our actual cost so long as they make a margin, and in fact they are compelled to make as low prices as they dare to by the competition among themselves. The

whole course and conduct of our export business has grown into an unnatural and unprofitable condition. Instead of tieing our hands so we can not even help ourselves, we should not only be permitted but encouraged to put our business into normal, wholesome, healthy condition, equipped to meet our competitors with fairness and freedom of means, securing not only our fair share of the world's commerce, but a reasonable price for our natural resources. More than that we can not secure and hold our own in the world's markets.

The 1st of December we closed our own plant the first time voluntarily for over 50 years, to avoid the alternative of accepting practically nothing for the timber we have carried and paid taxes on during that time.

Nearly a thousand men were thrown out of employment and many other mills have or will have to adopt the same course. We have just resumed operations temporarily to avoid loss by deterioration and overhead charges greater than the loss in operating, even at a reduction in wages. In urging this consideration we are not only prompted by the necessity of the employers, but equally if not more so, of the employees. Our industry is quite the largest on this coast and the Northwest is practically dependent upon it. From my intimate knowledge of prevailing and prospective conditions, I urge you with all the power at my command to assist in preventing the great business mortality that is otherwise inevitable.

It is not detrimental to any American citizen, but in every way beneficial to them, and it is a crime to prevent us from doing that which we have an honest right to do. The best authorities positively assert that this would not in any sense contravene our treaties and any amendment accomplishing this can and should give no more offense to other nations than that we should question the fairness of the decision of the English court of July 25, 1913, copy of which I attach, or the payment of subsidies by other nations to build up and encourage their foreign commerce.

I am addressing this letter as the representative and under the frank of all the manufacturers of this coast.

Yours, most respectfully,

D. E. SKINNER, *President.*

AN ENGLISH DECISION IMPORTANT TO THE WORLD'S BUSINESS.

On the 25th of July, 1913, the lords of the judicial committee of the privy council of England returned a decision relative to the Australian industries preservation act, 1906, and two amending acts, No. 5 of 1908, and No. 29 of 1909. This was an appeal from an order from the High Court of Australia in its appellate jurisdiction reversing a decision of Mr. Justice Isaacs, dated December 22, 1911. The case was that of the attorney general of the Commonwealth of Australia versus the Adelaide Steamship Co. (Ltd.).

As stated by Lord Parker, of Waddington, in giving reasons for the report "the act of 1906 (in Australia) was a new departure in legislation and its true construction may be a matter of far-reaching economic importance. Their lordships propose to consider its provisions with some particularity."

The report then refers at some length to the law as it existed prior to and at the passing of the act in relation to monopolies and contracts in restraint of trade. The report discusses the right of the individual under common law.

It then discusses monopolies and their interference with the common right of freedom of trade. It then takes up for discussion the question of contracts in restraint of trade.

THE CASE INVOLVED.

The case involved was briefly as follows: Certain collieries in New South Wales had "vend agreements" relative to prices, and these agreements at the same time controlled wages. Here we quote from the report direct:

"For the last 40 years wages in the Newcastle coal field have, by agreement between the colliery proprietors and the workmen, varied with the selling price of coal. There is an assumed minimum price paid per ton for the best coal f. o. b. at Newcastle corresponding with an assumed minimum hewing rate. The probable price f. o. b. at Newcastle is declared for each year in advance by agreement between the colliery proprietors and workmen, and for every 1s. by which the declared price exceeds the minimum price the minimum hewing rate is increased by 4d. and the wages of certain other workmen

by sums amounting to 2¼d., so that out of every shilling advance in price 6¾d., in all goes to the workmen. It is not the practice to vary the declared price by fractions of 1s. This method of determining wages appears to their lordships to be eminently reasonable and well calculated to prevent labor troubles."

THE NEW AGREEMENT.

In the early years of the present century a new near-by coal field was opened which as a result of the control of steamers and the determination to sell the output resulted in a ruinous underselling, which in turn affected old and new collieries alike and the wage earners. Under these circumstances a meeting of colliery proprietors took place on the 5th day of January, 1900, and an association was formed to raise and maintain the price of coal. Lengthy negotiations followed and a vend agreement was prepared and assented to in April, 1900.

Quotations from the report follow:

"Their lordships therefore propose to consider whether an unlawful intention, i. e., an intention to restrain trade to the detriment of the public, can be gathered from these agreements considered separately or as part of a general scheme, it being admitted that each agreement constitutes a contract or combination in restraint of trade.

"The unlawful intention alleged is, so far as the vend agreement is concerned, in substance an intention to injure the public (1) by raising the price of coal, and (2) by annihilating competition in the Newcastle coal trade. There can be no doubt that the vend agreement was intended to preclude competition in the sense of underselling among its members, and by this means to raise and maintain the price of coal won from the Newcastle and Maitland coal fields. Ceteris paribus low prices are of advantage to the consuming public, and their lordships will assume that in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would, from the standpoint of public interest, require some justification. It can never, in their lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams.

"The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, can not, in their lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent. Not only can no trace be found in the vend agreement of an intention to raise the price of coal to an unreasonable extent, but such an intention is highly improbable, for it was not in the interest of the vend to charge unreasonable prices.

"In their lordships' opinion the decision appealed against was right, first, because so far as the Crown relied upon section 4a and section 7 of the act, there was no evidence (at any rate, no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and secondly, because so far as the Crown relied on section 10, there was no evidence (at any rate no sufficient evidence) of injury to the public."

BOSTON, MASS., *March 14, 1914.*

CHAIRMAN HOUSE JUDICIARY COMMITTEE,
Washington, D. C.

DEAR SIR: Understanding you committee has been taking testimony with reference to the possible repeal of certain features of present antitrust statutes, we are taking the liberty to address you upon a phase of the subject which is of considerable personal interest.

We refer to the present interpretation of the Sherman antitrust law, which, as we understand it, makes it illegal for any manufacturer to stipulate the prices at which his product shall be marketed. By a Supreme Court decision, the manufacturer can not now say to his purchaser, "You shall not offer my goods for sale at better than a certain price." We believe this is unfair to the manufacturer in many instances; but, considering now wherein both manufacturer and jobber are affected by this decision of the proper interpretation to the law, we cite to you a specific case where there is much dissatisfaction. The American Pulley Co., of Philadelphia, Pa., a manufacturing concern making steel pressed pulleys after patents secured from one Peter Corscaden, formerly (before the decision referred to) incorporated in their agents' contracts the following clause:

"The party of the second part further covenants and agrees that it will not quote or sell 'American' pulleys to consumers at a greater discount from the American Pulley Co. price list than that fixed by the American Pulley Co. from time to time, directly or indirectly, and that it will not allow a greater cash discount than 2 per cent from the prices for which 'American' pulleys are sold by it."

This contract had to be signed by the purchaser who intended to resell, before the American Pulley Co. would make him a selling agent; and the practice or custom made for a uniform price to the user or consumer, so-called in the contract, of this particular pulley. A further clause, as below, made it obligatory for the agent to exact from the reselling jobber a similar agreement, copy of which we number 2.

"To ——— ———

"——— hereby agree that ——— will not sell any of the steel pulleys made by the American Pulley Co., and covered by the patents owned by said company, to any one at a greater discount than that fixed by the said American Pulley Co. and confirmed by ——— as the discount to consumers on the price list of pulley company until ——— are authorized by said American Pulley Co. or by said ——— to change the prices; and this agreement shall be binding, whether the quantity of pulleys sold is great or small. ——— will not allow a discount greater than 2 per cent for cash in 10 days from date of invoices, or in any other way, directly or indirectly, in effect sell below established prices fixed as aforesaid.

"And ——— hereby agree that ——— will not sell any of said pulleys for export from the United States, but will refer all inquiries for said pulleys for export, or for steel pulleys of English or millimeter bores, to said American Pulley Co.

"——— ———"

A further clause, as below, fixed the price the agent could sell the jobber, thereby giving him a profit.

"The party of the second part further covenants and agrees that it will sell 'American' pulleys to reputable dealers (which term does not include consumers or manufacturers who buy pulleys to use with machines made by them) at fifteen per cent (15 per cent) advance on prices paid said party of the first part, plus the freight from Philadelphia to Boston, Mass., under written agreements identical in all respects to the form which is hereto annexed and made part of this agreement."

Therefore the user of pulleys could buy either from the stock-carrying agent or from the jobber and always at the same price. Both jobber and agent were assured of a profit, but the point you may be particularly interested in is that the jobber was certain of realizing a certain gain. He knew always that his price could not be bettered, and he was consequently reasonably sure of making the sale.

Since the Supreme Court's decision the stock-carrying agents have been released from their contracts, and in many instances have now gone over the jobber's head and quoted and sold his "consumer" trade at the same prices they previously sold him. He is therefore eliminated now, as he can not buy at better prices than can the user. His business is therefore in a fair way to be wiped out; the agents are no better off, since they now sell the user at the same prices they formerly sold the jobber, and also have had to change their prices on their own former "consumer" customers to the lower level.

The practice must be objectionable to the manufacturers as well, as it is to their advantage to keep jobbers satisfied. When they become otherwise, the natural impulse is to take up a competitive pulley and offer it against the "American" pulley, all to the detriment of the American Pulley Co.

Legislation which prohibits any agreement as to price between manufacturers, agents, or jobbers of similar materials is eminently proper; that which prohibits an agreement between a manufacturer and his agents is not; it is driving one class (the jobber) out of business, and is unfair and beyond the spirit of the law, to my mind.

There should be nothing savoring of restraint in trade; there is nothing of such description in the legal permissibility of one manufacturer to fix and to do all he can to maintain any price he may see fit to make for his agents.

We are arguing simply in the case of an article manufactured under patent and going into or assisting in the manufacture of some other article, not some of the necessities of life, so called.

The conditions at present surely mean for the ultimate passing of the jobber. Is this desirable? Is it in keeping with his constitutional rights, if we go to that limit? Does it not mean that he is deprived, or will be, of the chance to make a living in the vocation he has followed all his life?

We believe the law as at present interpreted by the Supreme Court is wrong, and respectfully ask your committee to consider the advisability of reporting favorably some legislation which will permit the class of manufacturers above referred to to govern their agents' selling prices.

We ask for this consideration in a spirit of absolute fairness; the agent is at present neither benefited or handicapped; the jobber is. Legislation can be passed which neither helps or hinders the agent, yet gives the jobber a chance to live.

We are not jobbers ourselves, but are manufacturers, and, in the case referred to, agents of the American Pulley Co., so are asking for nothing which particularly benefits us personally. We are interested in seeing fairness shown to the middleman, and hope your committee can consistently report favorably some such legislation as we suggest.

Yours, respectfully,

FALLS RIVET & MACHINERY CO.,
V. R. MACBAIN, *Manager.*

LANCASTER, PA., *March 19, 1914.*

HON. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR SIR: On February 10 I appeared before your committee, with the counsel of the Hamilton Watch Co., Mr. Charles L. Miller, for the purpose of making a statement based on our experience and favoring the price-maintenance plan of merchandising. Our statement appears in the record on trust legislation, serial 7, part 10.

On March 6 Mr. Charles A. Keene and Mr. Adolph H. Rosenfeld, of New York, appeared before your committee to oppose the price-maintenance plan of merchandising. Their statement is in the record on trust legislation, serial 7, part 25.

There is one particular point in Mr. Keene's testimony which I would take strong exception to, and I am writing you to ask permission to insert in the record a denial of the charges made by Mr. Keene with regard to our method of doing business and a statement of the true facts of this particular phase of the case. Our statement is as follows:

On page 1145 of the record on trust legislation, hearings before the Judiciary Committee, serial 7, part 25, Mr. McCoy mentions that "Mr. Miller, president of the Hamilton Watch Co., testified he had been able to control the jobbers' and retailers' selling prices up to the present time," to which Mr. Keene replied:

"Well, I will tell you how that was done. They make arrangements with the manager of a railroad to put a time system on that road and they appoint inspectors, and so on, to inspect the men's watches and see that they have proper watches; and they advertise the well-known engineers and put their pictures in the magazines and talk nice to them, and they manage to make a demand on the railroads for that Hamilton watch. They sell no cheap watches. I understand they claim to sell about 50 per cent or 55 per cent of the high-grade watches used on railroads."

Taking this reply part by part:

First. Approximately 225,000 miles of railroad in the United States are under official time-inspection system, embracing a great number of steam and electric railroads, and of all these roads we deny ever having made any arrangements

with the manager of a railroad to put a time system on that road, all such systems having been placed there entirely without any arrangements on our part with the managers or high officials of the railroad.

Second. We disclaim absolutely the fact that we ever appointed any inspectors. Such action would be impossible, as it is a well-known fact and merely a part of railroad regulations, that the chief time inspector is always selected and appointed by the railroad officials, himself becomes an official of the railroad, and appoints his subinspectors at various railroad division points.

Third. The statement about our advertising the well-known engineers and putting their pictures in the magazines is quite correct, but we wish to emphasize in this connection that the use of these pictures has come after the sale of the watches; in other words, we have never given a watch to any railroad man or any other man in order to make use of his picture and testimonial in our advertising. We have been advertising nationally only about three years, and before starting this campaign of advertising we ascertained the number of Hamilton watches in use by railroad men on the railroads of the United States having official time inspection. Having obtained this information, we merely used it as evidence that of all the railroad men coming under official time inspection in the United States, who by the nature of their occupation had to depend implicitly on the accuracy of their watch, 56 per cent of these had selected the Hamilton watch.

Fourth. I would particularly call the attention of your honorable committee to the fact that the railroad does not specify any one particular watch, but sets as a minimum standard certain grades of 9 or 10 different makes of watches, and the railroad employee is privileged to buy absolutely whatever make of watch he cares to purchase, the only requirement being that it must meet the standard as designated by the chief inspector.

Thanking you for your consideration of the above, I remain,

Respectfully, yours,

CHARLES F. MILLER,
President Hamilton Watch Co.

JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES.

GENTLEMEN: Re bill amending Sherman Act: In presenting this protest we are fully convinced that a serious injury will be done to the manufacturing business of our country if the prohibition of interlocking directorates is made a feature of the bill. We believe, in such an event, progress and enterprise in business will be throttled and no commensurate advantage for the injury done. We believe that in presenting our argument to you we can do no better than state the concrete facts of our business experiences as manufacturers and indicate to you the wrong and injury that the passing of this bill in this form would be to our industries, and our experiences will be no different than that of numerous other manufacturing enterprises which develop similar conditions in the extension of business.

The writer is a wall-paper manufacturer, a director and president in two manufacturing companies—Imperial Wall Paper Co., Glens Falls, N. Y., and the William Campbell Wall Paper Co., Hackensack, N. J. The Imperial Co. has a capital of $500,000, of which $350,000 is issued. The Campbell Co. has a capital of $300,000, all issued.

The manufacture of wall paper represents one of the smaller industries of our country, where some 35 factories produce annually about 300,000,000 rolls (8 yards to the roll) of manufactured product of a total estimated manufacturing value from ten to twelve million dollars. It may be safely stated that there is no other line of manufacture where the first cost is as great as in this industry. It is an annual product, a new line brought out each year, four months of the year occupied in sampling, and if the manufacturer is fortunate enough to obtain a full output he will occupy seven and a half months manufacturing, which will allow him two weeks to close down his plant for repairs. Our industry has never been favored with a tariff protection higher than 25 per cent, so there is no comparative printed product that has a lower tariff protection. There is no other country in the world making and marketing wall paper on as close a productive basis as the manufacturers and dealers of the United States, and there is no country in the world where its use is so general; no cottage so humble which may not afford the use of this decorative commodity.

Furthermore, the American wall-paper manufacturers pay their skilled laborers from two to three and in some instances four times the weekly wage paid

by their European competitors. The minimum wage paid a wall-paper printer in the United States is $24 per week to run what is called an 8-color machine, and up to $27 per week for the operation of a 12-color machine. The minimum wage paid a color mixer is $27 per week, and many of the more skilled earn $28, $30, and even some as high as $35 per week, and all with a guaranty of 50 weeks' employment.

The wall-paper trade is not in a healthy or vigorous condition to-day owing to the keen competitive conditions developed both from manufacturing and distributing standpoints. In the decade 1900–1910 there were as many manufacturers driven out of business either through bankruptcy, liquidation, or reorganization as there are in existence to-day.

At the outset these statements may appear to be extraneous to the matter under consideration, but I wish to impress this fact, that small business can not stand being further fettered by the enactment of legislation that will further throttle or hinder its progress, as will surely be the case if this Government will pass this bill in its present suggested form, the prohibition of all interlocking directorates.

The Imperial Wall Paper Co. was organized in 1901. The William Campbell Wall Paper Co. was a reorganization in 1903 of the William Campbell Co., one of the oldest wall-paper manufacturing concerns in the country, originally organized in 1865. In the year 1908, following the panic of 1907, it was again on the financial rocks. The heads of our organization—that is, the Imperial Co.—two of whom were formerly representative associates of the William Campbell Co., purchased a controlling interest in the plant and saved the concern from certain bankruptcy. A thorough reorganization was effected. The young men who had made good in the Imperial Co., coupled with certain associates of the Campbell Co., were made part of the reorganization, and with the guiding influence of the stronger company, a rehabilitation of the Campbell Co. is being effected.

Now, then, if this interlocking directorate bill goes through in its present form we are not in a position to let go of this Campbell Co. without sustaining a severe loss, which I assure you none of us can afford, and a great injury will possibly be done to the young associates who have staked their all in this enterprise. We would be forced to either liquidate, to use dummy directors, or consolidate. A consolidation scheme would be impracticable, and even if feasible it would be approaching a business method which the country does not desire to countenance, which would mean combination which we ourselves do not desire as it is inimical to wall-paper success.

The wall-paper business is peculiar from this standpoint, its prosperity and success is better assured by the individuality of its manufacture. Its production is a development of ideas, and no two plants could successfully manufacture the same patterns, same designs, same ideas. Each plant, therefore, to be successful must develop its own idea of pattern and design. Competitive dealers do not desire to handle the same line of wall paper; that is, the same patterns and designs. Hence, there is a limit to the productive sale of any individual plant. Our two companies, therefore, are practically just as competitive with each other as if owned by separate individuals. The advantage is in an economy of production, supplies, financing, etc.

One further argument growing out of our experience: We have a distributing branch in Chicago, which we call the "Imperial-Campbell branch," to enable us to distribute our wall-paper product west of Chicago to the retail trade. Heretofore the western distribution was practically entirely in the hands of the jobber or middle man, who alone occupied a position to purchase the product in carload quantities. We established this distributing branch to enable us to reach the retail trade ourselves. After operating this branch for a year, we found that we had no legal standing in the State to do business and we were of necessity obliged to incorporate. We have taken in the organization there two more of our representative young men and are developing a successful distributing industry there. Pass this interlocking directorate bill and we are illegally organized with our present officers. The State of Illinois requires us to be incorporated or we have no business protection there. Your interlocking directorate bill will tell us that we can not legally carry on this business if so organized; a dilemma which should be prevented, not created.

Respectfully submitted.

GEORGE TAIT,
President Wm. Campbell Wall Paper Co., Hackensack, N. J.,
President Imperial Wall Paper Co., Glens Falls, N. Y.

NEWARK, N. J., *March 20, 1914.*

Hon. WILLIAM HUGHES,
United States Senate, Washington, D. C.

DEAR SIR: We are very much surprised to note in the makeup of two of the tentative bills introduced by the Hon. Mr. Clayton and now receiving a hearing before the Committee on the Judiciary, that they contain measures which we believe would seriously interfere without present method of doing business, and about which we have never heard the first word of complaint. We can see no legitimate cause for objection by anyone to the way we conduct our business. We refer particularly to the manner in which we makes sales and dispose of our product. We herewith give you a brief outline of the way we market our goods, and would ask your advice as to whether it is the intent of your committee or the administration to prevent us from doing business in the manner described below. If this is their intention, it would seem to us that it will be bound to cause a great disturbance and increased expense to us in the marketing of our goods, perhaps compelling us to establish and maintain our own offices and direct representatives in various parts of the world, which it would be apparent to almost anyone, would be a procedure which would be vastly more expensive than our present method of selling.

To briefly explain our present method, would say, in various prominent cities scattered throughout the world we select certain representative business houses who are willing to act as our exclusive representatives for a certain specified territory. In times past they have voluntarily come to us and stated that they would agree not to offer for sale any similar machine to ours without first obtaining our consent. We have a form of agreement under which they work, as per copy inclosed.

On one line of machines which we make we permit the agent to sell a similar line of another make, but of a much cheaper grade, the machines which we make being of a high-priced class.

The necessity for this exclusive agency condition became apparent to us about 10 years or more ago. At that time it was not our custom to have exclusive agents, but rather to accept an order from any agent. We found, however, that this general-agency proposition was one which was very inefficient to us, so far as getting orders was concerned, and resolved itself into a condition where the agent would sell the machine which would bring him the most commission, regardless of whose make it was, and that, all in all, selling machine tools in this way became a matter of juggling prices, in which the merits of the tool were entirely lost sight of, or at least given very little consideration. In addition to this we found that with the advance of time and the intensive selling organization methods of some of our competitors whose business was much larger than ours, which warranted their maintaining direct representatives and showrooms in the various cities, our policy of accepting orders from any and every dealer was very unsatisfactory from the standpoint that we could not rely on the amount of trade or business which we require to keep our works busy. We require to work ahead on stock, and carry a certain amount of finished stock the year round. We, however, depend on shipping a certain amount as it becomes finished, and this means that we must, in the absence of having sufficient business to warrant maintaining our representatives in different parts of the country, have instead certain live and loyal representatives who willingly volunteer to represent us exclusively in our line of manufacture, and to that end they engage and train traveling salesmen to become thoroughly familiar and conversant with our machines, and sometimes they become sufficiently skilled to the extent of being able to operate our machines in a customer's factory. This training is expensive to our agents; they, however, are willing to do it for the sake of representing us the same as they similarly represent a dozen or more other manufacturers making another line of machinery, but the selling method in principle is the same as we have explained in our case.

This practice has become quite a custom among a great number of very reliable manufacturers, which we feel is the most equitable and satisfactory all around of any method which we have ever heard of.

The good result obtained from the exclusive agency feature is that the agent feels that in the exclusive territory assigned to him it is their own, and for whatever business or prestige they can create within their territory, which either at the moment or at some future time will bring them orders, whether the orders come to them direct or through another agent, they will

receive the benefit of same and thus be compensated for the efforts put forth in that exclusive territory.

You will note that in the agreement we have a clause to the effect that where one agent ships into the territory of another agent he credits the agent into whose territory the shipment is made with full commission. All of our agents willingly agree to do this. In reality these so-called agencies have become our personal representatives, and whatever statements they make to a customer regarding our machine we feel obliged to live up to. In order for them to thus represent us they visit our factory from time to time, to keep informed on what we are making and how it is made, and we in turn visit their places and call upon the trade with them. In this way a very close and intimate personal acquaintanceship has come to exist. All that we have stated thus far applies equally with reference to Europe. It has come to be that we are closely interested in our agents' business, and our agents are equally so in our business. This mutuality extends to their salesmen, who, when they approach a customer, talk, so to say, as representing one master and not two or three or half a dozen, as the case may be, serving best the one from whom they are making the most commission. In all of our experience we have never found a more just or equitable method of disposing of our product, which promoted and maintained a spirit of loyalty mutually satisfactory to both parties, as the plan we have outlined.

You will also note, from the blank form of agreement submitted, that we reserve for ourselves the right to deal with a customer direct should a customer not wish to deal with the agent. Our agents agree between themselves what credit they should allow should another agent, by mistake or through the condition of the geographical location of a certain manufacturer happening to be in another agent's territory from that in which the home office or purchasing agent's office would be, where the order might be placed.

We quite frequently have agents who are competing agents to our representatives treat with our own representatives and order our machines; in the case of a customer who wishes to place an order for one of our machines with an agent not our own, and so to say not with us direct, but wishing to place the order through some dealer with whom he is on more intimate terms, possibly, than with our own representative. We make this explanation for the reason that we can not see how, according to the plan with which we are working, there is the least semblance of restriction or monopoly as to trade or commerce, or as to how there is any semblance of the maintenance of prices injurious to the buyer. If a certain customer wishes one of our machines, and does not wish to treat with our representative, he can buy direct from us, or through another agent; and then, too, there are from six to a dozen manufacturers making the same line of goods which we do, and it is certainly very true, which we regret to state we sometimes experience, that a customer places his order with one of our competitors, so that with all of our conditions we still have ample competition.

The selling arrangement which we have we have thought in the last few years has proven itself to be one of the nicest and most pleasant conditions which we have ever been able to work out, a condition which was eminently satisfactory to us as a manufacturer, to our representative as the dealer, and to the customer as a purchaser, for by this system our representatives gradually accumulate a corps of trained workers who advocate only the several manufacturers which they exclusively represent. In this way they become expert themselves, which quite naturally proves more satisfactory to the manufacturer, the customer, and the house they represent.

As we take it, the bill, as drawn at present, will entirely upset all of this, which, if true, we feel that if the proposed bills are passed, would oblige us to virtually alter our selling arrangement, and we do not at the present moment know just how. It seems almost as though we would be obliged, as mentioned in the fore part of this letter, to resort to the expense of maintaining our own individual representatives around the country, which would be expensive for the small volume of business from some sections, as a representative does not always receive a steady volume of inquiries or orders, and yet to get his share of orders in his territory is required to travel from place to place to see one customer after another.

Or we might have to give up all of our agency arrangements and simply solicit orders direct. This would also be a very expensive method, as the average buyer nowadays wishes to see a personal representative, and imagine what that would mean in attempting to cover a country such as ours.

For the above reasons we can not see that our plan is in the least monopolistic, and trust that our fears will not be realized, and that the Judiciary Committee will be able to follow some plan which would permit us to continue to market our goods as we do.

We have gone into this at some length, but trust that you will be able to read this at your leisure, sufficiently so to thoroughly familiarize yourself with our condition and situation better than a personal talk, but we are willing, and we know that a great many of our friends in a similar line would be willing to personally present the same.

We would appreciate any suggestions or advice which you may be able to offer under the circumstances.

Yours, very truly,

GOULD & EBERHARDT.
FRED L. EBERHARDT.

AGREEMENT.

This agreement executed in duplicate and entered into this — day of ———, nineteen hundred and fourteen, by and between Gould & Eberhardt, a corporation of the State of New Jersey, party of the first part, hereinafter referred to as the manufacturer, and ——— of ———, party of the second part, hereinafter referred to as the agent, witnesseth:

That whereas the manufacturer is desirous of securing representation in the following territory for the sale of his shaping machines and automatic gear-cutting machines and attachments, it is agreed as follows by and between the parties hereto:

1. Outline of territory: The agent is to have the exclusive right to sell the shaping machines and automatic gear-cutting and gear-hobbing machines and attachments, made by the manufacturer, in the following-named territory: ———

2. Push sales: The agent will diligently and vigorously push the sale of the manufacturer's machines in the above-named territory.

3. Competing machines: The agent agrees not to offer for sale any competing machine or machines without first obtaining the consent in writing of the manufacturer.

4. Advertising material: The manufacturer is to supply free of cost to the agent, in reasonable quantities, such catalogues, circulars, electrotypes, and other advertising matter of like nature as the manufacturer may regularly issue.

5. Stock machines: The agent agrees that he will purchase and carry in stock as samples at least two sizes of the shapers made by the manufacturer.

6. Terms of payment: It is agreed that the terms of settlement for all machines sold by the manufacturer to the agent are to be on a basis of 30 days' cash (excepting where cash discount is allowed) payment from date of invoice, which date is fixed by the date machine is ready for shipment.

7. Exclusive sale: (*a*) During the life of this agreement manufacturer agrees that he will not sell in the territory above allotted to the agent as exclusive, and further agrees that he will refer to the agent all inquiries received from said exclusive territory. Should a customer positively refuse to deal with the agent, in such an event the manufacturer will be at liberty to handle the deal direct, and agrees to pay the agent one-half of his regular commission on the list price of any new machines so shipped.

(*b*) The agent agrees to confine himself strictly to the territory as named in the foregoing and not to accept orders for the machines or attachments for same made by the manufacturer for shipment into territory other than his own, whether for railroads or anyone else, except with the written consent of the manufacturer or his authorized selling agent for such territory.

(*c*) The manufacturer is hereby given the right to charge up to the account of the agent a sum equal to the regular commission on the agent's cost price of any new machine or machines or parts of machines that the agent ships into territory other than hereinbefore agreed to, or for any new machine or machines (made by the manufacturer) reshipped into territory other than his own, and is hereby instructed to pay said amount to the agent into whose territory the machine or machines or parts of machines are installed, excepting where there is a written agreement to the contrary between the interested agents and a copy of said agreement has been filed with the manufacturer.

(*d*) In case any new machine or machines made by the manufacturer be shipped or reshipped into the exclusive territory of the agent by the manu-

facturer or anyone else, then the manufacturer will collect from the offending party and pay over to the agent a sum equal to the regular commission on the agent's cost price on any new machine or machines so shipped. The manufacturer hereby assumes the payment of this amount sixty days after shipment of the machines.

8. Change in price: To take effect at once upon receipt of notice to that effect. Bona fide sales during the following ten days on quotations already out shall be entered at the old prices. Agent shall notify manufacturer promptly of such prospective sales.

9. Prices and cancellation of unfilled stock orders: It is agreed that no further stock orders are to be accepted at the old prices after such notice. Unfilled stock orders are to be invoiced at the new prices. As soon as possible after change in prices the agent agrees to furnish the manufacturer a list of all unsold machines on stock orders. In the event that said change in price is a reduction, all unsold machines invoiced to the agent within six months prior to said notice shall be subject to said reduction in price. Should there be any advance in price the agent has the right to cancel any or all unfilled stock orders. It is agreed that the termination of this contract cancels all unsold and unfilled stock orders.

10. The manufacturer shall have the right to limit the number of machines for which he will accept stock orders.

11. Warranty: The manufacturer warrants that the machines he supplies will fulfill the conditions named in his literature and specifications and are adapted for the work for which the literature and specifications recommend them.

12. Workmanship and material: The workmanship and material of the machines, if not as represented in the literature and specifications issued by the manufacturer, will be made good by the manufacturer, but no allowance will be made for any expense incurred in repairing or supplying any defective or missing parts, unless on the written consent of the manufacturer.

13. Termination of agreement: This agreement shall continue in force for one year from date, and thereafter until terminated by either party giving sixty days' notice in writing.

It is mutually agreed that should either of the parties hereunto become involved in receivership, bankruptcy, or insolvency proceedings this agreement may be terminated at the option of the other party.

14. This agreement shall be binding on the successors or assigns of the parties hereunto.

In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

GOULD & EBERHARDT.

Per ———. Date, ———.

MARCH 23, 1914.

Hon. HENRY D. CLAYTON,

Chairman Committee on the Judiciary, House of Representatives.

DEAR SIR: Conformably to your request that I write you relative to bill No. 4, committee print, concerning "Holding companies," I do so.

If the purpose of the bill is to deal with the effect of stockholding where it affects "competition," as distinguished from where it affects "trade," it seems necessary to me to define what is meant by the words "lessen competition." What do they mean? They do not define a rule of law, for, of course, it is not the purpose of the bill to cover every limitation upon competition, since there are many limitations upon competition which are beneficial and have been so recognized by the courts for centuries, and by Congress and the States in legislation.

The word "lessen," as applied to "competition," would cover only questions of fact; and the courts in applying the act would only make a finding of fact, instead of formulating a rule of law saying what the lessening of competition referred to was. It is a rule of law only that can be a guide to business. Accordingly the word "lessen" should be defined; and I suggest that after the word "or," section 1, line 8, the word "unlawfully" should be inserted. This would then cover whatever Congress has heretofore enacted on the subject or may hereafter enact on the same subject, as well as such rules as the courts have heretofore formulated or may hereafter declare. In short, it would lay down a general rule. In every case then coming before the courts the court

would have to declare the rule of law applicable to the facts, whereas without the insertion of the word "unlawfully" the court would merely find as a fact in each case whether or no competition was lessened without stating the rule of law in respect thereto.

The word "unlawfully" should also be inserted after "or," in section 2, line 6; after "or," in section 5, line 4, and "unlawful" after "the," section 3, line 14.

Does the word "competition" really, however, meet the purpose of the bill? It has many applications and suggests to my mind great uncertainty as to the exact intention of Congress. There are many phases of competition. It will certainly have to be construed by the courts.

Perhaps, however, the purpose of the bill is to "prohibit unlawful restraint of trade or monopolies in interstate" trade, as the title reads and as is also referred to in section 6? If so, the words "eliminate or lessen competition" should be stricken out and the words "restrain trade" inserted. These words would make clear the intention of Congress, for they have a clear meaning in the law. They would cover all the cases broadly where the effect of stock-holding is to restrain trade unlawfully or in a manner harmful to the interests of the public.

These ideas are written very hurriedly, but I hope I have made clear the changes which I think should be made.

Faithfully, yours,

HERBERT NOBLE.

CHICAGO, ILL., *March 26, 1914.*

Mr. THAD. E. RAGSDALE,
406 Fifth Street NW., Washington, D. C.

DEAR SIR: I am sending you herewith a brief printed statement showing the growth of commissions in the several States as indicated by me in my previous testimony before the Judiciary Committee of the House.

I also transmit herewith a suggestion for an exception to be incorporated in the interlocking directorate bill, exempting public utilities from the operation of the statute. My suggestion is as follows:

"*Provided*, This act shall not apply to corporations engaged in the operation of public utilities other than common carriers as defined in the act to regulate commerce approved February 4, 1887, and amendments thereof."

In addition to the above, I inclose herewith a copy of the tentative bill No. 4, by Mr. Clayton, with certain suggested amendments, which I have indicated in brackets and in italic. I have omitted from section 5 the following words in the second line, to wit: "Engaged in interstate or foreign commerce."

Very truly, yours,

BERNARD FLEXNER.

TO PREVENT UNLAWFUL RESTRAINT OF TRADE OR MONOPOLIES IN INTERSTATE OR FOREIGN COMMERCE BY CORPORATIONS THROUGH THE DEVICE OF INTERCORPORATE STOCKHOLDING.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. That it shall be unlawful for one corporation engaged in interstate or foreign commerce to acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in interstate or foreign commerce [*except corporations engaged in the operation of public utilities other than common carriers as defined in the act to regulate commerce approved February 4, 1887, and amendments thereof*] when the effect of such acquisition is to eliminate or lessen competition [*in such interstate or foreign commerce*] between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any area or community.

SEC. 2. That it shall be unlawful for one corporation to acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in interstate or foreign commerce [*except corporations engaged in the operation of public utilities other than common carriers as defined in the act to regulate commerce approved February 4, 1887, and*

amendments thereof] when the effect of such acquisition or the use of such stock by the voting or granting proxies or otherwise is to eliminate or lessen competition [*in such interstate or foreign commerce*] between such corporations or any of them whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

SEC. 3. That this act shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about or in attempting to bring about the lessening of competition.

SEC. 4. That every violation of this act shall constitute a misdemeanor punishable by a fine of not exceeding $5,000 or imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court; and any individual who as officer or director of a corporation or otherwise, orders, takes action, or participates in carrying out any transaction herein forbidden shall be held and deemed guilty of misdemeanor under this section.

SEC. 5. That nothing contained in this act shall prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their lawful business or the natural and legitimate branches thereof or from owning or holding all or any part of stock of such subsidiary corporations when the effect of such formation is not to limit or lessen preexisting competition.

SEC. 6. That nothing contained in this act shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall make legal stockholding relations between corporations when and under such circumstances such relations constitute violations of the act approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

HISTORY OF COMMISSION GROWTH IN THE SEVERAL STATES.

[Submitted to the Judiciary Committee of the House of Representatives of the United States of America by Bernard Flexner.]

The present utility commissions of the various States are for the most part the outgrowth of the old railroad commissions. These commissions, weak in the beginning, were gradually strengthened. Scattered powers of control were first centralized, then extended from steam railroads to common carriers of various sorts, car companies, electric railways, street railways, and other utilities. In some cases the old commission was retained and its power amplified; in others new commissions were created. It was very early the policy to put the control of railroads in the hands of State commissions. On the other hand such control as was exercised over the utilities was usually left in the hands of local bodies. It afterwards become the policy to take away the control of such bodies and place it in the hands of State commissions.

The first railroad commissions appeared in New England. New Hampshire and Rhode Island each established a commission in 1844; Connecticut in 1853; and Vermont in 1855. New York's first commission was established the same year. A second commission was created in 1882, giving way to the present public service commissions in 1907. Maine established a commission in 1858; Ohio in 1867; and Massachusetts in 1869. All of these old commissions were weak as compared with later commissions. They had supervision over railroads but their duties were merely to collect information as to the condition of the roads, their manner of operation with reference to the observance of law by the carrier and with reference to the safety and accommodation of the public. They were required to report to the governor or legislature, and, in case of violation of law, to the State official charged with its enforcement. None of these commissions had any power over rates.

In the seventies a number of the States became greatly interested in the question of transportation, and through the granger organizations, which at that time had a large membership, took a determined stand for State and National regulation and control of transportation companies.

One of the principles advanced by the grange was, "that all corporations are subject to legislative control; that those created by Congress should be restricted and controlled by Congress; and that those under State laws should be subject to the control respectively of the States creating; that such legislative control should be an express abrogation of the theory of the inalienable nature of chartered rights; and that it should be at all times so used as to prevent moneyed corporations from becoming engines of oppression."

Following this agitation, a number of the States began to pass granger laws fixing the maximum rates of transportation of freight and passengers.

During the next 20 years 27 new railroad commissions were established, and of these all but 10 were strong commissions; that is, to say had power to fix rates; and of the 10 weak commissions 5 were afterwards given jurisdiction over rates.

Among the States establishing commissions during the period from 1870 to 1890 were: Minnesota and Illinois, 1871; Michigan, 1873; Wisconsin, 1874; Missouri, 1875; California, 1876; Virginia, 1877; Iowa and South Carolina, 1878; Georgia, 1879; Kentucky, 1880; Alabama, 1881; Kansas and Tennessee, 1883; Mississippi, 1884, Colorado, Dakota Territory, and Nebraska, 1885; Florida and Oregon, 1887; and North Dakota, 1889.

The passage of maximum rate laws and the control of the commissions over railroad rates subject to such laws was the marked movement of the period from 1870 to 1890.

During the period from 1890 to 1902 commissions were established in the following States: Arizona, North Carolina, and Texas, 1891; Florida and Tennessee, 1897; Louisiana, 1898; Arkansas, 1899; and Kansas, 1901. The first Tennessee commission had been abolished in 1884.

The tendency of a railroad regulation during this period was to relinquish control over rates by maximum-rate statutes and to substitute therefor complete control by commissions. The marked tendency of the period was to increase the powers of the commissions in this respect. Another important tendency was to extend the control of the commissions over technical matters, such as construction, maintenance, and operation. The commissions now had not only the power to keep themselves informed about these matters, but to require the railroads to comply with their orders in respect thereto.

There was also during this period a tendency to regulate the railroads through special public agencies, created in place of, or in addition to the commissions, such as the Michigan Railroad and Street Crossing Board, the Kansas Charter Board, and "Court of Visitation," and the "North Carolina Corporation Commission": eight of these agencies were created during the period. This accounts for the abolition of some of the old commissions and the reestablishment of the Kansas Commission after the new body called the "Court of Visitation" had been declared illegal by the courts, as an attempt to combine legislative and judicial powers in one body. This policy was afterwards abandoned in most States in favor of the single railroad commission.

The important subjects considered by the railway commissioners in their annual meetings during this period were the problem of uniform reports of statistics, uniform classification of freight, grade crossing, heating and lighting of cars, safety devices, and uniform accounts.

In 1905 railroad commission laws were passed in Indiana, Washington, and Wisconsin. The jurisdiction of the Washington commission extended to railroads and express companies; that of the Indiana and Washington commissions to other common carriers and car companies. Street railways in cities were expressly exempted from the control of the commissions. In Indiana and Washington electric and interurban railways were also exempted. These laws gave the commissons full control over rates and service, and invested them with ample powers to enforce obedience to their orders.

The period of development of the modern public service or public utility commissions may properly be said to have begun in 1907. In some States old railroad commissions were continued, and their jurisdiction extended to utilities other than those which may be classified under the head of common carriers; in others, new commissions were created and given names signifying their wider jurisdiction.

State control over utilities other than carriers, however, began long before 1907.

In 1885 Massachusetts established a board of gas commissioners. It was required to make annual reports on the capitalization and financial condition of the companies and as to the quality of gas. The companies were forbidden to dig up the streets without permission of the commission.

In 1887 the board of gas commissioners was constituted a board of gas and electric light commissioners. Companies were required to obtain a certificate of necessity and convenience before beginning operations.

In 1888 the commission was given power to fix the price of gas furnished cities and towns on the application of the company and to investigate accidents.

In 1894 the right of the commission to fix rates was extended to all electric

light and gas companies; stock and scrip dividends were forbidden, and the issue of stock and bonds by gas and electric companies was required to be approved by the commission. Telephone, telegraph, aqueduct, and water companies were forbidden to issue such securities without the approval of the commissioner of corporations.

In 1896 the commission was given power to require the companies to remedy impaired capital on an application to issue securities.

In 1905 New York State established a commission of gas and electricity. The commission was given general supervision of gas and electric corporations, the right to investigate the quality of gas, to fix the standard of illuminating power and purity of gas, to prescribe methods of accounting, to examine into the condition of the corporation's business, require the usual reports, summon witnesses, require the production of books, etc., to inspect meters, to approve franchises and the issue of stock and bonds, and to approve the transfer of franchises, and to fix minimum rates upon complaint and after notice and hearing.

In 1903 a State corporation commission was established in Virginia with power to require all corporations chartered under the laws of the State to perform any duty imposed by law, including the furnishing of reports.

Aside from the jurisdiction of the commissions mentioned, such control as existed over utilities, other than common carriers, was exerted by local legislative bodies or special local commissions.

In 1907 Wisconsin placed the public service of telephone, telegraph, heat, light, water, and power companies under the jurisdiction of the railroad commission and charged it with the enforcement of all laws relative to such subjects.

During the same year New York State abolished its railroad and gas and electric commissions, conferring the powers of each upon the public service commissions, first and second districts. The jurisdiction of the commissioners extended first to railroads, street railroads, common carriers, and gas and electric corporations. The jurisdiction has since been extended to telegraph and telephone companies, baggage and transfer companies, steam corporations, and stockyards.

During the same year Georgia extended the jurisdiction of its commission to telephone and telegraph companies, street railways, gas and electric companies. Alabama also passed a new law including in the jurisdiction of the commission telegraph and telephone lines operating in more than one city or town, but expressly exempting street and electric railways operating within the limits of a single city. Colorado, Montana, Nebraska, Nevada, and Pennsylvania also passed new commission laws during the same year, but did not extend jurisdiction beyond utilities which might fall within the general designation of common carriers or storage companies. Colorado expressly exempted street railways.

Of the various commissions existing under the new laws at the end of 1907, the Wisconsin, New York, and Georgia were all what might be termed modern commissions. The Wisconsin act, however, did not give the commission the control of stock and bond issues as did the New York and Georgia laws. The New York law also gave the commission power to supervise relations of the utilities between themselves in respect to finance and organization, such as transfer of corporate property and sale of securities.

The Nebraska commission has not since been changed, but in 1909 acts were passed requiring telephone companies to furnish adequate service, regulating the issue of stocks and bonds, and giving the commission control thereover and providing for the valuation of railroad and other public-service property. In 1911 the commission was given power to fix reasonable rates for water and irrigation purposes and in 1913 an act was passed giving the commission power to regulate telegraph rates.

The Pennsylvania statute authorized the commission to employ experts to value property in connection with the issuance of stocks and bonds. This statute gave the commission power to report violation of the law to the attorney general, but gave it no power to make rates.

In 1908 Oklahoma created a corporation commission. Its jurisdiction extends to all public-service corporations.

In 1909 Michigan passed a new law giving its railroad commission control and supervision of the transmission and supply of electricity when generated by power within one county of the State and delivered in the same or some other county; but telegraph, telephone, and gas companies, street and electric railroads in the cities were not included. In 1911 telephone, telegraph, light,

heat, water, mechanical power, railroads, interurban railways or other carriers were forbidden to issue stock except for specified purposes and with the consent of the commission. Telephone companies were also put under the general jurisdiction of the commission.

In 1909 the name of the Vermont Board of Railroad Commissioners was changed to the "public-service commission," and the new commission given jurisdiction over gas, electric, telephone, and telegraph companies and supervision over stock and bond issues.

In 1910 the Maryland Public Service Commission, the Corporation Commission of New Mexico, and the Public Service Commission of South Carolina were created. The Maryland commission has jurisdiction over railroads, street railroads, common carriers, telephone and telegraph lines, gas, electric, and water companies. In 1912 this commission was given power to approve the issue of stocks and bonds for specified purposes. The jurisdiction of the Corporation Commission of New Mexico does not extend to gas, electric, and water companies. The South Carolina Commission was created to fix maximum rates and charges in all cities, except those named in the act, for the supply of water, gas, or electricity furnished to the city or its inhabitants. No commission, however, appears to have been organized under this act.

In 1911 new laws were passed by Connecticut, Kansas, New Hampshire, New Jersey, Ohio, and Washington.

In all of these States jurisdiction was extended to utilities other than common carriers, including gas and electric companies. The California law, in addition to the usual powers, gave the commission full control over capitalization and intercorporate relations with power to value utility property. The Connecticut law gave the commission power to fix rates upon complaint, but no control over capitalization. The Kansas commission, in addition to the rate-making power, was given extensive control over capitalization and required to value public utility property. The New Hampshire commission was also given control over stock and bond issues. The New Jersey commission was given no control over capitalization, but was invested with ample powers over other fields, including the transfer of stock to other corporations. In 1913 the commission was given control over mergers. The Ohio commission was given control over the issuance of stocks and bonds and was authorized to value public utility property. Municipalities are, however, given power to establish rates for public utilities with the right of parties affected to carry the case to the commission. The Washington commission, like that of New Jersey, does not have control of capitalization.

In 1912 Arizona established a corporation commission and Rhode Island a public utility commission. The jurisdiction of these commissions covers both railroads and other public utilities, including gas and electric companies. The Arizona law was apparently modeled on the California law of the year before, giving the commission control not only of rate making and service, but also of capitalization and intercorporate relations. The Rhode Island law does not extend the powers of commission into these latter fields.

In 1913 new commission laws were passed in Idaho, Indiana, Illinois, Maine, Massachusetts, Missouri, Pennsylvania, and West Virginia. In all of these States, except Massachusetts, jurisdiction of the commissions covers public utilities other than those coming under general designation of common carriers, including gas and electric companies. The Illinois commission has jurisdiction over stocks and bonds and intercorporate relations. In Massachusetts the board of gas and electricity retains jurisdiction over gas and electric companies. In Idaho, Pennsylvania, and West Virginia the regulatory powers of the commissions do not extend to stocks and bond issues. The Maine law is not yet in effect, but under the referendum will be voted on by the people this year. The Massachusetts commission has jurisdiction over railways, including electric railroads and steamships, express and car service and telegraph and telephone business, the jurisdiction of the latter companies being taken away from the highway commissions. The commission has power to value property and regulate the securities of the corporations under its control.

Of the important powers exercised by the modern commissions, it has been seen those relating to service and observance of law date from the organizations of the first commissions; that those relating to rates and rate making go back to the seventies.

Commission control of capitalization antedates the period of 1907, which marks the beginning of the swift development of public-utility control. States exercising such control were New York, 1889; Texas, 1893; and Massachusetts,

1894. Since 1907 the tendency has been to extend such control, a large number of States having vested their commissions with extensive power over this field.

The valuation of corporation property, other than for purposes of taxation, also antedates the moder[illegible]missions. Texas was the first State to value its railroads. This was in pursuance of a statute passed in 1893. The Supreme Court decision in Smyth *v.* Ames (169 U. S., 466), emphasizing the doctrine of fair value of property uses for the convenience of the public as a basis for rate making, was decided in 1898. Since then specific statutory power to value public-utility property has been given in a number of States, although such power is exercised by commissions even in the absence of statutory command.

The provisions of the utility law designed to give the commission control of the field by regulating the purchase and sale of securities, consolidations, and reorganization is a product of the last stage of commission growth. None of these statutes go further back than the Massachusetts law of 1906. The present tendency is to give the commission ample powers over intercorporate relations.

In a number of States, municipalities have been given the right to acquire the property of gas, electric, and water utilities by condemnation. In 1899 Colorado provided that all franchises for such utilities should be thereafter granted or renewed with the understanding that the municipality should have the right to purchase at the actual cash value if they desired.

In 1902 Massachusetts gave municipalities this right to purchase, and in 1907 Wisconsin provided for an intermediate permit giving municipalities the right to take over such properties upon paying just compensation therefor, to be determined by the commission. This policy has also been embodied in the Indiana statutes of 1913.

These have been the principal developments of the law with reference to the commission control of utilities during the period beginning with 1907.

UNITED SHOE MACHINERY CO.,
Boston, Mass., March 27, 1914.

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: On February 16 Mr. Louis D. Brandeis appeared before your committee in advocacy of legislation supplementary to the Sherman antitrust law, and made certain statements concerning the United Shoe Machinery Co.

His posing as a public-spirited citizen should not blind you to the fact that he has recently been and for all we know now is counsel for a small group of men who have been attacking the United Shoe Machinery Co., and his oblique references to that company, to illustrate his points, illustrate still better the sinister purpose of his remarks.

Among other things he urged the adoption of section 16 of the so-called Lenroot bill which he explained "was suggested by a set of facts resulting from the Shoe Machinery situation, but by no means peculiar to it." He named no other company to which the provision would apply, and the proposed section is substantially identical with that which he urged upon your committee two years ago when he appeared before you as the counsel of the Shoe Manufacturers' Alliance. It is reasonable to suppose, therefore, that the legislation he now proposes is aimed at the United Shoe Machinery Co. alone. The committee will, of course, decide for itself as to the wisdom of enacting a law of universal application in order to reach a particular case, assuming the facts in that case to have been truthfully presented, and I have no intention of touching upon the merits of Mr. Brandeis's proposal; but in the course of his argument he made certain statements about our company which are not true, and as these statements have now found a place in the printed report, I am writing you this letter so that the committee may have an opportunity to set the official record straight. If no correction were at hand, the very audacity of the statements might naturally lead you to believe that Mr. Brandeis's word could be relied upon; for many members of the committee know that for a long time he was intimately connected with our company as director and counsel and that he thus had ample opportunity to become conversant with our methods. You might also assume that he could speak with authority in discussing the leases which he helped to draw, and which he has advised are legally valid and ethically right, although he now tells you they will be held invalid by the courts, and asks you to legislate against the effect of them.

On page 654 of the published hearings, Mr. Brandeis says:

"No other machines are in existence and they can not be brought into existence quickly."

This statement is absolutely untrue. Not to speak of the large and well-equipped foreign manufacturers whose capacity to supply all lines of shoe machinery is proved by their catalogues put in evidence in the pending suit in Boston, and who, now that the duty on shoe machinery is abolished, can flood this country with machinery, there are—and for years have been—machinery makers in the United States who stand ready to supply any factory desiring equipment. Since the organization of the United Shoe Machinery Co. several hundred new shoe factories have been started in the United States, no one of which was under any obligation whatever to the company. If any substantial number of these new factories had at any time desired to secure an equipment that was not furnished by the United Shoe Machinery Co. the other manufacturers of shoe machinery could easily have responded by increasing their output so as to meet the demand; but manufacturers have preferred the machinery of the United Shoe Machinery Co., because they have regarded it as the best and the terms upon which they could get it as reasonable and proper, and because they have wanted to secure the service which goes with our machines.

If new factories had desired other machinery than that of the United Shoe Machinery Co. and had secured any advantage by so doing, factories already established would have followed their lead in securing outside machinery.

On page 655, line 31, Mr. Brandeis says:

"His (Plant's) business is to-day running on the machines which his people constructed. That business, although three-fifths of it is owned by the United Shoe Machinery Co., is running to-day because it is being run on the Plant machines."

This statement is also untrue. The Plant factory is running to-day under the management of the men who managed its several departments when he owned it and who now have an option on the purchase of the stock interest held by the United Shoe Machinery Co. They have replaced all the most important Plant machines with machines of the United Shoe Machinery Co., which they use on precisely the same terms as other manufacturers, and they have testified that they have done so because Plant's machines were not so good as the United Co.'s

On page 659, near the bottom of the page, Mr. Brandeis says:

"Anybody to-day could get a welter or a stitcher which would do his work perfectly well. Anybody could get a slugger or any of these other machines, like nailers and various other machines of that kind.

"But they have not been in a position where they could go out and get one of these machines without running the risk of losing a large number."

The shoe manufacturers in the United States who lease our machines are about 1,000 in number. It has been shown in the testimony before the Federal court that manufacturers may have machines of our lasting, metallic, heeling, and Goodyear departments on independent lease, not tied in any way to any other machine, and practically every manufacturer has other machines obtained either from the United Co. or elsewhere not tied.

Mr. Brandeis's remarks on this and other occasions have given the committee to understand, and the committee seems to assume, that the United Co. has a monopoly of all shoe machinery. (See his remarks, p. 654.)

As a matter of record the counsel for the United States, on December 3, 1913, abandoned such a claim, and in open court said:

"The only thing we contend for is that they have monopolized machinery designed and adapted for use in the manufacture and attaching—preparation and attaching bottoms to the uppers of shoes; the clicking machine and the eyeletting machine."

Of this change of position Judge Brown, of the court hearing the case brought by the United States against the company, said:

"There is very substantial difference between the allegation that they intended to monopolize the shoe-machinery business and the charge that they intended to monopolize machinery related to a particular part of the manufacture, to wit, the bottoming of shoes. It is about as different a case as can be imagined. It is the difference between a monopolist and a specialist."

I know that you do not wish to be burdened with a discussion of the shoe-machinery situation, such as was inflicted upon you two years ago; and I am not going to enlarge upon the subject any more than may be necessary to prevent misrepresentation in the record. But I should like to say, in reply to the

question asked by Mr. Webb, on page 659, and repeated by him on page 660, that there has never been a time when our company compelled or expected any manufacturer to use an unpatented machine as a condition of leasing a patented machine. In reply to the suggestion of Mr. Volstead, on page 663, that the United Shoe Machinery Co. refuses to sell to anyone who buys a machine from anyone else, let me say that we are glad to sell any one of the machines we make for sale to any shoe manufacturer who wants it and can pay for it; and that there is probably not a shoe manufacturer in the United States, leasing any of our machines, who does not use side by side with our machines some machines bought or leased from our competitors. All this has been brought out clearly in the suit which is now pending in the Federal court, and much of it was testified to by shoe manufacturers before your committee two years ago.

If it were fair to trespass on your patience I should be glad to go further in analyzing Mr. Brandeis's statements, and of course we are ready at any time to supply you with any facts you may care to have. The shoe-machinery business is exceedingly technical and complicated; and members of your committee, absorbed as they are in the study of many important questions, may not be able to devote much time to its consideration; but Mr. Brandeis has had exceptional opportunities to familiarize himself with it through acting both as counsel for our company and as counsel for our opponents, and if in volunteering to enlighten the committee he imparts to it untruthful information, it is for the committee to judge whether he misrepresents intentionally or is merely careless of his facts.

Yours, very truly,

L. A. COOLIDGE, *Treasurer.*

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
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JOHN C. FLOYD, Arkansas.
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LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 35.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, April 6, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Gentlemen of the committee, Representative Vollmer a few days ago asked that Mr. Edward C. Roberts, one of his constituents, be accorded a hearing by this committee in regard to the trust bills pending before this committee. I told Mr. Vollmer that the committee had practically decided not to have any more hearings on those bills, but in as much as his constituent, Mr. Roberts, and his business have been referred to by another gentleman, who has been heard by the committee, I thought the committee would be willing to hear Mr. Roberts to-day. Besides, Mr. Roberts is here and he desires to give his views to the committee. He desires also to criticize an amendment to one of the bills which was suggested by a gentleman who appeared before the committee, and he will disclose that matter fully in the statement he will make to the committee.

I now introduce to you, gentlemen of the committee, Mr. Edward C. Roberts, of Davenport, Iowa, and we will be glad to hear from him at this time.

STATEMENT OF MR. EDWARD C. ROBERTS, PRESIDENT OF THE GORDON-VAN TINE CO., DAVENPORT, IOWA.

Mr. ROBERTS. Mr. Chairman and gentlemen of the committee, on March 10 last, Mr. L. R. Putnam, of Fayetteville, Ark., appeared before you and made certain statements about the firm which I represent, which is the Gordon-Van Tine Co., of Davenport, Iowa, which statements are not in accordance with the facts. Mr. Putnam, also as the representative of the Retail Lumber Dealers' Association, proposed an amendment to section 9 of tentative bill No. 1, and if it were not for that amendment which he proposed, I would not be here, because the statements that he made about our concern we would pass by and disregard.

But I am here to try to explain to the committee that the amendment proposed by the Retail Lumber Dealers' Association through Mr. Putnam, while very innocent looking on its face, is in our judgment very sinister.

I desire to present what I have to say to you, gentlemen of the committee, in as intelligent a way as possible and as briefly as possible. In order to present intelligently our objections to this amendment to which I have referred, it will be necessary for me to briefly give you a little bit of business history, and I will make it as brief as possible.

I desire to say, first, that the owners of this firm have been in business in Davenport, Iowa, for 49 years, always having an honorable name throughout the Middle West. About eight years ago we ceased selling to retail lumber dealers and began selling direct to the consumer through the media of advertising and catalogues. It has proven very successful, and our files contain many thousand letters complimenting us on our upright methods, our exceptionally high grades, and our efficient service. Our decision to sell direct came about because marketing our goods through retail lumber dealers became unprofitable.

The retail lumber business throughout the Middle West was controlled by great "line-yard" companies, each company owning a large number of retail yards, reaching as high, in some instances, as 100 yards to one firm. The headquarters of these firms were centered in Minneapolis, Kansas City, Chicago, and other large cities, and their power became tremendous. They purchased in large quantities and on an exceedingly low basis. On the other hand, they obtained from the consumer exceptionally high prices, dominating the field absolutely and annihilating swiftly any independent competitor who dared to come into their territory.

The manner in which these "line-yard" companies controlled trade and how competition was crushed is intensely interesting, and I can briefly state it to the committee if it is desired; otherwise I will proceed.

Mr. FITZHENRY. Do you think it is pertinent to the proposition?

Mr. ROBERTS. If you decide it is pertinent later I will be very glad to give it to you.

A manufacturer who sold to any person not a retail lumber dealer was blacklisted by the retail lumbermen's associations. His offense was overlooked, provided he sent to the retail lumberman nearest by a sum equal to 10 per cent of the sale. This was in the nature of a

fine or penalty. Manufacturers soliciting the trade of retailers were expected—yea, practically compelled—to become honorary members of the retailers' association, agreeing, of course, to sell no one but "recognized" lumber dealers.

This system became more intolerable each year, and manufacturers chafed under the yoke of the retailers' combines, but no manufacturer seemed to dare fight it. The system was the more galling because a large percentage of retailers made it a practice to purchase from us and other firms like us No. 2 grade doors and sell them to their customers for No. 1 grade. Likewise they would purchase windows glazed with single-strength glass and sell them to consumers for double-strength glass. I have personally seen hundreds of letters from retail lumbermen ordering such second-grade materials and asking us to brand them No. 1 grade, which I can emphatically say we never did. You can imagine the state of affairs was very exasperating.

After we started selling direct to the consumer, we wondered why there was such a big increase in the proportion of orders for No. 1 material. There was not any change in the proportion demanded by the public, but the explanation was that we were getting our orders direct from the public.

Mr. CARLIN. When you say you were blacklisted, do you mean your name was put on the black list? I understood that they did not publish a black list.

Mr. ROBERTS. They published in the trade journals the name of any manufacturer who sold his goods to other than a retail lumber dealer.

Mr. CARLIN. But they did not publish the names of those who did?

Mr. ROBERTS. Yes; in this way: That only the names of those who stuck to the rules were published as associate or honorary members of the retail lumber organization. If your name was not in that book——

The CHAIRMAN (interposing). They published, then, what was sometimes called a white list, and you contend that your name, not being on the white list, you were in that way put on the black list?

Mr. ROBERTS. I used the word black list in the commonly accepted sense, that you were held by the retailers' combine as being a kind of black sheep. You were held not to be fit to sell to the members of the association, because you had sold to some one who was not a recognized dealer.

Mr. CARLIN. Then you say they did not publish a black list, but they did publish a list of names of men with whom they thought it was improper to deal. They deny that they ever published a black list, but, of course, the publication of such a list is, in effect, a publication of a black list.

Mr. FITZHENRY. They did publish a list of the wholesale dealers who were engaged in the retail business, directly or indirectly, did they not?

Mr. ROBERTS. They published a list of manufacturers—I think they call it the white list.

Mr. CARLIN. Then you are mistaken in saying they published a black list?

Mr. ROBERTS. I did not make exactly that statement. I said a manufacturer who sold to any person not a retail lumber dealer was blacklisted by the retail lumbermen's association.

Mr. CARLIN. They deny they have a black list.

Mr. TAGGART. Did they publish the name of a man or a firm who sold to anybody except a retail lumber dealer?

Mr. ROBERTS. Yes. Many things they have said have been disproven in the United States courts.

The CHAIRMAN. I understand that the name of every manufacturer of lumber who sold direct to the consumer—his name was withheld from the white list—and that, in effect, was a black list, because the name was not in the list of manufacturers whom the members of the association should patronize.

Mr. ROBERTS. That is the idea.

The CHAIRMAN. I think the committee understands that.

Mr. ROBERTS. As I was saying, I have, personally, seen hundreds of letters from retail lumbermen ordering such second-grade materials and asking us to brand them No. 1 grade, which I can emphatically say we never did. You can imagine that state of affairs was very exasperating.

I have refused orders, when I was traveling on the road, from retail lumber dealers for the simple reason that my firm would not misbrand goods. This was one of the things that drove us to selling direct to the consumer.

Knowing that the consumer was fearfully overcharged for building materials and that the marketing of our products to the retail lumber dealer was proving less remunerative every year, we decided to cut loose and sell our products direct to the builder, the home owner, the consumer, the actual user.

This naturally aroused the ire and the hatred of the retail lumber combines, and for eight years we have been subjected to a most grilling and cruel persecution. They have not hesitated to misrepresent us and slander us whenever opportunity offered. Logically seeing if we were successful others would follow suit, the campaign waged against us has been almost fanatical in its intensity, which I will refer to later.

The remarks of Mr. L. R. Putnam before your committee on March 10 last covered two or three subjects, the most important one to us being the objectionable amendment which his association proposes. Before coming to that, however, in justice to our own good name we desire to correct the erroneous impression given the committee with regard to our advertising and the quality of our goods.

The gentleman expressed his annoyance at our advertisement in the Saturday Evening Post in 1912, wherein we advertised a "strong door" for 77 cents. He went on to explain the effect of the advertisement on the people of his community.

I will not take up the time of the committee, unless you desire it, with reference to this particular door, but I will only state that it is an article which, if used in the right place and where it belongs, is all right and worth the money asked for it. It is technically known as D grade, and is described and priced as such in our general catalogue, from which customers make their selections and purchases. Customers do not buy direct from the advertisements, the object of the advertisment being to stimulate the reader's interest and get him to send for our catalogue, in which our goods are fully described and illustrated. The State of Arkansas, from which the gentleman comes, is one of the greatest consumers of D-grade doors in this country,

and there is little doubt but what he has the same in stock in his own place of business.

One fact is certain, that we sell these doors for just what they are, which I fear retail lumbermen do not always do. In fact, when I traveled on the road I knew retail lumbermen to order these doors already painted and varnished, so as to cover defects, and sell them to undiscerning farmers as No. 1 quality.

The picture drawn by the gentleman of the effect of the advertisement on the retail trade of his community is, in our judgment, altogether fanciful and greatly overdrawn and intended to prejudice your committee rather than to state the actual facts.

The gentleman stated that he corresponded with the publishers of the Saturday Evening Post, telling them that our advertisement was a misrepresentation. The gentleman also stated that the said advertisement had never reappeared in the Saturday Evening Post, giving the impression, I fear, that the Curtis Publishing Co. had cut us out and turned our advertising down.

As we are continually freshening and changing our copy, it is difficult to say whether this particular advertisement has ever reappeared in the Post, but our advertisements have appeared in that publication many times since the date referred to—that is, 1912.

The Curtis Publishing Co. is an exceedingly high grade firm, and only accepts advertising which it knows to be first class. Now, had the gentleman who appeared before your committee desired to acquaint you with all the facts in the matter, he would and should have submitted to you the correspondence between himself and the Curtis Publishing Co., as he has given you a wholly incorrect impression of the attitude of this publishing company toward our firm. We have been furnished from time to time, through our advertising agents, with copies of replies made to Mr. Putnam by the Curtis Publishing Co., to which they felt we were entitled. These letters are not very long, and as they are very vital in this matter I desire to read them to the committee at this time.

The first one I desire to read to the committee is dated May 14, 1912. The letter says:

MAY 14, 1912.

Mr. L. R. PUTNAM,
The Northwest Arkansas Lumber Co., Fayetteville, Ark.

DEAR SIR: We are in receipt of your favor of May 11 in regard to the Gordon-Van Tine advertising and thank you for the spirit of fairness in which your letter is written. We also note with pleasure that your previous complaint was sent without the knowledge of anyone else. The fact that we have received similar complaints from other people was doubtless a coincidence.

In regard to the question of censorship of advertising copy, would say we believe, without fear of justifiable contradiction, that there is no publishing company which exerts a more rigid censorship of its advertising than the Curtis Publishing Co., nor one that is doing more to protect its readers from specious and fraudulent claims of mail-order advertising.

However, we are only human, and it may be that sometimes misstatements will creep into copy without our knowledge. Some of these statements involve technical information which is only known to people in the same line of business. We have also found that in most cases the people with whom we are doing business do not intentionally mean to deceive or exaggerate, and are usually amenable to any suggestions which we make that are prompted by a spirit of fairness to all parties concerned.

We are not aware that there is any legitimate objection to the fact that some of the goods sold by the Gordon-Van Tine Co. are stock goods any more than there would be to such goods being sold by a retail dealer.

I do not understand that they claim that all their goods are made to order, or even a large part of them.

If there is any specific statement in their copy to which legitimate exception can be taken, we will always be glad to have you call our attention to it, and see that it is eliminated if the claim is well founded.

With cordial regards, we remain, yours, very truly,

THE CURTIS PUBLISHING CO.,
WM. BOYD, *Western Manager.*

There is another letter, also addressed to the same Mr. Putnam, under date of May 21, 1912, and also signed by Mr. Wm. Boyd, western manager of the Curtis Publishing Co. That letter says:

MAY 21, 1912.

Mr. I. R. PUTNAM,
The Northwest Arkansas Lumber Co.,
Fayetteville, Ark.

DEAR SIR: We are in receipt of your favor of May 18, which we have read with a good deal of care.

You are mistaken in saying that the Gordon-Van Tine Co. is the only mail-order advertiser appearing in our paper. As a matter of fact we carry quite a few mail-order accounts, although in the aggregate they represent only a very small portion of the total volume of our business.

We could not exclude the Gordon-Van Tine advertising on the basis that it is a mail-order proposition, as mail-order advertising has its legitimate side quite as much as any other class of business.

We have had a great deal of correspondence with these people in reference to their advertising, and they have practically followed every suggestion we have made to them. In fact, I think you will find that in their advertising they have modified their claim to save the consumer from 25 to 50 per cent, and they have cut out everything that reflects directly or indirectly on the retailer; so that their proposition resolves itself to a case of ordinary competition.

The consumer can submit his list of requirements to his local dealer and to Gordon-Van Tine, and then place the order wherever he can do so to the best advantage. In some cases, naturally, the local dealer will get the benefit of such a comparison, especially when freight, delay, and the difficulty of dealing with an out-of-town factory are considered.

You mentioned the fact that the door advertised at 75 cents is of poor quality. I can not think that any intelligent person would expect to get very much of a door for that price.

The simple fact is, as we understand it, that Gordon-Van Tine guarantee all of their products to be exactly as represented or they will refund the money to any dissatisfied customer. This is about all that we can expect any advertiser to do.

We have never had a complaint that they have failed to do this, and if we should have such a complaint we would require them to make good on the proposition or we would be compelled to refuse their advertising in the future. The only complaints we have received are from dealers. We have always carefully considered these complaints, and when suggestions have been made which have required modification in the Gordon-Van Tine advertising, and we have insisted on such changes, they have always been followed.

We see no way in which the consumer can possibly be wrong or deceived in dealing with this house, and hardly feel justified under the circumstances in refusing their advertising on the facts submitted.

If there are any specific statements made by the Gordon-Van Tine Co. which you consider false or misleading, or if you can point out any way in which a consumer could be injured or mislead we would be very glad to consider such suggestions on their merit.

Yours, very truly,

(Signed) THE CURTIS PUBLISHING CO.,
WM BOYD, *Western Manager.*

Then there is one more letter, which is very short, under date of January 30, 1914—this year. It is also addressed to Mr. Putnam,

and is signed by Mr. Boyd, the western manager of the Curtis Publishing Co. This letter says:

JANUARY 30, 1914.

Mr. R. L. PUTNAM,
Secretary and Manager Northwest Arkansas Lumber Co.,
Fayetteville, Ark.

DEAR SIR: Replying to your favor of January 21, would say that neither your correspondence with us during April and May, 1912, nor that received from a number of other lumber dealers about the same time, of similar tenor and effect, had anything to do with our attitude toward the Gordon Van Tine Co.

Our position toward that company is the same now as it was before, and we continue to execute their advertising on the same basis as that of every advertiser in our publications.

This basis was fully explained in our correspondence at the time referred to. While we are always glad to give careful consideration to every sincere and reasonable suggestion from our readers, any attempt at concerted action, for selfish reasons, to discredit an advertiser, must necessarily defeat itself.

Very truly, yours,

THE CURTIS PUBLISHING CO.,
By WILLIAM BOYD, *Western Manager.*

I sincerely trust that these straightforward statements from the Curtis Publishing Co. will suffice in themselves to place us in the true light before this committee.

The gentleman stated to the committee that there should be some form of Government censorship of advertising, or, at least, intimated that was his thought.

Nothing would please us more than some method of Government censorship of advertising, if the same could be made practical and workable. We have nothing to fear, but everything to gain, from such a censorship. There are firms engaged in every line of business whose advertising is untruthful and unethical; and nothing would please us more than to see it eliminated from the mails. Whether this can be done in a practical manner or not without becoming an abuse in itself is something for our lawmakers to decide.

My principal reason for appearing before you this morning is to oppose the adoption of an amendment to section 9 of tentative bill No. 1, which the gentleman appearing before your committee favored. I will read you the proposed amendment as it was suggested by him:

And provided further, That it shall not be deemed an attempt to monopolize or to restrain commerce among the several States to disseminate, through trade associations or otherwise, truthful information as to the methods, practices, or policies of persons, firms, or corporations engaged in commerce among the several States or with foreign nations.

This is a very innocent-looking amendment, but is proposed, we believe, from the most sinister motives. You understand this amendment was proposed by Mr. Putnam, as the emissary of the Retail Lumber Dealers' Association, representing a great many thousand retail lumber dealers.

Mr. CARLIN. Do you approve of the section as it stands, without this amendment?

Mr. ROBERTS. As far as—I do not disapprove of anything in that bill which I have read. This amendment is the thing which we are solicitous about.

Mr. CARLIN. I am referring to section 9 of the tentative Clayton bill No. 1. Do you approve of that section?

Mr. ROBERTS. I have read that, and I see no objection in it, as far as we are concerned, sir.

In order to disseminate information, it must first be collected, and, under the guise of "collecting information," we have been subjected to the most grilling, cruel, and unethical persecution ever endured by an American firm, which I have already referred to. These vicious methods were fully brought out in the cases which the United States Government brought against the Retail Lumber Dealers' Associations, and which is a matter of record in the Federal courts.

The utmost efforts were put forth by the Retail Lumber Associations to wreck our business, and a "little black book" was published, informing and instructing retail lumbermen how to proceed to "collect information" about us and our prices.

I have a copy of the text of the "little black book" given me by the Department of Justice, and appropriately bound in yellow. This is an exact copy of petitioner's Exhibit No. 162, in the case of the United States *v.* Willard G. Hollis et al. This "little black book" was introduced by the Department of Justice as evidence in the case of the United States *v.* Willis G. Hollis et al., in equity No. 1079, suit filed in the Federal court at Minneapolis, Fourth Division of the District of Minnesota. In the records of that court the "little black book" is known as petitioner's Exhibit No. 162.

Mr. CARLIN. That seems to be a little yellow book.

Mr. ROBERTS. Very appropriately bound in yellow, I think.

I want to read this to the committee. This forms a little chapter in American industrial history which is very dreadful, we think. Evidence has been introduced by the Department of Justice proving that this little book was ordered printed by the secretary of the Northwestern Retail Lumber Dealers' Association. It is the work of their hands. At the beginning of this "little black book" it says that these are suggestions for meeting mail-order house competition, compiled from ideas offered at various conventions. This little black book says:

IMPORTANT.

(Suggestions for meeting mail-order house competition compiled from ideas offered at various conventions.)

It is beyond doubt that the greatest menace to the lumber business to-day is the competition of the mail-order house which has wrought such havoc in the ranks of the small merchants throughout the country.

Although a vigorous effort toward meeting the competition of such concerns is of vital importance, it is believed that at the present time Gordon-Van Tine & Co., otherwise the U. N. Roberts Co., of Davenport, Iowa, is the most formidable competitor of the retail lumber dealer, not only because of their own activity, but because of the probable result of their success, if they succeed, upon all other manufacturers of millwork.

In order to successfully compete with them, it is necesary for every dealer to keep in close touch with them and know what prices they are quoting to his customers. To accomplish this the following line of action should be persistently, faithfully, and systematically carried out.

Get prices and catalogues.—Secure from Gordon-Van Tine & Co. at least two catalogues per week, using your name and also that of other members of your family, employees, friendly contractors, and merchants, with their permission, but never use a fictitious name. By using care each name will answer for five communications.

1. Send for catalogue in respond to ad.
2. Send list of material for estimate.
3. Send letter asking questions requiring special reply, remembering that all your letters will be answered by printed replies if the labor of writing a special reply can be avoided.
4. Send for samples of roofing.

5. Send for paint-color card.

N. B.—Be sure to answer all question cards and leave the correspondence under each name in such shape that it can be renewed at a later period. Don't fail to change names frequently.

Mr. ROBERTS. Is this America?

Order something.—Send in one or two small orders during the season, for two reasons: First, so as to have a sample of their goods to show your customers. Second, so as to keep a name on their buyers' list, to which they send all of their "good things." Also send an order occasionally without the money to see if they stick to the cash basis.

Visit depots.—Make a practice of visiting the depots each day to see if any shipments arrive from catalogue houses, being particular to note the party's name and the kind of goods received. With this information, the recipient of the goods should be seen and have demonstrated to him that the local dealer would have sold him the goods, and will in the future sell him on the same terms as the catalogue house.

Meet the price.—When you get a catalogue, study it. Then make your prices on the same items and on the same terms, low enough to get the business and you can better afford to do it now to keep your business than you can later to get it back.

Advertise.—When you make up your mind to meet the price, let the people know it. They can't find it out unless you tell them, and they may send their orders elsewhere supposing you are still a "mossback." Don't let your local newspaper man depend upon outside advertising for his living. He will be hostile to you if you do and will not help you in a campaign of education, in which you should join with other merchants.

Campaign of education.—Study and learn all of the arguments in favor of home buying and against mail-order houses. Make yourself a committee of one to organize your town into battle array against the encroachments of these great monopolies.

Stock sizes.—Insist upon your trade using stock sizes. You can not compete with a mail-order house and sell odd-size material any more than you can compete with a concern that sells for cash by granting six months or a year's credit. Better push than be pushed.

Buy in carloads.—There is only one way to buy cheap and that is in carloads. Join with your neighboring dealers and buy carloads of stock sizes and divide them. Otherwise you can not compete with Gordon-Van Tine & Co. prices.

Act on information.—When any valuable information reaches you act on it. Remember, information costs money and you don't get what you pay for unless you use it. Wake up and put some ginger into your neighbor also.

Others.—Get at least one catalogue or price list per week and send in one estimate per week to the following:

Millwork only: Chicago Mill Work & Supply Co., Chicago, Ill.; Sears, Roebuck & Co., Chicago, Ill.; Montgomery Ward & Co., Chicago, Ill.; Schaller-Hoerr & Co., Chicago, Ill.; Waterman-Hunter Co., Minneapolis, Minn.

Lumber and millwork: Geo. Green Lumber Co., Chicago, Ill.; John Spry e Lumber Co., Chicago, Ill.; Chandler Lumber Co., Chicago, Ill.; Street, Chatfield & Co., Chicago, Ill.; White River Lumber Co., Chicago, Ill.; Chicago & Riverdale Lumber Co., Chicago, Ill.; Chicago House Wrecking Co., Chicago, Ill.; South Side Lumber Co., Chicago, Ill.

Report.—Make special report on inclosed blank and remember that it means serious loss to you if you don't keep persistently at this defense of your business existence.

Mr. ROBERTS. Evidence was furnished by the Department of Justice in the Federal courts to show that the printing of this little black book was ordered and paid for by Mr. Hollis, secretary of the Northwestern Retail Lumber Dealers' Association. Its text was copied in the trade journals and mouthpieces of these associations. Compiled by legal talent of the highest order, it informed members of the Retail Lumber Associations how to wage war against us and undermine our business, but for each suggestion given gave seemingly good legal reasons for the same. The reasons, however, have not

stood the test very well in Federal courts, as I will explain to the committee later on, if the gentlemen desire to hear it.

The warfare waged against us by members of retail lumber associations became almost fanatical in its intensity. I desire to submit to you now in a condensed form some of the evil practices indulged in by these people.

Every association member was urged to write or send for a copy of our expensive catalogue, not with the intention of buying, but to cost us expense. One large firm owning a great many yards offered a prize of $100 to the retail yard manager who would collect the greatest number of Gordon-Van Tine Co. catalogue covers. One dealer was said to have 600.

Mr. CARLIN. What did that catalogue cost you?

Mr. ROBERTS. At that time it cost us about 25 cents. We have sent copies of our catalogue to your committee, and you can see for yourselves how expensive it is.

Retail lumbermen rarely used their own names in writing us, but instead they used the name of an employee or the name of a friend, or a fictitious name; any way to get the catalogue. We have received as many as 25 requests from one town in one day in the same handwriting, signed by seemingly different persons, asking for our catalogue. The practice became so widespread that they ran our mail up to 5,000 letters per day from a normal mail of 500 or 600 letters a day. You can easily see how this would soon wreck our business. This was called "collecting and disseminating information."

Association members were exhorted to write us, sending in long lists of material which the writer alleged he desired to purchase, and asking for our lowest cash price on the same. This involved on our part several hours time of an expensive clerk; and as these requests were received by the thousands, it became a matter of impossibility to cull the ones sent in good faith from the spurious ones or the "phonies." We were therefore obliged, for a time, to charge $2 to make an estimate on material. This practice also was called by the Retail Lumber Dealers' Association "collecting and disseminating information"—collecting information and disseminating it through trade associations, as is proposed in the amendment suggested by Mr. Putnam.

Spies were hired and put into the various freight depots of Davenport, Iowa, which spies made lists of our customers' names from shipments. Through a devious process those names were forwarded to Minneapolis, from whence notification was sent to the association member at the point where such shipment was destined. The association member at that point was supposed to get after our customer and try and prevent him from ever trading with us again. His mind was poisoned by every conceivable misrepresentation about us, too lengthy to enter into here.

Mr. CARLIN. What is the size of your firm; what is its capital?

Mr. ROBERTS. $250,000.

Mr. MORGAN. What is your gross business a year?

Mr. ROBERTS. A million and a half. The retail lumber dealer would receive a card reading something like this: "The Gordon-Van Tine Co., of Davenport, Iowa, have made a shipment to John Smith, of your town."

Well, John Smith may be a farmer who lives 5 miles out from the town. It has been known that a retail lumber dealer would drive out, in a case like that, 5 miles to see Mr. John Smith, and, after greeting him, he would say: "Well, I see you have been buying some goods from Gordon-Van Tine Co.?" "Well, maybe I have. Why? I have a right to buy where I want to." The dealer would say: "I am just checking things up through the county. I get a secret commission of 10 per cent for all the sales they make in this county, and I want to put it down."

That was false, absolutely, of course, but it poisoned the farmer's mind. "Oh," he said, "do those rascals give a commission to anybody?" That gave us a great deal of trouble. For several years we sent out a circular in regard to that matter stating that any such statement, any statement of that sort, was false; that we gave no secret rake-offs to anybody.

Every conceivable attempt was made to cut off our supply of raw material. Spies were hired who took numbers of the freight cars entering our premises, and consignors shipping us raw material were threatened with boycott and other severe measures if they continued to sell to us. All possible sources of our raw material were looked up and constantly notified that they must desist. Thousands of such notices were circulated through the United States mails throughout the country directed to every possible source from whence we might obtain raw material and finished products. Personal messengers were sent to interview many people supplying us with goods, in the endeavor to dissuade them from selling to us.

The amendment which these retail lumber associations favor and would like to see adopted, would, apparently, in their judgment, give them authority to again "collect and disseminate information" regarding us, and it is, in our judgment, a very dangerous amendment.

Had we not discovered ways and means of circumventing these nefarious schemes and combating these frightful inroads on our expenses, it would have gone very hard with us and probably made it impossible for us to continue doing business. We have managed, however, to survive and succeed, partly by our own ingenuity, and partly by the cooperation of publishers. Another factor not to be disregarded was the large number of "conscience letters" we received from members of the lumber associations who could not in honor carry out their instructions to harass us, and who thought it a more manly course to inform us as to the inside workings of the association against us. We have even had retail lumber men of high character make trips to Davenport to see us and inform us personally of schemes that were on foot to ruin us. It is therefore partly due to the good American conscience that we are successful and are doing business to-day.

In view of the facts which I have presented to your committee, I implore you to recommend against the adoption of the proposed amendment as being wholly unnecessary and containing very dangerous possibilities.

Mr. TAGGART. You speak of these fellows who gave you information. Did those fellows buy a bill of goods from you and deal with you after that?

Mr. ROBERTS. No; we do not sell to retail lumber dealers.

Mr. TAGGART. You do not sell them at all?

Mr. ROBERTS. We do not refuse to; but we do not seek their trade.

Mr. TAGGART. You do a regular mail-order business?

Mr. ROBERTS. We sell practically all of our goods through the United States mails.

Mr. MORGAN. Do you assume that the lumber dealers of the West are not men of high character? Do you think the men who came to you—do you mean to reflect on the lumber dealers as not being men of high character as a class?

Mr. ROBERTS. No; I do not; but, I think, in answer to the question you asked me, that the men who came to see us were certainly men of high character.

Mr. MORGAN. Do you think that their coming to see you was prompted by a benevolent spirit which induced them to go to see you?

Mr. ROBERTS. I do not know what they were prompted by; but I know they came.

Mr. TAGGART. They looked better to you than the other fellows, anyway?

Mr. ROBERTS. That is true; they did. I would be glad to answer any further questions the members of the committee may desire to ask me in regard to this matter.

Mr. MORGAN. Naturally your talk is very interesting to me, because I have a great many people who belong to that class who you evidently think are engaged in a very unethical and unfair practice; and I agree with you that that ought to be prohibited in the extreme cases, of course. But after all, of course, your firm has succeeded in making a larger profit than the average local dealer makes, have you not?

Mr. ROBERTS. I do not know.

Mr. MORGAN. How many persons do you employ?

Mr. ROBERTS. From 225 to 250—that is, at Davenport.

Mr. MORGAN. From 225 to 250 at Davenport. Do you have other houses?

Mr. ROBERTS. We have a large lumber-shipping yard at St. Louis.

Mr. MORGAN. Has your business been growing generally from year to year?

Mr. ROBERTS. It has been growing nicely, sir.

Mr. MORGAN. About how much money do you expend in advertising each year?

Mr. ROBERTS. From $40,000 to $50,000.

Mr. MORGAN. Do you apprehend that you are liable to be put out of business by this retail organization of the lumber dealers?

Mr. ROBERTS. We hope not.

Mr. MORGAN. Is there any danger of it under present conditions?

Mr. ROBERTS. There would be great danger of it if this amendment to which I have referred was made a law.

If you will pardon me, I would like to say that the United States Government itself has filed suits in the United States courts against the retailers' organization in the East, and, in fact, all over the country. There are several of them, and the United States is prosecuting these cases right now and has secured an injunction in the eastern case.

Mr. MORGAN. Did not that injunction seek to prevent them from competing with you?

Mr. ROBERTS. As I understand it, that injunction is to restrain them from engaging in the very practices which I have referred to in my remarks this morning.

Mr. TAGGART. What they have asked for in this amendment is exactly what is guaranteed by the Constitution of the United States. The Constitution gives a man the right to disseminate information. You think they have a sinister motive in asking for this amendment?

Mr. ROBERTS. I do.

Mr. TAGGART. In asking for that right?

Mr. ROBERTS. Judging from what they have done to us in the past, under the guise of the collection and the dissemination of information.

Mr. VOLSTEAD. The Constitution of the United States does not guarantee that you may have a conspiracy.

Mr. TAGGART. That is right; but to collect and disseminate information is the basis on which every newspaper in the country is doing business, and it seems to me it would look rather peculiar for a committee of this House to go into the House with a constitutional right in a bill and ask for its adoption.

Mr. VOLSTEAD. If you put that provision in you would give all the retailers in the country, all the retail lumber dealers, the right to prescribe a blacklist. That is what they want under the amendment which has been proposed.

Mr. ROBERTS. You have struck the keynote of the situation.

Mr. VOLSTEAD. We have had a large number of men before us asking for that provision. We have had almost every trade in the country represented before us asking for the right to publish a blacklist.

Mr. TAGGART. Can we make a law prohibiting anybody from publishing the fact that John Jones buys his lumber from the Gordon-Van Tine Co.?

Mr. VOLSTEAD. I do not know; the Supreme Court of the United States has made some sort of a decision in regard to those things.

Mr. ROBERTS. As I look at it, they seek by this amendment to legalize ways and means that have heretofore been used to try to destroy our business. That is in a nutshell the whole matter.

I would like to add one thing more, which I wish to make very emphatic, and that is, if you would like some illuminating information on this question I would suggest that you call on Mr. Bielaski, the chief of the Bureau of Investigation in the Department of Justice. Mr. Bielaski has made a very exhaustive study into this subject and he will give you some facts that will light it up from an angle you, perhaps, have not seen it before.

I will be very glad to answer any other questions which any member of the committee may desire to ask me at this time.

Mr. TAGGART. Does it not look as if you are holding your own, when they take such measures as they have taken to fight you?

Mr. ROBERTS. Yes; we think we are winning the fight.

Mr. VOLSTEAD. That is, if you are let alone.

Mr. ROBERTS. Yes, sir. We have had a fierce time.

Mr. TAGGART. Do you make use of the parcel post in delivering any of your goods?

Mr. ROBERTS. Very slightly; not to exceed one-tenth of 1 per cent.

Mr. TAGGART. Then, you are not getting rich by using Uncle Sam as a messenger boy?

Mr. ROBERTS. We are not, and we do not expect to. And yet these same gentlemen howled about the damage the parcel post was going to do them, and in one of their trade journals it was predicted that shingles would be shipped by parcel post. But that is preposterous.

Mr. FITZHENRY. Your concern is a corporation, is it not?

Mr. ROBERTS. Yes, sir.

Mr. FITZHENRY. Who are the prominent stockholders in your concern; just name me a few of them.

Mr. ROBERTS. It is largely a family corporation; myself and my brother and my mother and Mr. Scott; and one or two other parties who have a smaller interest.

Mr. FITZHENRY. As I recall the statement of the gentleman who appeared before the committee, it was that some persons were engaged in some other line of business, in the general lumber business, and that the first names and the married names of the daughters were put together for the purpose of making the name of this corporation, organizing this corporation, and then the original five continued in this line of business, and that this is really a department of the original business; is that true?

Mr. ROBERTS. I can explain, very briefly, what is the facts in regard to that.

From 1865 to 1906 we did business under the name of The U. N. Roberts Co. U. N. Roberts was my father. When we decided to cut loose and sell to the consumer direct we knew there would be trouble ahead and so we decided to start out by organizing another firm under another name, and if the business was unsuccessful we would drop it and go on in the old way and do our business under the old name. We cast about for several weeks for a suitable name. We thought of the "Davenport Lumber & Mill Work Co.," for instance, and other names. None of them seemed particularly good to us, and so we made up a name by using the middle name of my brother, which was Gordon, and the middle name of my other partner, which was Van Tine, thinking we would start it that way, and then after while drop the new name and go ahead and do business as we had done it for years. But we were successful in the new move and very soon the name of Gordon-Van Tine began to have a tremendous trade value; and so we could not drop it.

Mr. FITZHENRY. Is the U. N. Roberts Co. still doing business?

Mr. ROBERTS. They are engaged in business in this respect: That they manufacture the goods and own the real estate and buildings, but they do not solicit business from anybody.

Mr. FITZHENRY. But the Roberts Co. would sell to the line yards if the orders happened to come in?

Mr. ROBERTS. Oh, yes; we would.

Mr. FITZHENRY. The original Roberts Co. dealt entirely with the local lumber dealers?

Mr. ROBERTS. With the retail lumber dealers; yes, sir.

Mr. FITZHENRY. As I recall the statement made before the committee, there was another objection, and that was that you claimed to own large forests, and claimed that in dealing with your concern

it was a proposition of from forests to consumers, and it was claimed upon investigation that it was discovered that you did not own any forest land at all?

Mr. ROBERTS. That is not true; we do. The company itself does not, but I and other stockholders do.

Mr. DANFORTH. Is the Roberts Co. a corparation or a partnership?

Mr. ROBERTS. It is a corporation.

Mr. DANFORTH. Both of the companies are corporations?

Mr. ROBERTS. Yes, sir.

Mr. MCGILLICUDDY. How extensive is your ownership of the timberlands and forests?

Mr. ROBERTS. I am willing to answer the gentleman's question, but I would like to ask you in fairness to me—as I understand it, these records are to be published, and I would like to just ask how far you gentlemen think I ought to reveal the company's inside affairs?

Mr. MCGILLICUDDY. I will not press the question.

Mr. ROBERTS. I will simply leave that to the fairness of the members of the committee.

Mr. FITZHENRY. I do not think we are particular about it. I only asked you the question which I did ask you because it was one of the points which they brought out, and they claimed that it was a fraud which your firm was perpetrating.

Mr. VOLSTEAD. Have you any arrangement with any lumber company or sawmill to take their entire output?

Mr. ROBERTS. We have several long-time arrangements for the output of mills and factories.

Mr. DANFORTH. And are any timberlands owned by these other mills or factories?

Mr. ROBERTS. Yes, sir.

Mr. TAGGART. Have you had any lawsuits on questions as to whether or not you delivered the goods as advertised?

Mr. ROBERTS. No, sir; I do not think we have ever had a single one of that kind.

Mr. TAGGART. Have you delivered the goods as advertised?

Mr. ROBERTS. We have, absolutely; and I can truthfully state that we have thousands of letters in our files from grateful people all over the Middle West acknowledging that we have saved them from 25 to 50 per cent in the matter of cost. Our catalogue to-day is full of good testimonials in that regard.

Mr. TAGGART. It is not a question of who owns the trees, but whether the goods are delivered as advertised.

Mr. ROBERTS. We have absolutely made good on saving the consumer from 25 to 50 per cent. I can give you instances of the prices that used to prevail.

You all know what quarter-round molding is. Our price on it is from 25 to 35 cents a hundred feet. There are lots of places in the Middle West where the lumber dealers charged $1 per hundred feet; 75 cents is a common price. In that case we save the consumer a great deal more than 50 per cent.

Now, take the case of the glazed windows that cost the dealer from 85 cents to $1 and usually sold by him at $2.50 or $2.75 to the consumer. Our price to the consumer is as low, and in a great many cases lower, than the retail lumber dealer can buy it for.

Mr. MORGAN. Will you please explain how you can do that? How is it that you can afford to sell at such a lower price? Do you mean to say that on the average you sell your goods 25 per cent less than the retailer?

Mr. ROBERTS. I think that is a conservative statement.

Mr. MORGAN. Do you sell a full line of lumber?

Mr. ROBERTS. Yes, sir; lumber, doors, sash, moldings, and building materials generally.

Mr. MORGAN. And on an average your prices are 25 per cent lower than the retailer can sell to the consumer for in the Middle West?

Mr. ROBERTS. Yes, sir.

Mr. TAGGART. Do you expect to get lumber through the Panama Canal up the Mississippi River from the Pacific coast?

Mr. ROBERTS. I hope so.

Mr. TAGGART. Delivered at New Orleans——

Mr. ROBERTS (interposing). We ought to get it. That ought to come. We ought to be able to bring lumber through the Panama Canal and then barge it up the Mississippi River, and if it can be done it will mean a much lower cost to the consumer throughout the Central West.

Mr. WEBB. So that you may be able to sell your 77-cent door for 30 or 40 or 50 cents?

Mr. ROBERTS. Possibly.

Mr. MORGAN. I suppose you are in favor of free tolls?

Mr. ROBERTS. I will be perfectly frank with you and say that I am, but that we would not make a cent by it.

Mr. TAGGART. Who would gain by it?

Mr. ROBERTS. I think the people would gain by it.

I would like to say further, Mr. Chairman, that my firm is not trying to drive any retail lumber dealer out of business. We think this is a free country, with lots of business for all, and if all those who are in it will compete in a fair way that is all we ask. We think there is room for both of us; we believe that a firm like ourselves, that sells direct to the consumer, is a good check on the retailer to prevent the retailer from overcharging. We do not want to drive the retailers out of business; not at all. The retail lumber dealers, as a crowd, are a lot of good fellows.

Mr. TAGGART. You do business for cash?

Mr. ROBERTS. Yes, sir.

Mr. FITZHENRY. And that, notwithstanding the "little black book"?

Mr. ROBERTS. Yes, sir; and the "little white book," too, a later publication, a sort of rehash of the "little black book," with an added suggestion to write to us in as many languages as possible—Swedish, German, Norwegian, Polish, Bohemian, etc. They also wrote the banks of Davenport many times a week. Our banks received thousands of letters asking if we were all right, and asking whether we were in some bad game, thus trying to ruin our credit.

Mr. TAGGART. Did they ever try the Post Office Department on you in a former administration—trying to get a fraud order against you, a fraud order of any kind?

Mr. ROBERTS. I do not know; I would not be surprised if they had. I know of one postmaster who used to tell everybody in his town when

a mail-order catalogue came to his post office, so that the retail merchants would know about it.

Mr. CARLIN. Have the retail dealers discontinued their publication?

Mr. ROBERTS. Of the black book?

Mr. CARLIN. Of what they called the white list.

Mr. ROBERTS. I do not know. We have so much work to do that we pay as little attention to them as possible, so that I am not sure about that.

The CHAIRMAN. We are very much obliged to you, Mr. Roberts, for the expression of your views which you have given us this morning.

Mr. ROBERTS. I am greatly obliged to you, Mr. Chairman and gentlemen, for having given me the opportunity to express my views on this subject.

The CHAIRMAN. Hon. Jack Beall, a member of the committee, requests the printing of letters which he has received, and, without objection, those letters and two others, one to Hon. Jeremiah Donovan, a Representative from Connecticut, and one to myself from Mr. Donelson Caffery, whom the committee heard, will be printed in the record at this point.

There being no objection, it was so ordered.

LAW OFFICES TERRY, CAVIN & MILLS,
Galveston, Tex., March 17, 1914.

HON. JACK BEALL,
House of Representatives, Washington, D. C.

MY DEAR SIR: I take the liberty of handing you herewith a pamphlet on the antitrust bills now pending before the Committees on Judiciary and Interstate and Foreign Commerce of the House of Representatives, in which attention is called to what we believe to be vices in the proposed bills.

Supplementing this pamphlet, I call your attention to that part of the bill No. 3 which provides that no person who is engaged as an individual, or as a member of a partnership, or as a director or other officer of a corporation engaged in whole or in part in conducting a bank or trust company, shall act as a director or other officer or employee of any railroad or other public corporation which conducts an interstate business.

It seems to me that this provision is very much broader and more sweeping than is necessary to assist in abolishing whatever evil there may be in interlocking directorates, and that it ought to either be eliminated from the bill altogether or substantially changed. Certainly, here in Galveston, it would operate to prevent a number of persons from giving attention as directors to the conduct of the business of corporations in which they are interested and in which they have invested their money or compel them to retire from directorates or employment of corporations engaged in interstate commerce. For instance, some of the officers of a railway company are directors of a trust company that is engaged in the business of lending money upon real estate security and other collateral, but principally upon real estate security, there being absolutely no relations of any kind between the railway company and the trust company.

In another instance some of the officers of the railway company are directors in a bank which has no relations at all with the railway company.

In another instance several bankers are directors of a wharf company, the only relation of the wharf company to the banks being that it may from time to time have occasion to borrow money and carry a bank account.

The closest scrutiny could not possibly discover anything vicious or wrong in any of these situations. None of these directors, nor all of them put together, owns a controlling interest in any of the corporations. They are elected by the stockholders because of their confidence in the business ability, integrity, and faithfulness of the persons chosen as directors.

It seems to me certain that such a law as this would deprive most corporations of the highest quality of efficiency in management which must necessarily result in great injury to the interest of stockholders and to the public.

In this connection I call your attention to the testimony of Mr. Untermyer, delivered before the Committee on the Judiciary February 6, in the course of which he said that it seemed to him that there is no good reason why a man

should not be a director of a bank or trust company and still be a director of a railroad company. And again he said: "I can not, however, quite see that the relation is so close that every man who is a director of a railroad company should necessarily be ineligible to be a director of a bank, and that every man who is a director of a bank should necessarily be ineligible to be a director of a railroad company. They may have no relation, except that the one may deposit with the other." And again: "The end sought to be attained by requiring that a man serve only one master is unanswerable in principle, but there is danger that it may be carried to such extreme lengths in practice as to severely cripple business efficiency by depriving our great corporations of their best talent and substituting inferior men or dummies."

I am sure that you are keeping up with the views expressed by the witnesses before the committees, but I should like to particularly call your attention to the evidence of Mr. L. F. Loree, delivered before the Judiciary Committee March 4, a synopsis of which appeared in the Journal of Commerce of March 7.

I sincerely trust that you will find it consistent with your views to oppose the enactment of these bills.

Very sincerely, yours,

J. W. TERRY.

DALLAS, TEX., *March 19, 1914.*

HON. JACK BEALL, M. C., *Washington, D. C.*

DEAR SIR: I have noticed in the daily press and have made some investigation of a measure entitled "A bill to supplement an act to protect trade and commerce against unlawful restraints and monopolies."

Our company does business over the southwest, operating plants in the cities of Dallas and Houston. We furnish all classes of structural steel for buildings, bridges, etc. It is a recognized fact and consistent with legitimate trade that home territory is the best territory. When the capacity of our plants permits us to do so, our contracting agents visit outlying territory, which we reach at a greater disadvantage in competition with plants, particularly in Pittsburgh and Chicago districts. We can not expect on that class of business that it should be as profitable as business nearer home, especially in the cities in which our plants are located, which we secure under the most favorable conditions. For illustration, we must go to Pittsburgh to get nearly all of our steel; we pay high rates of freight from that section to this, and then when we go into certain sections they have freight rates as low or lower than we have to our plant, and then we have to estimate on paying freight to these points from our works, so we can not expect to meet competition there without largely decreased margins of profit, or in some cases possibly a loss, which we would prefer to do rather than close our plants, lay off our men, and reduce our organization.

We appreciate that the intention of this law is to prevent monopolies, but in trying to do so it will have an effect a hundred times worse on legitimate business in our own line, as well as others, as we would have to either advance our prices in outlying territory and lose that trade or lower our prices in our most advantageous territory and lose our profits.

The writer remembers having had correspondence about the eight-hour law, which was passed by the last session of Congress, and we were advised that we need not be concerned about it, but the law is now in effect and we have been compelled to refrain from bidding on Government building work, which we did extensively before the passage of the law, as we operate our plants 9 and 10 hours per day, and it is necessary for us to sacrifice Government work, as we could not operate continuously on what work we could secure for Government purposes at the shorter hours. However, the law is operating in such a way as we consider it a great injustice in depriving us of this class of business. However, we are not really certain of our position and legal decision may give us an opportunity, but contractors who used to be our customers advise us of having great difficulty in securing estimates on material in our line, and state that prices on this account have advanced about 60 per cent.

If this law should be passed, and if it should operate, as we understand it, it would cause us a greater loss of business. The structural iron and steel business at this particular time is operating at a very low tension, and we want to enter our earnest protest against the passage of this particular legislation.

Please give us an expression, and very much oblige,

Yours, truly,

MOSHER MFG. CO.,
W. S. MOSHER, *Manager.*

BRIDGEPORT, CONN., *April 1, 1914.*

Hon. JEREMIAH DONOVAN,
Washington, D. C.

DEAR SIR: We should like to call your attention to one feature of the proposed trust legislation now before the Judiciary Committee and its unfairness to the retail merchants of the country. It seems to us that when you appreciate the real situation, your own good judgment will show the evil effect such legislation would have upon the interests of the consumers of the country; those served by the retail merchants and in whom your first interest lies.

It is proposed to incorporate in the proposed law, a section permitting the manufacturers of patented or copyrighted or proprietary articles to fix the prices at which their product may be sold at retail. Apparently, on the surface, fair; this provision is actually vicious.

For some years, some makers have been doing this to the disadvantage of the ultimate buyer. Recently the Supreme Court has decided against the legality of their plans and now they are endeavoring to procure special legislation to make those plans legal.

When a manufacturer sells his product, he procures his own price for it. Why should he be permitted by law to fix the price the retailer is to get for it? He knows nothing of local conditions. He knows nothing of what may develop in the retailer's business. It is possible that a merchant may be compelled to raise money to carry his business forward, but if the proposed law was in effect he could not raise it by the selling of his own merchandise at a reduced price and smaller profit. It would put the merchant in the position of owning something and yet being enjoined by law from selling it.

Would the manufacturers urging this law agree to have their price to the retailer fixed by law?

If they did agree, would they agree to permit the Government to inspect their plants and processes, to compute their expense of production, and then allow them a fair margin of profit in fixing this price at which they were to sell?

Can you imagine a manufacturer agreeing to such a law?

Yet it would be only fair, if that manufacturer was to have the privilege of fixing the retail price of his product.

This entire movement is due to a combination of manufacturers of trade-marked, nationally advertised articles with the publishers of magazines carrying advertising of those articles.

They have formed a coalition for mutual benefit. If the proposed law becomes an actual law the magazines will benefit through increased advertising, the manufacturers will benefit through fixing both their own and the dealer's selling price, with a resulting opportunity to increase their own profits. But the consumer and the retailer will be in worse condition than now. Price to consumer will not be reduced. Retail merchant will be in position where his stock is his own and yet controlled by the original producer.

This law would make a practical manufacturer's agent of every retailer, but the retailer would not enjoy any of the privileges the agent usually does. He would not have goods consigned to him, to be paid for when sold. Instead he would pay for them on delivery, as now, and yet would have to sell them at the maker's fixed price, or keep them in stock till the accumulation of such purphases drove him into bankruptcy.

We know that much sentiment has been created in favor of this proposed law. Much of it has been done by the paid attorneys of the big manufacturers. Some chambers of commerce and boards of trade have indorsed it. But we all know that boards of trade and chambers of commerce are quite prone to adopt resolutions of almost any sort presented by a member in good standing, and to do it without investigating the merits of the question at all.

This letter represents a retailer's view of the proposed law. We feel sure it will be of interest to you, and when you are next at home the writer would be glad to talk over the matter in further detail with you should you care to take it up.

Yours, very truly,

THE HOWLAND DRY GOODS CO.,
JOHN G. HOWLAND, *President.*

CAFFERY, QUINTERO & BRUMBY, ATTORNEYS,
New Orleans, La., April 4, 1914.

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: Under section 7 of the Sherman antitrust law it is provided that the venue of suits against those who have rendered themselves liable to damages by violating the act, shall be where the defendant "resides" or "is found."

Under section 51 of the new Judicial Code it is provided that a defendant shall not be sued out of the district of which he is an inhabitant, with some exceptions, which do not specifically include the cases provided for under section 7 of the Sherman law.

Section 7 of the Sherman law is not among the acts which the Judicial Code specifically repeals, but there is a repealing clause in the Judicial Code to the effect that all statutes or parts of statutes embraced within the Judicial Code or superseded by it are repealed.

It is very gravely contended that under the foregoing provisions of the Judicial Code the Sherman law has been weakened and made still more ineffective than it has heretofore been, by a repeal of the provision enabling suit to be brought against a violator of that statute wherever he is "found."

If one damaged by a violation of the Sherman law must go for relief to the domicile of the defendant, and is not allowed to sue where said defendant is "found," trusts will be much more secure from pursuit than they have ever been, which will mean a quite impregnable immunity from liability for the injuries they perpetrate.

In as much as it is conceded by everybody that the Sherman law needs strengthening on the practical side, I beg to call your attention to this apparent mistake in the opposite direction in the Judicial Code.

Yours, very truly,

DONELSON CAFFERY.

(Thereupon, at 12.10 o'clock p. m., the committee adjourned.)

APPENDIX.

1775

APPENDIX.

Recommendations submitted by Gustavus A. Rogers..... 1777
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Memorandum by Daniel Davenport..... 1810
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Letter and brief, by Stuart G. Gibboney, New York..... 1825
H. R. 15657..... 1849
H. R. —— (second committee print)..... 1869
H. R. —— (third committee print)..... 1889
H. R. —— (fourth committee print)..... 1909
H. R. 15657 (committee print)..... 1931
House report 627, Sixty-third Congress, second session..... 1953
Minority views..... 2005

RECOMMENDATIONS SUBMITTED BY GUSTAVUS A. ROGERS, OF ROGERS & ROGERS, 160 BROADWAY, NEW YORK CITY.

I. Give the courts power by mandatory injunction to compel monopolistic combinations or those having such tendency, engaged in interstate commerce, to maintain a continuance of trade relations with their customers, whether contractual relation exists or not.

II. Amend the proposed bill of Judge Clayton (tentative bill No. 1, section 9) by striking out the second proviso and inserting in lieu thereof a provision that persons engaged in selling goods, wares, and merchandise in interstate commerce, whether the same be patented or unpatented, copyrighted or noncopyrighted, shall not refuse arbitrarily the same to a responsible person, firm, or corporation, or cash customer, who applies to purchase.

III. Confer discretionary power upon the Attorney General to apply for injunctive relief as preliminary or incidental to a suit by the Government under the act to protect a person in the continuance of his business where threatened destruction is attempted. (This to be in addition to or in lieu of section 13 of the Clayton bill No. 1.)

IV. Confer the right of appeal for a refusal by the court to issue a preliminary injunction, either in a suit by the Attorney General or by private persons.

V. Everycombination of patents that are competing, correlated, interrelated, or dependent, shall be illegal and constitute a violation of section 10 (Judge Clayton's bill No. 1) and subject the persons engaged therein to the same suits and penalties as one who monopolizes or attempts to monopolize trade or commerce.

VI. That it shall be deemed an attempt to monopolize trade or commerce for two or more persons, firms, or corporations to market all of the commodity through the same selling agent or agency, where the result thereof would give the selling agency the control of one-third or more of the entire supply manufactured or sold in the United States.

VII. In an action begun by the Attorney General or in an inquiry instituted by the interstate trade commission, the attorneys who prepared or participated in the preparation of the instruments, agreements, or documents under which the persons, firms, or corporations are operating shall be competent witnesses before the courts and the commission and shall not be privileged from testifying fully to the circumstances under which the papers were drawn, the parties at whose instance the same were executed, as to the negotiations and conversations had before and at the time the same were executed, and the advice, if any given, by said attorneys with respect thereto, or any matter connected therewith.

VIII. No license agreement based upon letters patent shall be effective unless the form thereof be approved by the interstate commission, which shall have power to direct what provisions thereof should be eliminated and what additional provisions shall be inserted.

[United States District Court, Southern District of New York. Greater New York Film Rental Co. complainant, v. Biograph Co. and General Film Co., defendants.]

HAND, District Judge: I do not think that the complainant's case is necessarily wholly without substance, or that no cause of action can by any possibility exist, or that it may not be a tort to sever existing business relations with another, even when one is under no contract to continue. It may be a tort to dissuade another from continuing established business relations with the plaintiff, even when no contract exists between him and the third party, provided it be done with "malice," whatever that may mean. I can hardly see how it can be a tort to procure an act to be done which is not itself a wrong of some kind, if one does that with the same motive; and if "malice" exists, I can see no reason why it should not be a tort to injure another by severing business relations with him. If so, then we can substitute for "malice" the equally objectionable word "conspiracy," and the same result follows. Now, „conspiracy" includes any agreement which contemplates an unlawful act, especially when the unlawful act is the conspiracy itself. In short, I am by no means willing to agree that if 10 manufacturers agree together to monopolize the function of middle-

man, and in pursuance of that agreement they discontinue selling to existing middlemen, and so ruin them, the middlemen have no relief. It is very well to say that each manufacturer may refuse to sell to whom he chooses, and so he may, but his right not to sell is not necessarily so absolute that he can use it as a means of effectuating an illegal purpose. That an act is one of a series, forbidden as a whole, is an incident often very relevant legally. If it were not, we should never have the element of intent in crimes or torts.

Nor am I any more impressed with the argument that there can never be a monopoly created when the owners of several patents combine their interests. Competition requires only substitution, and two patents may be each a monopoly and yet capable of mutual substitution. To combine them would eliminate competition between them, just as to combine the ownership, for example, of the only tin mine and the only zinc mine in the vicinity, if they be mutually substitutable in the arts for some purposes. It is true that the defendants here assert that the patents combined are each essential to the art, which if true would forbid literal competition between them, but that is an issue in the case. Moreover, it does not inevitably follow that a combination is not illegal which suppresses competition between two patentees, each of whose inventions is essential to the art. The question is intricate and difficult just to what extent such a combination might eliminate the incentive of each to reduce the price. Joint cost in economic theory is a complicated question, and not to be answered too readily apriori.

As to relief, the degree of mandatory relief which can be granted is almost wholly in the court's discretion. (Toledo, A. A. & N. M. Ry. *v.* Pennsylvania Co., 54 Fed. R. 730, 741; Stock Yards Co. *v.* Keith, 139 U. S., 128, 136.) It may be hard to regulate such business relations, but I will not say it is impossible. I concede that the relief must be carefully limited, so as to leave the defendant its full right to sever relations for any purpose, arbitrary or reasonable, except to secure the success of an illegal monopoly, assuming such an agreement now to exist. Whether the practical difficulties which will arise in shaping a permanent decree will require such constant supervision of the court as not to permit any relief, this is not the time to say. That question will largely depend upon what condition the proofs develop. It is quite true, therefore, that the complainant's right is doubtful in law, and it is also such in fact, but the threatened tort will be quite likely to destroy or badly cripple the complainant's business, for it is conceded that the Biograph Co. alone can furnish the films in question, and it appears that the complainant will continually lose customers who wish these films in their programs. On the other hand the Biograph Co. has nothing to lose except a supposed humiliation at being obliged to furnish films, or, if the complainant is right, some delay in absorbing the complainant's business, as the combination has in fact absorbed so many others. The case is one, therefore, in which the status quo should be preserved, even though the right be doubtful. (Carpenter *v.* Knollwood Cemetery, 188 Fed. R., 856.)

There is no need of any temporary order against the General Film Co., and the motion will be denied as against it. There is pressing and absolute need of an order against the Biograph Co., if the status quo is to be preserved, because there is reasonable fear that without it there will be no subject matter in existence for equity to protect if the complainant ever gets a decree. However, such an order should be limited strictly to that end under well-recognized law. The following order will, I think, protect the complainant while it entails absolutely no loss or hardship on the Biograph Co.; that is to say, an order directing that company to furnish such films as the complainant may from time to time order under the license agreement with the Motion Picture Patents Co., and at the prices and terms stated in the same. All such orders are to be accompanied when made with the proper amount of cash or a certified check. The amounts so to be supplied need in no case be larger than the like amounts of the same films for like periods supplied by the Biograph Co. to the General Film Co., nor is the Biograph Co. to be obliged to furnish in any case more films to the complainant than such as it already has on hand, or that it can manufacture within the time allowed with its existing equipment, force, and facilities, supplying at the same time its other customers first. I see no evidence of any conscious violation of the complainant's obligations under the license agreement, and the Biograph Co.'s indirect rights under the same seem ample to protect it in any future instances pendente lite.

As a condition of this order the complainant must at once file its replication, and consent, if the defendants wish, to the selection of an examiner who shall forthwith proceed to hear the proofs in the cause from day to day, or at such intervals as the defendants may desire, until the same shall be wholly completed. The complainant must likewise consent, if the defendants wish, that the cause be brought on for final hearing on the proofs when completed at the first motion day thereafter at which it

may be heard; or, if that can not be done, then at the next ensuing equity term of this court. Should the defendants not care to join in hastening the final disposition of the case under quite so stringent conditions, the ensuing delay must be charged to them; they can not object to the maintenance of the status meanwhile. If the complainants do not file a stipulation as above, then the motion is denied; if it fail in performing the stipulation when made, then the defendant Biograph Co. may move to vacate the order. As to the General Film Co., the motion is denied.

Let an order pass as above.

[United States Circuit Court of Appeals, Second District. Before Lacombe, Coxe, and Ward, circuit judges. Greater New York Film Rental Co., complainant-appellee v. The Biograph Co., defendant-appellant, and General Film Co., impleaded, defendant-appellee.]

This cause comes here upon an appeal from an order of the district court, Southern District of New York, granting a preliminary injunction of a mandatory character against the defendant Biograph Co.

LACOMBE, C. J.: The complainant is a so-called film rental exchange engaged in the business of leasing motion pictures films from the manufacturers thereof and subleasing them to exhibitors. The Biograph Co. is engaged in the business of manufacturing motion-picture films. The General Film Co. is another film rental exchange engaged in the same business as the complainant. The relief demanded in the complaint is that both defendants be enjoined from conspiring and confederating with each other and with other named persons (individual and corporate) to injure or interfere with the business of the complainant, by causing the supply of film from the Biograph Co. to the complainant to be in any way curtailed or diminished or in any other manner to interfere with the business of the complainant. An injunction is prayed for against the Biograph Co. forbidding it to deliver any film to the General Film Co. unless the Biograph Co. shall continue to furnish such film in equal quantities and upon the same terms to the complainant. An injunction is prayed for against the General Film Co. forbidding it from leasing films from the Biograph Co. unless the latter company shall continue to furnish film to complainant. Certain other injunctive relief is prayed for against the General Film Co., which need not be referred to.

The motion for preliminary injunction came on to be heard on the bill of complaint and supporting affidavits and also affidavits submitted by defendants. No preliminary injunction was issued against the General Film Co. The injunction issued against the Biograph Co. ordered it to deliver films of its own manufacture to complainant as the latter might from time to time order. Details as to prices and payment need not here be stated. The injunction was mandatory only, and the one thing it commanded was that the Biograph Co. should sell films to complainant.

The averments as to the details of the conspiracy alleged in the complaint are voluminous, and the argument as to whether or not complainant has made out a cause of action involved much discussion, and suggested various theories. Upon this appeal, however, we are concerned solely with the question whether the specific relief, granted temporarily by the order appealed from, should have been granted.

It is asserted by the defendant appellant that at no time prior to the institution of this suit was there any contract between it and complainant whereby it had agreed to continue to supply complainant with films of its manufacture for any period of time. We find nothing in the record to indicate that there was any such contract, and we do not understand that complainant contends that there was.

This being so we are satisfied that if all the facts averred in the bill were proved at final hearing and all the inferences of fact which complainant contends for were drawn from the facts thus proved, and that if upon some theory or other of those suggested it were held by the trial court that complainant had suffered wrong at the hands of those whom it alleges conspired to injure its business, and that for such wrong it was entitled for some relief against the conspirators or some of them, it could not obtain specific relief of the sort accorded by this preliminary injunction, viz, a decree compelling the Biograph Co. to sell films to complainant against that company's wish. That being so, we are satisfied that this preliminary injunction should be reversed. It can not be sustained merely on the ground that its continuance until final hearing will injure defendant less than its dissolution will injure complainant.

This may be a hardship to complainant, but it may be noted that seven months have elapsed since the decision in the district court, and had complainant been reasonably expeditious the cause might now be ready for final hearing.

The order is reversed.

NOTES ON THE CLAYTON BILL, FORBIDDING INTERLOCKING DIRECTORATES, BY WILLARD V. KING, OF NEW YORK.

What is the defect which this bill purposes to remedy?

This brings us first to the question, Why do corporations need directors?

Briefly stated, there are three useful ends to serve—(1) to bring business; (2) to give information and advice; (3) to give the prestige of their names.

Of these objects the second is the principal concern of this bill, and only so far as the advice given might tend either to damage the public by suppressing competition or to damage stockholders of a corporation by robbing it of possible profits. It is not to be denied that several instances of both these wrongs have existed, and the point to consider is whether the proposed measure would abolish these evils and whether it would leave a better situation than before.

The value of the advice to be derived from directors, even where they are at the same time directors of corporations in the same or similar lines of business, is not to be denied, because it is growing more evident that the best business methods depend upon a sort of cooperative competition, designed to prevent unsound practices and to thwart crooks. It is also not to be denied that we are outgrowing the methods and ideals which gave opportunity for "inside jobs" (to use police parlance) and our rebellion against the methods which made this old-fashioned piracy possible is a symptom of this growth. It is important to note that these methods obtained, and to some extent still obtain, not only among large corporations, but among the smaller units and down to the most insignificant individual. Even in the realm of politics we have still a long way to go before we can boast purity of ideals and practices. This is said not by way of apology, but in order that a correct point of view may be adopted and that corrective measures may be aimed at the real evil.

INTENT OF THE PROPOSED LAW.

The measure appears to be aimed at "big business," because it is there that interlocking principally exists. Yet any candid man must admit that large concerns are managed better in every respect than small ones. Their affairs are more public; there are more watchful eyes in the executive offices and boards, jealous of every act. It is in the small "one-man" concerns that irregular practices occur. An interesting instance of this might be cited in the statute in New York forbidding the officers and directors of any bank or trust company to accept any fee or profit for making any loan or purchasing any investment. This law was aimed against the practice that was said to exist in the small country banks where the president, cashier or director of a bank was in a position to demand "a little something" for himself before recommending a loan.

There was no claim that this practice was general. It would be difficult for it to obtain on Manhattan Island, where competition is tremendously keen and gossip is very quick and severe. It would be easy to show that the small country banks throughout the country oppress their customers more than the large banks in important cities.

EFFECT OF THE BILL.

The proposed law might be called "a law to throttle new enterprises and those of inferior credit." Where a new enterprise is starting or an old enterprise needs new capital in order to give better service, an appeal must be made to the public for funds. The investors who answer this appeal are entitled to some assurance that the funds will be intelligently spent and the investment safeguarded. Surely, the best way to do this is to have a representative of the investors on the board of the company. Our statutes provide for such representation where the investment is made in the form of a subscription to stock, but there is no provision for representation of creditors. This representation, therefore, is given, if at all, by the voluntary act of the company when it sells its bonds to a banking firm for distribution to the public, and the banking firm which lends its name to the issue and advises its particular list of customers to buy the securities stands sponsor for the investment. If for any reason the banker feels that his responsibility toward his investors requires his presence on the board, surely it is to the advantage of all that he should be on the board. Many instances come to mind of struggling corporations which have been rescued by the courage of earnest bankers, who gave the prestige of their names to the securities of a corporation, sold them to good advantage, gave their time and brains to the direction of the company's affairs, and placed it beyond the reach of the bankruptcy courts. A striking example of this is the case of the General Motors Co., which,

a few years ago, faced insolvency and which to-day is one of the most prosperous and successful of our corporations, due to the action, after the fashion I have described, of J. & W. Seligman & Co. and Lee, Higginson & Co.

Any man who wished to benefit himself at the expense of a corporation would put his dummy on the board, thus securing immunity himself while achieving his purpose. On the other hand, a scrupulous but cautious man who had no improper ends to serve, and whose assistance would be of value to the company, would decline to go on the board if this law were passed, for fear he might in some way be violating the statute. Thus the corporations would be compelled to turn over their affairs to dummies or men of no information or experience, depriving themselves of the prestige, advice, and financial resources of the very men it needs.

It must be remembered that thousands of designing men are burning midnight oil devising methods to rob and defraud banks, railroads, public-service corporations—and in fact, all forms of wealth. It is of the utmost importance to circulate information that will frustrate these men and protect honest men. For this reason chambers of commerce, trade associations, and other means of assembling and distributing information have grown up, and we need more of them. It is this reason that makes the modern practice of special clearing-house examiners for banks so valuable. This is one of the good ends served by the New York banking law, which requires written reports of all loans and investments to be made to the directors. The executive officers of banking companies find these discussions of the greatest value—the chance mention of a name often leading to a warning of serious danger. It is hardly necessary to remind you that a bank must first of all be solvent and prosperous in order to be useful to the community. A tottering institution can not help the merchants who depend upon it.

CONSTRUCTIVE SUGGESTIONS.

With reference to the furtherance of competition, it might be well, if it were possible, to forbid interlocking directorates in competitive companies; for instance, in railroads that are parallel and competing and in other corporations that compete in the same field. It would be necessary then to define "competing" so as not to give rise to the uncertainties and alarms we have had in enforcing the antitrust law. It might be important for one man to serve on the boards of two automobile companies, for instance, and if one made a high-priced car and the other a low-priced car there would be no real competition. Or it might be well to provide that any director who actually committed or abetted any act which destroyed competition should be personally liable. As for the protection of the stockholder against the director, it would be well to require in all matters the full disclosure by every director of his interests in the matters he votes upon. This would set right many wrongs besides the one this bill aims at. Forbidding a director to sit on the boards of companies which have dealings with each other would in many instances destroy competition and rob the stockholders of the free markets to which they are entitled. For instance, a railroad company might find it economical or even necessary to buy its coal from a certain coal company. Perhaps no other source of supply would be within its economic reach. There might be proper reasons for one man serving as a director of both companies. Should the railroad then be driven to importing coal from a distance and at great cost? Similar instances might be found in almost every manufacturing industry.

As a matter of actual fact, it is so easy to cultivate a high sense of duty among men gathered around one board that there is little need for legislation. It is interesting to note that in England there are almost no statutes regulating the practice of banking, and yet their banks have been singularly successful and sound. Their history is longer than ours and custom has created a mass of tradition which appears to be more potent than law to prevent irregular practice. In this country we have hardly arrived at the point where the public would give general support to a high standard of ethics in trade, just as it has broken down the standards fixed in the legal profession and is gradually doing so in medicine. Such laws as we have to punish guilt in high places are not enforced.

What with the delays and technicalities of our courts, and the emotional habit of our people in demanding pardons for those whom a few weeks earlier they were anxious to hang, the career of justice in this country is not impressive or effective. Even the smaller remedies are not availed of. We have very little heckling by stockholders at the annual meetings of our corporations. We are too much imbued with the idea that we should not be severe on misdemeanor in office, whether public office or private corporation, because it is loosely alleged that "everybody is doing it." This again is a survival of our earlier low standards of morality. We have not learned to give enough attention to character and record, and we do not take the trouble to study

available information and form our judgments from it. It is for this reason that the gold-brick man, the green-goods dealer, the bucket-shop keeper, and the get-rich-quick adventurer make money so easily. It is hard to sell a horse for $50 to a man who needs a horse and who has every reason for trusting your good faith, while the same man will spend hundreds of dollars on an obviously fraudulent investment offered by a man whom he has never seen before.

Statutes will not cure this condition. Nothing will help but a gradual education of the public—a general improvement of its intellectual and moral perceptions. A careful scrutiny of the business transactions of to-day and of the successive previous decades will convince any fair observer that there has been a steady improvement in business morality; and it is a reasonable deduction that the business practices of the day are as good as this generation deserves—just as our political methods, our legislators, and our governors are as good as we deserve.

To foster the business of honest and intelligent men, and if possible to give at the same time protection to fools—this is the problem before Congress and the State legislature. To invert this proposition and undertake primarily to protect fools, is to attempt the impossible. To foster business—not "big business," but everyone's right to work; to reduce unemployment and uncertain employment; to reduce the cost of living—these surely are the objects in your minds. To achieve these ends I earnestly urge:

1. Legislation that will simplify and quicken judicial procedure.
2. Less legislation of all other sorts.
3. Abolition of indirect taxes, which at great cost vex and hamper industry, and the substitution of direct stamp taxes, which will frankly remind the public of the cost of its own Government.

Respectfully submitted.

WILLARD V. KING.

STATEMENT OF HON. DICK T. MORGAN, A REPRESENTATIVE FROM OKLAHOMA.

Mr. Chairman and gentlemen of the committee, the State of Oklahoma has a corporation commission that was created by the constitution and given extensive power and jurisdiction by that instrument—especially over public utilities, transportation, and communication corporations. But by statute it has been given very large power over industrial and mercantile corporations and associations. So far as I have been able to ascertain, no other State has a similar statutory provision, declaring when, and under what circumstances a private business becomes a public business and subject, as the statute declares, "to be controlled by the State, by the corporation commission, or by any action in any district court of the State, as to all its practices, prices, rates, and charges." We have been for months holding hearings upon proposed antitrust legislation. Many propositions have been presented and discussed, but I submit that this provision in the Oklahoma statute is worthy our most careful study, and by some modification would be practical and effective in controlling our large corporations engaged in interstate trade. The statutory provisions are as follows:

Sections 8220 and 8235, Revised Laws of Oklahoma, Annotated, 1910, provide:

"SEC. 8220. Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State which is against public policy is hereby declared to be illegal."

"SEC. 8235. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence, or to effect the community at large as to supply, demand, or price, or rate thereof or said business is conducted in violation of the first section of this article, said business is a public business and subject to be controlled by the State, by the corporation commission, or by any action in any district court of the State, as to all of its practices, prices, rates, and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms, without discrimination, and adequately to the needs of the public, considering the facilities of said business."

Under this statute our State corporation commission has heard and acted upon a number of cases. I believe this statutory provision is a wise one, and I think should be carefully studied in connection with our antitrust legislation. In connection therewith I believe the decisions rendered by our corporation commission would also be of value, and I ask leave to print as part of my remarks a statement covering

some of the important decisions under the Oklahoma statute rendered by the Oklahoma Corporation Commission and furnished me by Hon. George A. Henshaw, a member of the Corporation Commission of Oklahoma. The synopsis of such decisions furnished by Commissioner Henshaw is as follows:

CORPORATION COMMISSION OF OKLAHOMA,
Oklahoma City, November 28, 1913.

Proposed Order No. 123. Order No. 769. In re proposed Order No. 123, investigation relative price of crude and refined petroleum. Cause No. 1719.

Appearances: E. C. Patton, for the commission; Dillard & Blake, attorneys for the Texas Co.; Burwell, Crockett & Johnson, attorneys for the Waters-Pierce Oil Co.; Parker & Simons, attorneys for the Enid Independent Oil Co.

FINDINGS OF FACT, OPINION, AND ORDER.

By the commission: The commission issued proposed Order No. 123 after many complaints had been filed, claiming that the stronger companies were trying to drive the weaker companies out of the State. During this hearing special complaints were made at the town of Enid, and special investigation was made at that place during the month of August.

It was claimed at this hearing by some of the complainants, who were engaged in the distribution of oil, that the price had formerly been made on the suggestion of the Waters-Pierce Oil Co. Our Constitution provides that a commodity can not be sold in one part of the State of Oklahoma cheaper than in another part, plus additional freight rate, if any. At the time of the investigation at Enid special or secret prices had been made by some of the companies, and gasoline was being sold in some instances at approximately the cost thereof to the distributor. The evidence showed that the distributors who bought their supply from the manufacturers in Oklahoma paid slightly more than 11 cents per gallon for gasoline and 4 cents for kerosene.

It is claimed there is a loss in evaporation and waste of gasoline of about 2 cents per gallon; that it costs from 1 to 1½ cents to distribute the same. Hence the actual cost of gasoline on this basis would be approximately 15 cents per gallon.

At the time of the hearing gasoline was being sold to the retail merchant at from 15 to 19 cents per gallon, and in some instances as low as 14 cents per gallon. Since the hearing the oil distributors at Enid were notified to raise the price of gasoline to 19 cents per gallon and kerosene to 9 cents per gallon. This order was made by the refineries, without any increase in the price of crude oil or increase in the price by the refineries to their distributing agents.

The loss by evaporation and waste in kerosene will not exceed one-fourth cent per gallon. Hence, the total cost to the distributor of kerosene would not exceed 6 cents per gallon, including the freight.

While this investigation has not been concluded in detail, the evidence was closed so far as the special conditions at Enid were concerned. However, at the close of that hearing all parties were notified they could introduce additional evidence at Oklahoma City. No request has been made of the commission to introduce any evidence, as shown by the record. Counsel for the Waters-Pierce Co. suggested to one member of the commission that they wanted to refute some testimony in reference to that company fixing the price of oil at Enid. However, nothing has been offered up to date.

In view of the fact that the prices have been arbitrarily raised pending this hearing beyond the maximum amount which was charged at the time of the hearing, the commission will fix the prices for the sale of kerosene and gasoline at Enid.

The Attorney General has filed a complaint with the commission involving substantially the same matter, which has been set for hearing at the December term, and the prices herein made are subject to revision during that hearing, and are only intended as a temporary or emergency order until the commission can arrive at its conclusions after the hearing that is to be conducted upon behalf of the people by the Attorney General. The Government is also making an investigation of the relative value of crude oil in Oklahoma. Copy of that report will be filed with the commission as soon as completed.

The contract between the refineries and some of the distributing agents at Enid provides that in case the price of crude oil advances the price of refined oil should advance one-twentieth of that amount.

It is the conclusion of the commission that gasoline should be sold at Enid in quantities of 5 gallons or more at a price not less than 16½ cents nor more than 17½ cents per gallon, and that kerosene should be sold at a price not less than 7½ cents nor more

than 8 cents per gallon, and that these prices should prevail at all points in Garfield, Kingfisher, Blaine, Major, Alfalfa, Woods, Woodward, Ellis, Dewey, and Grant Counties, plus any additional cost in freight rates to the different points.

It is therefore ordered that pending the investigation of the complaint filed by the Attorney General and the general investigation herein, all parties engaged in the distribution of kerosene and gasoline in Garfield, Kingfisher, Blaine, Major, Alfalfa, Woods, Woodward, Ellis, Dewey, and Grant Counties shall charge therefor in quantities of 5 gallons or more for gasoline not less than 16½ cents per gallon nor more than 17½ cents per gallon, and for kerosene not less than 7½ cents nor more than 8 cents per gallon: *Provided*, That lower grades of gasoline and kerosene than the standard may be sold at a different price: *Provided*, That the grade and price be first submitted to and approved by the commission: *Provided further*, That where parties have heretofore made contracts to furnish gasoline or kerosene at a certain price for a given time these contracts may be carried out if submitted to and approved by the commission, and the commission will approve any reasonable, valid contract that may differ from the prices herein set forth.

Should this order in any way work any hardship on any of the distributors of kerosene and gasoline, or any of the consumers thereof, pending the time for which it is issued, the commission will hear an application to modify or adjust the order to meet all necessary and reasonable conditions when at the same time the public may not be injured.

This order shall take effect on and after the 15th day of December, 1913.

CORPORATION COMMISSION,
A. P. WATSON,
GEO. A. HENSHAW.
Commissioners.

Attest:

J. H. HYDE, *Secretary.*

Sections 8220 and 8235, Revised Laws of Oklahoma, Annotated, 1910, provide:

"SEC. 8220. Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal.

"SEC. 8235. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the corporation commission, or by any action in any district court of the State, as to all of its practices, prices, rates, and charges; and it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination, and adequately, to the needs of the public, considering the facilities of said business."

Reference to opinions and orders of the corporation commission under the antitrust act of Oklahoma pertaining to the following classes of business:

1. Ice manufacturers and distributors.
2. Cotton gins.
3. Cotton compressors.
4. Oil, kerosene, and gasoline.
5. Newspapers.
6. Retail lumber yards.
7. Mill products.
8. Combination laundries.
9. Bus and transfer companies.

Reference will be made under each subject in the order above named, and all of the orders made under this act by the commission have been compiled with and appear to have the effect of satisfying all parties interested.

1. ICE MANUFACTURERS AND DISTRIBUTORS.

Order No. 210. Corporation Commission's Second and Third Annual Reports, 1909–10, page 353, directs that the Tishomingo Ice & Cold Storage Co. shall deliver ice to all persons in the town of Tishomingo, and scales shall be carried on each wagon and ice weighed to consumers when requested.

Order No. 227, same report, page 358, fixes the price at which the Ada Ice & Fuel Co. shall sell ice to the different classes of consumers in the town of Ada.

Order No. 233, same report, page 354, directs the Mangum Ice & Cold Storage Co. to deliver ice to all parties within the corporate limits of the city of Mangum and fixes the prices to be charged consumers.

Order No. 255, same report, page 361, directs Nathan Sass to weigh ice to consumers in the town of Marietta when requested.

Order No. 256, same report, page 390, directs D. B. Hull to weigh and deliver ice to consumers when requested.

Order No. 330, same report, page 403, directs the Geary Light & Ice Co. to keep its manufacturing plant clean and sanitary, and to adopt sufficient measures to protect ice in process of manufacture against contamination, and to manufacture pure and wholesome ice which is sold to the public.

Order No. 451, Corporation Commission's Fourth Annual Report, 1911, page 419, imposes a fine of $100 on the Pauls Valley Ice Co. for violation of order No. 256, refusing to deliver ice as directed in said order.

Order No. 504, same report, page 496, directs the Tishomingo Ice & Coal Storage Co. to deliver ice to consumers and fixes the price thereof.

Order No. 505, Corporation Commission's Fifth Annual Report, volume 1, 1912, page 498, directs all ice manufacturers in Oklahoma City to not deliver ice to any person for delivery to consumers in Oklahoma City unless such person shall have a permit from the corporation commission to deliver ice within the city; permits to be issued by the commission to all who may apply, and shall authorize the recipient thereof to deliver ice to consumers in Oklahoma City until they short-weight the consumers. When any person delivering ice in Oklahoma City who wilfully fails or refuses to give the approximate correct weight of ice purchased, the permit shall be canceled and the offending party shall not be allowed to deliver ice in Oklahoma City thereafter.

NOTE.—The above order has been obeyed, and there has been no complaint in Oklahoma City among consumers as to amount of ice purchased. The cause of the above order was an understanding or combination between employees engaged in distributing ice to sell 300 pounds for the price of 400 pounds and only account to the ice manufacturer for 300 pounds. It was estimated by the ice manufacturers that the people of Oklahoma City were being defrauded of at least $200 a day by this process.

Order No. 708, not published. Complaint against the New State Brewing Association, asking that the company be required to sell ice to ice distributors for the purpose of reselling to the consumer in Oklahoma City. The case was dismissed, the commission holding: "The manufacturer of a commodity has a right to select its agents of distribution and its system and means of distributing the commodity to the public in any manner it may adopt so that the public is not injured thereby. This means that a commodity which the public must use should be placed on sale where it may be purchased without any great inconvenience to the consumer."

2. COTTON GINS.

Order No. 447, Fourth Annual Report Corporation Commission, 1911, page 413. Complaint alleged that a certain cotton buyer was paying more for cotton ginned by his gin than if the cotton were ginned by other gins. The commission held that there being several cotton buyers in the town without any understanding or combination of prices, a virtual monopoly did not exist and the commission had no jurisdiction. The case was dismissed.

Order No. 530, Fifth Annual Report Corporation Commission, page 538, directs the defendant, the Harris-Irby Cotton Co., to gin custom cotton and fixes the price for ginning.

NOTE.—There was one cotton gin located at the town of Geary, which was isolated by several miles from any other gin. The owner of this gin was buying cotton in the seed. The merchants were also buying cotton. The gin man refused to gin cotton for anyone except himself. That is, before their cotton could be ginned they must sell it to this one buyer. The commission held that before a person who had dedicated private property to a public use could withdraw the same he must give a reasonable notice in advance of such action. If not, thrashing-machine owners, in the middle of a thrashing season, could refuse to thrash wheat for farmers and force them to sell the wheat in the field at such price as the machine owners may see fit to make.

3. COTTON COMPRESSES.

Order No. 559. Fourth Annual Report of Corporation Commission, page 606. Complaint asks that the Clinton Ice & Commerce Co. be required to operate its compress at Clinton, Okla. The case was dismissed and afterwards reinstated and an order made requiring the compress to operate during the season 1913-14.

Order No. 642, not published, prescribes the regulations for weighing cotton at compresses. Cotton is sold on the basis of compress weights. During damp weather the weigher at the compress docks the cotton a certain number of pounds per bale which, in his judgment, will amount to the moisture absorbed. This discretion on the part of the weigher is often abused, and it was alleged that favorite cotton buyers were sometimes given a great advantage. The commission held that where cotton was docked for dampness or other causes the actual weights, together with the amount each bale was docked, should be submitted to both parties in interest, and the cotton should be reweighed at the request of either party.

This order has been complied with and has given satisfaction to all parties concerned. Both the buyers and the compresses would now object to its repeal, notwithstanding it was resisted at the time it was issued.

4. OIL COMPANIES.

Order No. 601. Fifth Annual Report Corporation Commission, 1912, volume 1, page 690, directs the Waters-Pierce Oil Co., the Texas Co., and the Oklahoma Oil Co. to sell kerosene in quantities of 1 barrel or more at the same price.

NOTE.—This order was the result of oil companies selling oil stoves to the farmers in those localities where there was no timber or other fuel and agreed that oil should be furnished them in barrel lots at jobber's prices. After stoves were installed the local dealers objected to this arrangement. Complaint was filed and the above order resulted, which is being strictly obeyed.

Order No. 728, not published, directs that the Texas Co. and Waters-Pierce Oil Co. shall sell gasoline in the town of Idabel, Okla., for the same price it sells in other sections of the country plus any additional transportation charge and distributing expense.

Order No. 769, not published, temporary order fixing jobbers' price of kerosene and gasoline in the northwest part of the State of Oklahoma. This order was set aside pending final disposition of the case.

5. NEWSPAPERS.

Order No. 704, not published. This was an opinion based upon a complaint and agreed statement of facts filed by the Mellon Co., a large retail dry goods house, against the Daily Oklahoman, alleging that the Daily Oklahoman had a virtual monopoly on all morning advertising in Oklahoma City, and asked that this newspaper be required to advertise for the Mellon Co. at the same rate as it did for other similar concerns. The Oklahoman had refused to accept advertising from the Mellon Co. because of a controversy over other business transactions. The commission found that it was the duty of the Oklahoman to advertise for the Mellon Co., but made no order. The Daily Oklahoman followed the findings of the commission and complied with the suggestions made therein. All parties are now satisfied.

6. RETAIL LUMBER YARDS.

Order No. 589, Fifth Annual Report Corporation Commission, volume 1, page 656, directs the local lumber yards at Cherokee to sell lumber to all parties without discrimination in price for the same quality and quantity.

NOTE.—This complaint was filed by an independent lumber yard, claiming that other lumber yards were selling lumber at or below cost for the purpose of destroying competition.

7. MILL PRODUCTS.

Order No. 710, not published. Complaint was filed asking that the Cordell Gin & Milling Co. be required to sell its products to certain retail merchants. Complaint was dismissed, the commission holding that it has no jurisdiction in the regulation of a private business which deals with the public unless a virtual monopoly is shown. All laws regulating mills have been in the interest of the ultimate consumer and not the middleman or the distributor of the product. The manufacturer of a commodity has a right to select its agents of distribution and its system and means of distributing the commodity to the public in the manner it may adopt if the public is not injured thereby.

8. COMBINATION LAUNDRIES.

Order No. 685, not published, directs five laundries in Oklahoma City, who are organized under the name of the Oklahoma Operating Co., to not increase their prices

over those which were charged before the combination took place without first applying to the commission and securing permission, after making proper showing that the prices should be advanced.

(NOTE.—Five laundries in Oklahoma City combined under the name of the Oklahoma Operating Co. and issued a schedule of prices increasing the price of laundering in the city. This order prevented any increase in price, but the commission has no jurisdiction to dissolve combinations. That is for the courts. The orders of the commission go to controlling their prices and practices after the combination is made. The order in this case has been complied with to the letter, and the people do not complain of the combination, but all are apparently satisfied.)

9. BUS AND TRANSFER COMPANIES.

Order No. 758, not published, directs the Mahoney Bus, Baggage, Carriage & Taxicab Co. to transfer all baggage under similar conditions for the same prices, and it can not refuse to deliver any baggage when tendered.

(NOTE.—This complaint grew out of a controversy between the baggage company and a traveling salesman, wherein the baggage company refused to transfer the baggage of the salesman at any price because of some personal difference. The order is being complied with.)

DEPARTMENT OF COMMERCE,
OFFICE OF THE SECRETARY,
Washington, April 15, 1914.

MY DEAR JUDGE CLAYTON: I hand you herewith communication from the Commissioner of Corporations, together with copy of a letter sent by me this day to the President on the same subject.

Yours, very truly,

WILLIAM C. REDFIELD, *Secretary.*

Hon. HENRY D. CLAYTON, M. C.,
House of Representatives, Washington, D. C.

APRIL 15, 1914.

MY DEAR MR. PRESIDENT: There has been inclosed to you from the Commissioner of Corporations copy of a report dated March 21, 1914, by C. E. La Vigne, special agent of the Bureau of Corporations, in the matter of free deals in merchandise and gift enterprises, trading stamps, premiums, etc., connected with methods of distribution.

I venture to ask your very special attention to this memorandum, which seems to me to show an evil quite as serious as others to which fuller discussion has been given. You will find that business men, even those who carry on the practices, both manufacturers and retailers, object to the methods used, and that all seem to agree the consumer is deceived and not benefited.

Copies of this very important memorandum have been sent at my request to the Attorney General and the chairmen of the Judiciary Committee of the House and the Commerce Committee of the Senate.

I venture to think that legislation is practicable, indeed desirable, in this connection, to which there can be no objection either on financial, economic, or social grounds, and which will be of far-reaching value, especially to the poorer classes of our consumers. I recommend that it be made a portion of our pending business legislation.

Yours, very truly,

———.

The PRESIDENT,
The White House.

DEPARTMENT OF COMMERCE,
BUREAU OF CORPORATIONS,
Washington, April 14, 1914.

MY DEAR JUDGE CLAYTON: Upon the suggestion of the Secretary of Commerce, I have the honor to hand you herewith a memorandum upon the question of "Premiums for wrappers and coupons, trading stamps, free deals on merchandise, and

gift enterprises connected with methods of distribution," prepared by one of our special agents of the Bureau of Corporations at his request.

With assurances of my respect and esteem, I am,

Very truly, yours,

JOSEPH E. DAVIES, *Commissioner.*

Hon. HENRY D. CLAYTON,
House of Representatives, Washington, D. C.

Inclosure.

[Memorandum for the commissioner. In re premiums for wrappers and coupons, trading stamps, free deals on merchandise, and gift enterprises connected with methods of distribution. C. E. La Vigne, special agent. March 21, 1911.]

This memorandum relates to correspondence (R59526) between Mr. Samuel S. Fels, of Fels & Co., manufacturers of soaps, Seventy-third Street and Woodland Avenue, Philadelphia; Hon. William C. Redfield, Secretary of Commerce; and Representative W. C. Adamson, all of which has been referred by the commissioner to Agents La Vigne and Gries, with instructions to look into the question discussed in said letters and make report.

Free deals, coupons, trading stamps, and other gift enterprises have received some previous attention by the bureau in connection with the inquiry on resale price maintenance. There is much merit in the contention and foundation in fact for the statements of Mr. Fels to Secretary Redfield that—

"This matter of premiums for merchandise has grown to a tremendous business in the country—wholesale, retail, and direct to consumers. It leads to unfair competition. It gives the consumers the idea that they are getting something for nothing, which is untrue, as they have to pay more in the end for their merchandise. There is a great deal to be said on this subject, and a large amount of material can be gathered to show enormous waste."

Statements made by the merchandisers who have thus far been approached on this subject tend to support almost unanimously the opinions expressed by Mr. Fels.

In discussing resale price maintenance the following questions have been submitted to various dealers:

"Does the manufacturer or jobber 'throw in' any articles free of charge, or offer the retail dealer other special rebates based upon the purchase of certain quantities of certain goods?

"Are there any 'free goods' or coupons or other inducements connected with the sale of any articles to the consumer which you handle?

"What are the advantages of 'free goods' or coupons to the consumer?"

The following replies seem to be representative of the general attitude with regard to gift enterprises. They are self-explanatory, and are submitted as a preliminary to further study, as follows:

Drugs.—Free goods and special discounts are given to dealers on quantity orders which the small retailer can not always take advantage of. The free goods are not always of the same article ordered. More frequently they are goods of some other character which the manufacturer wishes to introduce or to push. We do not have the option of selecting the free goods. The articles received, being on the shelf at no direct cost to us, of course we want to sell them, and so we push them. Wholesalers throw in free goods with orders for perfumeries, toilet articles, and certain patent medicines, but never with proprietary medicines. Patented druggists' articles are usually nationally advertised. Proprietary preparations are sold mostly through the medium of prescriptions.

Special deals are occasionally offered to the retailer on a combination order for various articles made by one concern. For example, if a combination order for Colgate's products amounts to a specified sum, the freight charges are prepaid. Discounts and free goods reduce the cost of the order approximately 42 per cent more.

Generally speaking, I do not consider free goods or coupon inducements an advantage to the consumer. The manufacturer could put more quality into his goods instead or sell cheaper by diverting the costs of the coupon system into legitimate channels.

Another druggist says: There are some advantages in "free goods" for the wholesaler and retailer, but none for the consumer. The Larkin Co., of Buffalo, N. Y., hurts dealers everywhere. The Christiani Co., Washington, D. C., introduces its sirup compound, blood tonic, rheumatic remedy, sore-throat remedy, dyspepsia remedy, etc., by giving blocks of stock in the company to retail dealers to the amount of purchases, said stock not to exceed $1,000 in value. The manufacture of "chill and malaria capsules" gave one dozen bottles free with each dozen bottles sold to the retailer.

Only one order for one dozen free was given to the same druggist; after the first dozen, the gift amounts to three bottles free with each dozen order.

Furniture.—There are no free goods for consumers in this line of trade. The manufacturers used to give Christmas presents to retail dealers, but this is no longer done. I don't think there are any advantages for consumers in coupon and gift systems. I have tried coupon plans of my own arrangement. The only man to benefit is the one who gets up the coupon. The National sweeper throws in one sweeper free to the dealer with each order for a dozen.

Another furniture man stated that the effects of free goods and coupons for consumers are bad.

Clothing.—There is very little of the gift business in the clothing trade. There is no advantage for the consumer in free "goods." Coupons and such things are used for advertising purposes, but they do not benefit the consumer. He pays. The Cincinnati Garter Co. gives free goods to the retailer.

Haberdasher.—Manufacturers give deals to retailers on very large quantity orders and in "broken lots" of goods. The Hamilton Corporation, New York, gives a coupon to consumer with handkerchiefs, certain articles being offered in exchange for the coupons. The customer rarely accepts the coupons. This gratis stuff is no advantage to the consumer whatever.

Groceries and market supplies.—Manufacturers give all kinds of free goods to dealers on small orders, the gifts being added in proportion to the size of the orders. On large orders a small cash rebate is given, without free goods. Certain manufacturers throw in free goods, but raise the price. E. T. Babbitt and N. K. Fairbanks are famous for this.

In the majority of cases the jobber throws in free goods for the retailer. They won't mix a case of different goods to make a sale, but they offer free stuff as the inducement. Gift enterprises largely accompany new goods being placed on the market, as special concessions to the dealers for the purpose of introduction.

Another grocer says: "Post Toasties are given free to the consumer with an order for Grape-Nuts. This is the only gift connected with the goods I handle. In the item of Grape-Nuts, the consumer gets 25 cents worth of cereal for 15 cents. This is merely an advertising scheme. There is no ultimate advantage to the consumer.

Another grocer says: I use the coupon system to cut the price on nationally advertised, standard, and price-maintained articles. I give, with this class of goods, a coupon having a much larger exchange value than the coupon accompanying other commodities.

Jeweler and optician.—Reliable concerns do not offer special inducements. Manufacturers and jobbers do not throw in free goods in my lines. There are no advantages for consumers in the "free goods" systems. They are not getting something for nothing.

Hardware and paints.—Nothing is "thrown in" on hardware. On a $32 purchase, Liquid Veneer gives the retailer one dozen 25-cent cans free. On "61" varnish and Liquid Granite about 5 per cent of free stock is added to orders in 12-gallon lots. Free goods or coupons are sometimes a business maker for the dealer, but no ultimate advantage to the consumer. There are no free goods connected with the Gillette razor.

Another hardware merchant says: There are no gift enterprises in the hardware business now. Schemes of this kind are worn out. People have wakened to the fact that they don't get anything for nothing.

Shoes and rubbers.—No free deals are offered by manufacturers or jobbers. In an arrangement of my own (retailer) I give one coupon with each purchase of $1 or over. Twenty of these coupons are redeemable in my store for $2 worth of merchandise. If it happens to be a large family and the family bought regularly from me, this coupon system would actually result in a rebate to the consumer. It is more essentially an advertisement for me. I have never, as yet, had to redeem any of those coupons.

Cigars, cigarettes, tobacco, pipes, magazines.—There are no free deals or coupons connected with trade in pipes, magazines, or cigars handled by independents. Such deals are numerous in tobacco and cigarette trading, the inducement on small quantities usually being about 8 per cent gratis to the retailer in free goods, plus a small check from the factory; on large quantities it is mostly added free stock, with an occasional check for good measure. The jobber usually adds free stock to his sales, say a pound or more of tobacco added to an order. Lump combination deals are frequently offered on tobacco. This is one of the American Tobacco Co.'s strong methods of selling.

Wholesale and retail liquors.—Paul Jones & Co. gives the dealer one case of 24 pints of whisky free with a purchase of five cases of quarts. The same is done by Bairds & Daniels on buchu gin. Wilson whisky gives 13 bottles to a case, an extra bottle thrown in. Straus, Gunst & Co., of Richmond, Va., do the same as Wilson.

As a retailer, I give samples of liquors and also coupons. The cost of these samples and coupons, in my case, comes out of my own pocket. Samples given by any dealer are at his expense. My coupon amounts to an actual 10 per cent rebate on the customer's purchase. Customers cash their coupons right along in my store in exchange for goods. At Christmas time I make up "lump packages," containing five bottles of assorted wine for $1. This is a business maker. People think they are getting more than what is coming to them, but of course they are not.

Photo supplies, athletic goods, stationery, textbooks, and fiction.—Manufacturers and jobbers throw in advertising matter for retailers and display goods for show windows. That is all. Free goods are occasionally included in sales of high-grade pictures to retail dealers. There is no advantage at all for the consumer in coupon and free-goods arrangements. I tried it out as a retailer and was glad to give it up. Trading stamps demoralized business in Washington at one time, but they were finally knocked out by the courts. Customers used to ask me for trading stamps as a premium when I sold them postage stamps as a favor. And these people actually fussed when I refused to give trading stamps to cover the purchase on postage stamps.

Department store.—If anything is thrown in by manufacturers and jobbers for the retailer or consumer, you pay for it anyhow. The gift method of encouraging sales is frequently encountered. In general, there are no advantages in "free goods" or coupons for the consumer. These systems do not save the consumer any money.

The "gift-enterprise" customs in methods of distribution can be more fully studied coincident with the work on resale price maintenance. Coupon inducements, profit-sharing certificates, premiums, etc., are so closely woven into some lines of business as a special rebate that the subject is naturally an important factor correlated with the resale price systems.

The four bills (H. R. 188, 3404, 12470, 13723) recently introduced in Congress to levy a tax on tobacco coupons have been noted, as well as the hearings of March 11, 1914, before the House Committee on Ways and Means. At this hearing it was said that 95 per cent of all tobacco products sold by the United Cigar Stores Co. are the products of the divided parts of the former Tobacco Trust, and that a special rebate equal to the value of the coupon is given the United Cigar Stores Co. by the divided parts of the former trust on all their purchases. Hence, while the coupon appears to be an evidence of indebtedness on the part of the United Cigar Stores, it is, in fact, paid by the so-called trust and becomes a profit rather than a liability to the United Cigar Stores Co. The very fact that the majority of these divided companies now have a coupon is an admission that they recognize in the coupon an effective means of gaining a further control of the tobacco industry or regaining what they may have lost by the dissolution.

Special reports bearing directly on gift enterprises can be forwarded from the field as rapidly as the information is collected. This course will be followed, with your approval.

Respectfully submitted.

(Signed) C. E. La Vigne, *Special Agent.*

The Grasselli Chemical Co.,
Birmingham, Ala., April 17, 1914.

Hon. Henry D. Clayton,
Chairman Judiciary Committee, Washington, D. C.

Dear Sir: Referring to the proposed antitrust legislation and in reference to the interlocking directorates section, I notice in this morning's paper the following:

"Under the interlocking directorates section there is added a provision that after two years from the passage of the bill 'no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized and operating under the United States laws, either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000.'"

As a director in a national bank of this city, I respectfully submit that a bank containing deposits, capital, surplus, and undivided profits aggregating as much as $5,000,000 is not, in my judgment, a large bank, nor a bank at which the sentiment of the country calling for this legislation is directed. I therefore take the liberty of suggesting that this provision be so amended, either by striking out the word "deposits," leaving capital, surplus, and undivided profits aggregating more than $2,500,000, or that it be left deposits, capital, surplus, and undivided profits aggregating more than $7,500,000.

In my judgment, no bank whose total deposits, capital, surplus, and undivided profits do not aggregate more than $7,500,000 is in the class that constitutes the so-called

Money Trusts, or will or have figured in the past in any such combination. On the other hand, I do not believe that it is the intent and purpose of our Representatives to hamper by adverse legislation institutions doing business strictly within the limits of the law, in spirit as well as otherwise. They not only did not, but can not enter into the unlawful combinations at which this legislation is directed. There is scarcely a bank in Birmingham that would not now, or in the near future, come under the influence of this inhibition in the proposed statute, and it is obvious that the banks of a city the size of Birmingham or the size of the banks in the city of Birmingham are not those against whom the legislation is sought or should be sought to be directed.

I am taking the liberty of sending a copy of this letter to Mr. Underwood.

I am, yours, very truly,

WM. SLEDD.

FELT & TARRANT MFG. CO.,
Chicago, April 29, 1914.

Hon. HENRY D. CLAYTON,
Chairman Committee on the Judiciary,
United States House of Representatives, Washington, D. C.

DEAR SIR: I desire to respectfully register a most emphatic protest against paragraph 10 of section 7 of House bill No. 15657. This paragraph begins at line 23 of page 9.

If enacted into a law, it would at the end of two years place me in a position of violating that law although I have committed no act whatever which any member of the committee would declare to in the slightest tend to restrict competition.

The situation is this: During the last 30 years I have made many inventions in adding and calculating machines. I started with no capital of my own, and it was very difficult to procure capital because there had never before been anything along this line that was of real practical utility when contrasted with the expert mental computer or adder.

The machines of my invention fell into two distinct classes; one particularly adapted for certain classes of work, the other particularly adapted for certain other classes of work, but there were still other classes to which both were adapted in which it was possible for each class to come into direct competition with one another. As time went on other manufacturers came into the field, one of them backed by great ability and financial strength.

In the first place, I had no money myself, but was backed to the extent of about $50,000 by Mr. Robert Tarrant, whose fortune was not very large. We found it impossible to enlist outside capital during the first 17 years, and with limited means it was impossible to make much of any profit. Finally some parties offered that if we would split the business into two companies they would provide sufficient capital for the manufacture of one of these classes of machines, known generally under the name of "Comptographs." Inasmuch as that would leave us sufficient capital to carry on in a proper manner the manufacture of the other class of machines, known under the name of "Comptometers," we assented to this, and a new company was formed known as the Comptograph Co.

Mr. Tarrant and myself took our pay for the Comptograph business entirely in stock of the new company. Since that time, during some 10 or 11 years, the two companies have been actively competing in the field against all other manufacturers and against one another. Nevertheless during that time Mr. Tarrant, before his death, and his widow since his death, and myself have put about one-half a million dollars into the new company manufacturing the Comptograph. To-day we own, as originally, practically all the stock of the old company manufacturing the Comptometer and about one-half of the new company. It goes without saying that we are directors in both companies. Were we to continue as directors in the Comptograph Co. and also directors in the Felt & Tarrant Manufacturing Co.—two companies which, in the selling field, hotly compete with each other, with entirely separate selling organizations and separate offices in each city—we would be violating paragraph 10 of section 7 in the above-mentioned bill.

The younger company has not been very successful in a financial way. The old company, in which we own practically all the stock, has been very successful. Under the circumstances, if paragraph 10 of section 7 were enacted into law, I would sacrifice all my interest in the new company, in spite of the fact that I have put several hundred thousand dollars of cash into it since it was organized. Without my support there would be little if any chance of it continuing in business. The fact is, that paragraph 10 of section 7 in this case would destroy competition instead of conserving it.

Other sections of this bill seem to be drawn with a view to striking at some of the conspicuous trusts, without proper appreciation of the extent to which it would injure legitimate competitive business. For instance, the first paragraph of section 2 specifies one method sometimes used by powerful concerns to destroy a competitor, but does not specify others just as bad which are often used, and I therefore believe it would in practice, to a very great extent, relieve such competitors of the charge of unfair competition in the case of those practices not specified, which are quite as effective in destroying competition.

There is a kind of unfair competition which I believe the courts have already condemned in decisions under the Sherman law, consisting of the exploiting by a powerful manufacturer of an article made to a more or less extent in imitation of the principal article of manufacture or commerce of a weaker competitor and selling it at ruinous prices. This kind of substitute is usually referred to as a "knocker." The stronger concern, having a larger line of articles, can push very hard those in his line which the weaker competitor does not have, selling the substitute only in those cases where the weaker competitor wins out in fair competition against the article which the powerful one makes a profit on. He makes a large profit in those cases where he wins out with his regular article, and actually loses money where he has to use the substitute to keep the weaker competitor from obtaining the order. This is a very effective way of destroying competition, especially where a large amount of capital is required to manufacture and put on the market the article manufactured by the smaller concern. There are plenty of other ways of destroying competition. In fact, one could not possibly think in advance of all the different methods that could be employed for the purpose. I could name some in my line of business that no law could reach, unless it is the Sherman law just as it stands.

I would much prefer to take my chances against the unfair competition of a more powerful rival under the Sherman law than under this bill, No. 15657. I have been up against many kinds of unfair competition, and I believe the Sherman law is a splendid thing, and I do believe that this bill as it now stands would, on the whole, tend to destroy more competition than it will conserve.

I have been very much interested in the hearings before the Committee on Interstate and Foreign Commerce and the Committee on the Judiciary of the House, having read all the printed hearings given before the former committee and a considerable part of the hearings given before the Committee on the Judiciary. This bill is not nearly so bad as the several bills which preceded it, and which apparently have been merged into this one bill.

If paragraph *c*, on page 16, and paragraph *d*, on page 17 of section 18, House bill 14799, should be enacted into law, a patent would be so difficult to sustain that it would make it almost impossible for a new firm to get a start in any line under the protection of a patent. Under our present patent laws a great many concerns have been able to get a start who otherwise would never have come into the field of competition. House bill No. 9289 also had a dangerous paragraph in regard to patents.

However, section 3 of the composite bill, No. 15657, will be just about as effective as those clauses in regard to patents in preventing new concerns getting started. If a new concern can not grant an exclusive agency for their goods to one party in certain territories, with a distinct understanding that he will not handle any competing goods, the goods of a new concern in most lines of business will never stand a ghost of a show. In the matter of introducing new goods, no one will exert himself unless he can have an assurance that he will reap the benefit of his pioneer work, and no manufacturer when first starting out, with a reputation to make, will stand any chance of success unless he can have the assurance that the man who handles his goods handles no competing goods.

I believe the committee was desirous of framing a good bill, but if they had tried to frame one which would give the monopolists not only material hope of evading the Sherman law but new weapons with which to fight budding competition, they could not have framed a bill which would have been much more effective for the purpose of stifling competition. The great and powerful trusts won't worry very much over section 3 of House bill No. 15657. Most of them can easily change their methods to avoid any ill effect it might have on them, but the little fellow who has not the capital, and often not the experience, to successfully have his own selling offices in many large centers, will be helpless. In fact, the big fellows can use, and will use, this very section 3 to suppress budding competition.

I have read a good many bills that have been introduced for the regulation of trusts, and I found one paragraph in one bill which would help the little fellow more than probably any other thing which I have seen, and that has been left out altogether in House bill No. 15657, and House bill No. 15613, reported out by the Committee on Interstate and Foreign Commerce. That was the first paragraph in

section 11 of House bill No. 9763, introduced by Mr. Adamson, of Georgia. Many of the States have passed onerous laws, usually referred to as "foreign corporation laws." Those laws usually call for the payment of some fee or for some license or some special tax before a foreign corporation can do business in the State. Taking them altogether, if one complied with those laws in all the States, they would amount to an expense which would be a serious financial burden on a little concern just trying to get a start.

It is a very common practice for larger and older concerns, who would not feel that expense, to comply with those laws, and then when a little competitor beats them out in any particular case to go in and try to get the order canceled, explaining to the customer that the little fellow is not registered in the State and he does not have to pay the bill if he does not want to; that all he has to do is to set up the plea that the little fellow is not licensed to do business in that State. Usually the little fellow does not know how to conduct his business so as to make it fall strictly under the head of interstate commerce and the courts in some States are very prone to decide against the fellow who does not have a license. When the little fellow loses out once or twice he gets discouraged and feels that there is no use to struggle any longer. Section 11 of House bill No. 9763 would put a stop to that kind of thing.

I realize that it would be rather hard to get a provision of that kind passed, because of the powerful influence which would be exerted against it. These hostile foreign corporation laws are a source of very considerable revenue to the officers of some States.

As the Sherman law stands, in spite of the outcome of certain conspicuous cases brought under it, it is becoming a very effective instrument for the prevention of unfair competition and will be more and more so as time goes on, if it is not weakened by the passage of laws which will do more harm than good. There are some things in House bill No. 15657 which are good, but as it now stands it is on the whole, I believe, a very dangerous document.

Very respectfully, yours,

D. E FELT

COMMITTEE ON FOREIGN AFFAIRS,
HOUSE OF REPRESENTATIVES, UNITED STATES,
Washington, D. C., May 4, 1914.

Hon. HENRY D. CLAYTON,
Chairman Judiciary Committee, House of Representatives.

MY DEAR MR. CLAYTON: I am inclosing herewith a set of resolutions adopted by the Essex County Bankers' Association, of my district, which I trust will have the committee's consideration.

Very truly, yours,

E. W. TOWNSEND.

At a general meeting of the Essex County Bankers' Association, of Essex County, N. J., held on the 16th day of April, 1914, on motion regularly moved and seconded, the following preamble and resolutions were adopted:

Whereas the proposed bill of the House of Representatives, No. 15657, to supplement existing laws against unlawful restraints and monopolies and for other purposes in section 8 thereof, provides as follows:

"That from and after two years from date of the approval of this act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company organized and operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000 shall be eligible to be a director in any bank or banking association organized and operating under the laws of the United States.

"No bank, banking association, or trust company organized and doing business under the laws of the United States in any city or town of more than one hundred thousand inhabitants shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place." Now, therefore, be it

Resolved, That we respectfully recommend that the said bill be so amended that no person who shall be an officer or director of a State bank or trust company or any private banker shall be eligible as a director of any bank organized and operating

under the laws of the United States having a paid-in capital of over $2,000,000, and that no person who shall be a director of any bank organized and operated under the laws of the United States having a paid-in capital of over $2,000,000 shall be eligible as a director of any other bank doing business in the same city organized and doing business under the laws of the United States; and be it further

Resolved, That we respectfully recommend that the provisions of the said bill shall not apply to mutual savings banks without capital stock organized under the laws of any State.

The undersigned, the secretary of the association above named, has compared the foregoing preamble and resolutions with the originals thereof as recorded in the minute book of the said association, and hereby certifies the same to be a true and correct transcript therefrom and the whole of said original preamble and resolutions.

Dated April 30, 1914.

R. KEISTER, Jr., *Secretary*.

ARKMO LUMBER CO.,
Little Rock, Ark., May 1, 1914.

Hon. HENRY D. CLAYTON,
Washington, D. C.

DEAR SIR: We want to call your attention to section 6 of the bill introduced by you with reference to the antitrust laws, so that instead of reading as it does in this bill a change can be made which will include these words, "or any association instituted for the purpose of mutual help," instead of "associations operating under the lodge system instituted for the purpose of mutual help."

You will readily notice that your bill as it now reads excepts associations unless they should be fraternal, labor, consumers, agricultural, or horticultural in their nature, so that any organization of lumbermen, such as are formed in most of the States, would be an exception and would not come under the provisions of the bill although they are purely for mutual help and are not capitalized.

The reason we are bringing this matter before you is that from time to time in the past our secretaries have been taken before court and our associations have been condemned because of the fact that it was supposed that we were operating for the purpose of secretly maintaining prices or doing something else which was against the Sherman antitrust law, whereas in every respect we are just doing what any association of retailers of any business would do, meeting for the purpose of discussing matters which pertain to our retail business and which would be helpful to each other and not at any time for the purpose of maintaining prices or supporting a trust.

The State in which we are operating is, as you no doubt are well informed, in a large measure covered with timber, and there are in the State capitalists and labor who are very much interested in the lumber business and who spend all of their time in it.

As employers we realize that labor organizations under the bill mentioned have a perfect right to exist, hold their meetings, discuss political, financial, and any other subject which may come before them, this being perfectly lawful and according to your bill their action can not be construed as being in opposition to the antitrust law.

What can be more fair then, than that the employer, the man that furnishes the money for the industry to be carried on in this great State, should have an equal right to meet, discuss affairs pertaining to the business, the best method of manufacture, of logging, of selling, and of collections, without having by this bill a reflection cast upon them as being people who by these meetings are seeking in some way to evade or to break the laws in question.

Our association meetings are as innocent of anything connected with unlawfulness as can be the meetings of any labor organization, and we feel that it is an injustice to us caused, we hope, by prejudice, which we hope to be able to do away with, that puts us in a class by ourselves and seeks to keep us from having the same liberal constructions placed upon our actions as is to be the case with other organizations mentioned in the bill.

We wish that you would use your influence and, if possible, see that the clause as introduced by Hon. L. C. Boyle, of Kansas City, is incorporated in the law, so that we may get justice along with other organizations mentioned in the bill.

Yours truly,

ARKMO LUMBER CO.
C. K. NICOLL.

ROCK PLASTER MANUFACTURING CO.,
New York, May 1, 1914.

CHAIRMAN OF THE JUDICIARY COMMITTEE,
House of Representatives, Washington, D. C.

DEAR SIR: We wish to call your attention to sections 2 and 3 of the bill, H. R. 15657, known as the Clayton bill. We strongly object to the passage of this bill, including these sections, for the following reasons:

That commercial laws are quite sufficient to take care of the ordinary prices of goods in different localities and that we do not believe that they can be controlled by legislation.

That if an attempt is made to control prices, it practically commits the Government to guaranteeing to the manufacturer staple prices, thus insuring his profit, and this practically does away with business competition.

That the present laws are amply sufficient to take care of any unfair competition by large manufacturers who are making unbusinesslike attempts to injure their small competitors.

In addition to these reasons, it is not possible to make the same price in the same localities to all parties, as their responsibility differs, and prices are based largely on the amount of risk that is taken in the case of each creditor.

We trust, therefore, you will use your influence in having this bill amended so as not to include these two sections.

Yours, very truly,

ROCK PLASTER M'F'G CO.,
D. L. HAIGH, *President*.

CHILTON, WIS., *April 29, 1914*.

Hon. THOMAS F. KONOP,
Washington, D. C.

DEAR SIR: My attention has been called to the antitrust bills now pending before the National Legislature, and, as every citizen should, I have examined them with a great deal of interest.

With the present interstate-commerce act in force requiring the published tariffs of all railroads to be brought to the notice of shippers by the provisions of said act, and providing that the tariffs of all railroads must be substantially the same for the same service, and delegating the power to the Interstate Commission as the final arbiter to declare and fix the justice and equality of such rates, it would seem that the fourth paragraph of bill No. 2, which proposes to eliminate all conferences and understandings among the common carriers, as well as the shippers engaged in interstate commerce, is very drastic in the penalties imposed, and is neither required nor is it in the best interest of the business of the country, nor does it sufficiently or definitely define what shall constitute such transgression of the act.

The use of vague and indefinite terms in such a measure does not tend to benefit, but rather to hamper the business of the country. If I am a shipper, of course I am not entitled to a better rate than my competitor, but the rates for both of us are regulated by the interstate-commerce act, subject to the determination of the Interstate Commerce Commission as to the rate fixed by the carrier for both, but it would seem that I ought to be entitled to confer with the carriers not only with reference to the rate to be charged for my shipments, but also with reference to other matters necessarily connected with my business affairs with reference to the goods or property to be consigned to such carrier, without taking the chance that by so doing I would be a technical violator of the provisions of said paragraph and be subjected to the penalty provided by section 3 of said act.

With reference to tentative bill No. 3, relating to interlocking directorates, I have in mind a condition existing in this State with reference to the Wisconsin Central Railway Co. This line of road extended from Ashland in a southerly direction through the heart of Wisconsin, terminating at Chicago, with a branch from Abbottsford west to Minneapolis; originally a land-grant road. It was never a strong road, nor had it sufficient earning capacity to properly keep up and operate its system; its stocks had fallen in value and fluctuated at prices from 15 to 23. In this condition of its affairs a few years ago it leased its property to the Soo Railway Co. under a long lease. The Soo Road at once entered into possession of the property and expended a great deal of money in fitting up the line of the Central Road, and equipped it for both passenger and freight business, and under its operation the line of the Wisconsin Central Railway has become a great artery for the outlet of business. As I understand the conditions, by the terms of the lease from the Wisconsin Railway Co. to the Soo Railway, it provided for an interlocking directory for the purpose of protecting the interests not only

of the lessee but of the lessor as well, and those connected with each of said roads, and that such arrangement was made for that purpose only, and not for the purpose of destroying competition in the carrier's trade and business. The passage of bill No. 3 would cause a disruption of the business agreements between these roads and nullify the lease existing between them, and from my personal knowledge the effect of such disruption would be far-reaching and injurious to the interests of business located along the line of the Wisconsin Central Railway, and I can conceive of no possible advantage to the shippers over said line or to business tributary thereto that could be gained by such change so arbitrarily made.

I assume that there are many similar conditions existing in other parts of the country which might be cited, where substantially the same state of affairs will appear.

You will permit me to suggest that it might be well to make haste slowly in the passage of drastic legislation, without taking into consideration similar existing circumstances to that which I have above suggested, as a general law touching all railroad corporations and making them amenable thereto might in some cases work for good, yet in other cases, owing to the surrounding circumstances, instead of benefiting the public generally might destroy the usefulness of a public utility by disarranging its affairs, and thus instead of being a benefit might prove detrimental to or militate against the best interests of the public tributary to some of such public utility.

Respectfully, yours,

J. E. McMULLEN.

RANDALL LUMBER & COAL CO.,
Flint, Mich., May 4, 1914.

Mr. CLAYTON,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: As a business organization and as retailers of lumber and coal, we would respectfully ask the insertion of the following amendment to section 6 of the new antitrust bill introduced by you, the amendment to read as follows:

"That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations operating under the lodge system, or any associations instituted for the purpose of mutual help and not having capital stock or conducted for profit."

We feel, as members of the Retail Lumber Dealers' Association of Michigan, and of the Ohio, Indiana and Michigan Retail Coal Association, which bodies of retailers are organizations solely for mutual help and not for profit in any sense of the word, that this amendment should be introduced and made a part of the bill.

Kindly advise me on receipt of this letter if you will have any objections to this amendment, and if so, why.

Thanking you in advance for this, we are,

Yours, respectfully,

RANDALL LUMBER & COAL CO.
Per HUGH JACKSON, *President.*

LABOR AND ANTITRUST LEGISLATION—THE FACTS, THEORY, AND ARGUMENT.

[A brief and appeal by Samuel Gompers, president American Federation of Labor.]

AUTHORIZED BY AMERICAN FEDERATION OF LABOR.

To the Members of the United States Senate and the House of Representatives:

Since current discussion has been largely upon a matter of vital importance to many millions of people whose welfare has been entrusted to your keeping, and since special interests have endeavored to prejudice the minds of legislators and the public and to place them at variance with the contention of the workers thereon, there rests upon me an imperative duty not only to those upon whom the dead weight and burden of industry have ever fallen, but to you, that you may avoid being placed in opposition to labor's contentions without having had them fully and completely presented for your consideration.

The matter to which I refer is embodied in the Bartlett-Bacon bills (H. R. 1873, S. 927), Sixty-third Congress.

I am addressing you to explain why the working men and women demand as a matter of social justice and humanity that they be given relief from the status in

which they are now placed by reason of court interpretations of the Sherman antitrust law of 1890.

The history of those who toil has been one of pathos and bitter struggle, one of great suffering and indomitable courage. In the earlier centuries the toilers were compelled to work at the will or caprice of masters who owned their bodies and their labor power. Living beings with human hearts and brains were legally and socially rated as things, property. As a result of the barbarian invasions that overturned the social, economic, and political institutions of Europe and produced feudalism, it was expedient that changes be made in the status of the workers—they were made serfs and villeins. Although their bodies were made free, the overlord retained an ownership in their labor power. From this status, this semithraldom, the workers struggled to secure more definite and more advantageous terms affecting the services they owed, until finally they reached the level of freedom of contract.

Yet liberty, equality in justice, equal opportunity, had then not been won, nor are they yet assured to those who have always been the oppressed wherever or whenever oppression has existed. They had no voice or influence in determining the laws of the land, or in selecting the administrative agents who made them effective. The laws of the land had been made by those whose interests, environment, and experience in no way touched the world of the workers; political and judicial theories, precedents were in accord with the convictions and viewpoint of the controlling classes; intellectual life and interests were isolated from the work-a-day world. Ethical and moral standards were as yet untouched by enlightened and merciful humanitarianism. It was the task of the workers to present their pleas and conceptions of justice so that established practices and standards might be broadened to include the welfare of all the people. This was the task laid upon untutored, undisciplined workers. Opposed to them were the keenest, most subtle intellects and forces vested interests could retain. Each forward step was fiercely contested. The controlling interests would not abandon their special privileges even when once lost, but sought to regain them by circumvention, sophistry, and legal chicanery.

Law is a product of two elements—the imperative and the traditional. Most of our difficulties have arisen through the second element. Precedents and judicial interpretation determined by the individual bias of the judge or by prevailing economic and political philosophy, have been obstacles to the adoption of newer ideals of justice and to the shifting of standards to suit changing conditions.

These are some of the difficulties which the workers of to-day inherit from the past ages. They explain why the workers now have to combat legal and economic theories which accord to employers certain rights to labor power, and why greater consideration has been paid to safeguarding wealth than to safeguarding the freedom of the workers who help to create that wealth. The workingmen of our country ask most seriously and solemnly whether it is just that property be hedged about by inviolable sanctity, while they are denied normal activities in furtherance of the welfare of human beings.

When feudal regulation of labor conditions was broken down by the disturbances resulting from the black death, a system of State regulation was inaugurated. This was never effective and completely failed under the changes set up by the industrial revolution. With the coming of the factory system, individual relations between employers and employed became impossible and the workers were powerless to protect their rights, interest, and even their lives. Collective action by workmen in furtherance of such of their own interests as were opposed to those of the employers, was legislated against as "conspiracy." According to the old political and economic theories of justice, employees had no right to withhold labor power necessary to the operation of the employer's business, a theory evolved under the conditions of former periods when workmen were the master's property. We, in our country, inherit many of the problems and theories from the old country, and some are of our own making. It took years to secure relief from the old "conspiracy" laws which curbed and restricted the workers in protecting and promoting their industrial rights and interests. When at last it seemed that the efforts of the toilers were to be rewarded, the courts of the United States, by interpretations, which amounted to judicial legislation, applied the Sherman antitrust law to trade-unions in a way which virtually and actually revived the conspiracy laws.

When the courts applied the Sherman antitrust law to labor organizations, they created an offense never intended by the makers of that law. As has been repeated again and again, but never refuted, as an investigation of the Congressional Record will prove, the men who drafted the Sherman Antitrust Act, Senators Sherman, Edmunds, and George, did not intend that it should apply to organizations instituted not for profit. On March 25, 1890, when the bill was before the Senate, Senator Sherman insisted upon the following amendment:

"*Provided*, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with a view to lessening the number of hours of labor or the increasing of their wages, nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

Senators George and Edmunds did not oppose the amendment, but regarded it as surplusage. The amendment was agreed to while the Senate was sitting in Committee of the Whole. On March 26, when the bill came up again for consideration, Senator Stewart, of Nevada, said:

"The original bill has been very much improved and one of the great objections has been removed from it by the amendment offered by Senator Sherman which relieves the class of persons who would have been first under the prosecution under the original bill without amendment. * * * The bill ought now to be satisfactory to every person who is opposed to the oppression of labor and desires to see it properly rewarded."

In advocating the amendment Senator Hoar said in part:

"I hold we may constitutionally and wisely allow laborers to make associations * * * for the sake of maintaining and advancing their wages, * * * their contracts are made with corporations who are but associations or combinations of capital on the other side. When we are promoting and even encouraging that we are encouraging what is not only lawful, wise, and profitable, but absolutely essential to the existence of the Commonwealth itself."

Afterwards the bill was referred to the Committee on the Judiciary, where the amendment was suppressed.

Because of the failure to include this amendment in the law, organized labor was always apprehensive that attempts would be made to pervert the act from its real purpose. Nor were we mistaken, and that is why we now seek legislative relief that organized labor may not be prohibited from doing things "not in themselves unlawful."

That which we seek is not class legislation. It is a common custom in speaking to couple together the words "labor and capital," as though they stood for things of similar natures. Capital stands for material, tangible things, things separate and distinct from personality; labor is a human attribute, indissolubly bound up with the human body. It is that by which man expresses the thought, the purpose, the self that is his own individuality; if he is a free man, he has the right to control this means of self-expression. This he values above all, for if he lose this right to decide the granting or withholding of his own labor, then freedom ceases and slavery begins.

Under the present industrial order, with its concentration of industry on the one hand and the division and subdivision of work on the other, the individual workingman is unable to maintain his right of self-assertion unaided. Hence workers instituted organizations and banded together to secure for themselves wider freedom of action to regain the economic and social power they lost by the conditions mentioned. To classify these combinations, not for profit and without capital stock, in the same category with corporations, trusts, and monopolies is forcing an indefensible classification and grouping together things of a directly opposite character.

The associations of working people, commonly known as labor unions, deal not with property, material things, but with labor power alone, with lives, happiness, rights and welfare of men, women, and children. They strive for the uplift and conservation of the Nation itself.

Corporations, trusts, and monopolies aim to create monopoly conditions, to manipulate capital and production so as to secure monopoly profits. It is most unjust to try to coordinate these two inherently different kinds of organizations and to apply to them similar regulations. Justice does not necessarily result from the application of identical provisions to all people or to all groups or associations of people. On the contrary, it works injustice if the conditions, rights, and purposes are dissimilar or the people unequally situated. Theoretical justice becomes real justice only when men as well as their deeds are taken into consideration.

It is impossible to legislate equitably for "labor" and "capital" under the same law. Certainly it is not class legislation to make different provisions for two things inherently different, aiming at different purposes and employing different methods. The provisions of no law will admit of universal indiscriminative application.

This is no "special privilege" or "exemption" that organized labor asks. Our demand for justice is that working men and women and their organizations shall not be prosecuted for entering into any combination or agreement having in view the increasing of wages, the shortening of hours, or the bettering of conditions of labor, or for any act done in furtherance thereof not in itself unlawful.

Attention is respectfully and particularly called to those last four words that have been so persistently and unfairly suppressed by the press and our opponents. We are not seeking to be permitted to do criminal acts, but are demanding that the rights of which we have been deprived by judicial interpretation be restored to us. We are not asking to be "exempt" from the application of a law which properly applies to labor organizations as well as to other voluntary associations organized not for profit, but we are asking that inherent differences that exist be recognized by the laws and the courts as well as by reason.

The mere fact that a law or a legal precedent exists does not necessarily imply that it works justice. Oppression and wrong may become established, and under the cloak of authority and regularity take on a prestige and a sanctity usually ascribed to accepted rules of justice. These are the insidious forces that have fought labor under the guise of conspiracy laws, and now seek to accomplish their purpose by interpreting the Sherman antitrust law as a modernized conspiracy act.

Those rights which we wish restored are rights necessary to conducting the normal activities of labor organizations. Labor organizations are formed to protect the workers and their rights against the cupidity of employers and combinations of employers dealing in the products created by labor power. The right to cease work, to strike, to withhold labor power, is essential to the maintenance of the freedom of the workers. It would be impossible to retain present advantages, or to increase wages, or to better conditions of work without the right or the power to strike, not only as individuals but as organizations. Organized labor does not advocate strikes. On the contrary, we deplore the necessity for them, but we know, and we know from actual experience, how powerless and helpless workmen would be to protect themselves without the right and the power to strike. To make acts in furtherance of these purposes either enjoinable or punishable, both by fines and imprisonment, takes from the association of workers that which gives them virility and effectiveness.

The men and the organizations that have instituted suits against labor unions under this law, the methods that have been employed and the charges made, make it manifest beyond a doubt that the purpose of the prosecution is not to prevent restraint of trade or competition, but to disrupt or make ineffective labor organizations.

Those who have been in the ditches, the factories, the grinding toil of modern industry, know what the labor movement has done for human progress and welfare. Those who work for the United States Steel Corporation or the Tobacco Trust, know what it is to deal with organized employers without collective protection. In the light of these facts, which are well known, would it not be well to consider seriously whether or not this fear of alleged "conspiracies" of labor associations should be allowed to pervert an effort to arrive at standards of justice that do not sacrifice human rights to the right to conduct business?

Peaceful, rightful attempts to secure advantages for workers or to resist deterioration and oppression have been deemed "combinations in restraint of trade." The Workingmen's Amalgamated Council of New Orleans struck to induce the employers to make a beneficial joint agreement with union labor—a purpose certainly not in restraint of trade. No violence was charged, and yet the court ruled "the defendants were in restraint of trade." In the case of Loewe v. Lawlor et al., it was offered and accepted as evidence of "conspiracy" that out of 82 manufacturers of hats in the United States 70 were in agreement with the union of hatmakers to maintain the best standards of wages and other labor conditions prevailing in the trade. Is it any wonder that the men of labor have been forced to the conclusion that judicial interpretation of conspiracy is synonymous with successful hostility to the humanizing influences of unionism? It is absurd to argue that activities of organized labor are intended to destroy or to injure business; such a result would defeat the very purpose it has in view.

Even should the activities of labor organizations be rightfully classified as conspiracies, has not the time come when it must be considered whether these "conspiracies" of organized labor do not do more to further the advancement of humanity and national welfare than the property interests which have been heretofore carefully safeguarded? It is no "man of straw" that we fear in the application of the Sherman antitrust law to organized labor.

While it is unthinkable that the organized labor movement can be crushed out of existence, yet the repression of normal activities thus rousing among the workers resentment at injustice and the denial to them of legal methods of redress, would lead to situations and conditions which thoughtful, patriotic citizens can not consider without dread.

The struggle of the working people to secure individual rights and liberty has not been confined to our own country. In England the same problems have been confronted and solved. In 1824 Parliament enacted that no workman should be "subject

or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or statute law, for entering into any combination to obtain an advance, or to fix the rates of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or to quit or return to his work before the same shall be finished, or, not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof."

For a while the toilers were released from "legal shackles," but the courts by judicial legislation and interpretation, in England as here, sought again to bind on the chains. As soon as legislative relief was given against the judicial theory of "criminal conspiracy" under the common law, the interests took refuge behind the doctrine of "civil conspiracy." Finally the workmen won their fight by securing the British trade disputes act of 1906, which contains the following provisions:

"1. The following paragraph shall be added as a new paragraph after the first paragraph of section 3 of the conspiracy and protection of property act, 1875:

"'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.'

"2. (1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade-union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend, at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

"(2) Section 7 of the conspiracy and protection of property act, 1875, is hereby repealed from 'attending at or near' to the end of the section.

"3. An act done by a person in contemplation of furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

"4. (1) An action against a trade-union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade-union in respect of any tortious act alleged to have been committed by or on behalf of the trade-union shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade-union to be sued in the events provided for by the trade-union act, 1871, section 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

"5. (1) This act may be cited as the trade-disputes act, 1906, and the trade-union acts, 1871 and 1876, and this act may be cited together as the trade-union acts, 1871 to 1906.

"(2) In this act the expression 'trade union' has the same meaning as in the trade-union acts, 1871 and 1876, and shall include any combination as therein defined, notwithstanding that such combinations may be the branch of a trade-union.

"(3) In this act and in the conspiracy and protection of property act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labor of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises, and, in section 3 of the last-mentioned act, the words 'between employers and workmen' shall be repealed."

It may not be amiss to quote here the declaration upon this subject of the Democratic Party platform of 1908, which was repeated in 1912:

"The expanding organization of industry makes it essential that there should be no abridgement of the right of wage earners and producers to organize for the protection of wages and the improvement of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade."

In his speech of acceptance of the presidential nomination by the Democratic Party, Hon. Woodrow Wilson took occasion to make the following declaration:

"The working people of America—if they must be distinguished from the minority that constitutes the rest of it—are of course the backbone of the Nation. No law that safeguards their life, that improves the physical and moral conditions under which

they live, that makes their (the working people of America) hours of labor rational and tolerable, that gives them freedom to act in their own interests, and that protects them where they can not protect themselves, can properly be regarded as class legislation or as anything but a measure taken in the interest of the whole people, whose partnership in right action we are trying to establish and make real and practical. It is in this spirit that we shall act if we are genuine spokesmen of the whole country."

The Progressive Party platform of 1912 contained the following declarations upon this subject:

"The Progressive Party, in order to secure to the people a better administration of justice, and by that means bring about a more general respect for the law and the courts, pledges itself to work unceasingly for the reform of legal procedure and judicial methods.

"We believe that the issuance of injunctions in cases arising out of labor disputes should be prohibited when such injunctions would not apply when no labor disputes existed.

"We believe also that a person cited for contempt in labor disputes, except when contempt was committed in the actual presence of the court, or so near thereto as to interfere with the proper administration of justice, should have a right to trial by jury.

* * *

"We favor the organization of the workers, men and women, as a means of protecting their interests and of promoting their progress.

Mr. Wilson, presidential candidate of the Democratic Party, and Mr. Roosevelt, candidate of the Progressive Party for President, represented the principles enunciated in the two party platforms of 1912. Those principles quoted above declared in favor of the legislation urged by the workers and received, computing together the votes for both the Democratic and Progressive presidential candidates, 10,412,977 votes as against Mr. Taft, the candidate of the Republican Party, which did not declare for labor's principles, who received 3,484,974 votes. Surely no one can therefore truthfully declare that the people are not in sympathy with that which the workers deem so necessary for their welfare. The people desire the welfare of human beings and seek information how best to promote their purposes. The spirit of the age is sympathetic, humane.

But overwhelming as was the indorsement by the people of this legislation, it is submitted that the fundamental principles involved in the assertion of labor's rights should be more amply set forth. Those principles are based upon established truths. Who will gainsay that the ownership of a free man is vested in himself alone?

The only reason for the ownership of bondmen or slaves is the ownership of their labor power by their masters. Therefore, it follows that if free men's ownership of themselves involves their labor power, none but themselves are owners of their labor power. If a free man by choice or by reason of his environment sells his labor power to another and is paid a wage in return, this wage is his own. This proposition is so essentially true that it is the underlying idea upon which is based the entire theory of private property. To question or to attempt to destroy the principle enunciated, involves the entire structure of civilized society.

The free man's ownership of himself and his labor power implies that he may sell it to another or withhold it; that he may with others similarly situated sell his labor power or withhold it; that no man has even an implied property right in the labor of another; that a free man may sell his labor power under stress of his needs, or he may withhold it to obtain more advantageous returns.

Labor power is not a product; it is human ability to produce. Because of its very nature it can not be regarded as a trust or a corporation formed in restraint of trade. Any legislation or court construction dealing with the subject of organizations, corporations, or trusts which curtail or corner the products of labor can have no true application to the association of free men in the disposition or withholding of their labor power.

The attempt to deny to free men, by injunction or other process, the right of association, the right to withhold their labor power or to induce others to withhold their labor power, whether these men be engaged in an industrial dispute with employers, or whether they be other workmen who have taken the places of those engaged in the original dispute, is an invasion of men's ownership of themselves and of their labor power, and is a claim of some form of property right in the workmen who have taken the places of strikers or men locked out.

If the ownership of free men is vested in themselves and in them alone, they have not only the right to withhold their labor power, but to induce others to make common cause with them and to withhold their labor power also that the greatest advantage may accrue to all. It further follows that if free men may avail themselves of

the lawful right of withholding their labor power, they have the right to do all lawful things in pursuit of that lawful purpose. Neither court injunctions nor other processes have any proper application to deny to free men these lawful, constitutional, and inherent rights.

In the disposition of wages from the sale of labor power, man is also his own free agent. All things that he may lawfully buy, he may also lawfully abstain from buying. He may purchase from whomsoever he will, or he may give his patronage to another. What he may do with his wages in the form of bestowing or withholding his patronage, he may lawfully agree with others to do.

No corporation or company has a vested interest in the patronage of a freeman. If this be true, and its truth can not be controverted upon any legal basis, freemen may bestow their patronage upon any one or withhold it, or bestow it upon another. And this, too, whether in the first instance the business concern is hostile or friendly. It is true for any good reason, and, in the last analysis, for no reason at all.

It is not a question of whether we like or dislike lockouts or strikes, boycotts or blacklists. The courts have declared that lockouts and blacklists and all that pertain thereto are not unlawful. It is difficult to understand, then, unless the courts have the concept that an employer has some form of property right in the laborer or the laborer's patronage, how they are justified in stretching their authority, perverting the purpose of the law, and undertaking by the injunctive process to outlaw either the strike or the boycott.

To claim that what one man may lawfully do becomes unlawful or criminal when done by two or more men, is equal to asserting that naught and naught make two.

The legislation sought is not what can be termed "class legislation" if that expression is interpreted in the disparaging sense implied by those opposed to labor's position. Practically all legislation is group or class legislation. Universal categories of the Kantian type can deal only with metaphysical principles. Specific laws deal with groups clearly differentiated from others and possessing common characteristics. Unlike quantities, groups, or conditions can not be subjected to the same controls, if justice is the end sought. It follows, then, that special legislation is necessary and just, provided, however, that the differentiation is based upon correct principles. This fundamental truth has been upheld by the judiciary in the following decisions:

"Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment (the Fourteenth Amendment). (Barbier v. Connolly Laundry Case, U. S., 27; United Railway Co. v. Beckwith, 129 U. S., 26, and cases cited therein; Railroad Cattle Damage case.)

"The inhibitions of that section (section 1 of the Fourteenth Amendment) are laid upon the action of the several States and have no reference to legislation by Congress. (Chinese Summary trial, presumption of guilt; In re Sing Lee, 54 Fed. Rep., 337.)

"The equal protection of the law * * * does not forbid classification * * * The power of classification has been upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. (Atchison Railway v. Matthews, 174 U. S., 103. See also, Kentucky Railroad Tax cases, 115 U. S., 321.)

"Classification must also rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. (Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S., 155.)"

The fact, then, that organizations not for profit, but for securing humanitarian benefits for the workers, would be exempt from the application of the provisions of the Sherman antitrust law would not constitute a reason for declaring the measure unconstitutional—such a decision would depend upon whether there are real and inherent differences between the voluntary associations of working people (organized not for profit) and monopolies or combinations whose sole purpose is profit, or upon whether the application of the law to the two kinds of organizations would produce similar results.

Such differences do exist. Organizations of labor have their origin in human need; they seek human welfare and betterment; they have to do with human labor power. Capitalistic monopolies have their origin in desire for larger profits; they seek economic control and the elimination of competitive rivals; they deal in material things, in the products of labor, in wealth.

Between capital and labor there is a vital and fundamental difference, an understanding of which is essential to those upon whom falls the responsibility of dealing with matters influencing the freedom of men.

Capital consists in material things, which are external, useful, and appropriable.

Capital is that which a man has, not what he is.

To classify skill, knowledge, labor power as capital is an error in terminology that has crept into the thinking of some economists and political scientists.

It is an error conducive to grave injury to the working people.

These attainments or attributes are not possessions of the individual; they are the individual and can not be separated from personality. Cultivation of powers and ability increases the potential labor power, increases and enriches the resourcefulness and efficiency of the individual. But these things are subjective, immaterial, and are not in themselves capital The individual may be able, powerful, and therefore fortunate, but it does not necessarily follow therefrom that he has capital. The wealth which he may produce and use as capital is separate and distinct from himself.

It follows, then, that to apply to voluntary associations of working people (commonly called labor organizations) which are concerned with individuals and their powers, the same regulations as are applied to organizations manipulating the products of labor leads to mischievous results and perversion of justice. Legislation recognizing the inherent difference between these two kinds of organizations could not be condemned as unconstitutional on the charge of unjustifiable discrimination.

After considering the charge of "class legislation" from the angle of "difference of kind," it remains to take up the matter as to whether the law would produce similar effects upon both kinds of organizations. The effect upon trusts and monopolies of the application of the Sherman antitrust law is an open question, the discussion of which is not essential to the matter in hand. Suffice it to say, the law aims at the prohibition of conspiracies, monopolies, or combinations in restraint of material things, the reestablishment of competitive conditions in material things. So far as the law has been invoked against labor organizations, it has been directed against two kinds of collective action—the withholding of labor power and the withholding of patronage. It is at once evident that both labor power and patronage are not capital or material things—property—to which that law was intended to apply, but are subjective, personal.

If labor power and patronage are treated as something to be controlled as property, then so much of the individual no longer belongs to himself. The individual, like a nation, can not exist part slave and part free; it must be either one or the other.

A free man has the right to bestow or withhold his labor power and his patronage whenever or wherever he may wish. To gainsay this right is to deny freedom. Since no individual is given any legal or inherent proprietary right in a man's labor power or patronage, he can not be aggrieved or afforded grounds for action when they are withheld from him. Labor power and patronage are what make the individual workman effective and forceful; they constitute his principal protection and means of self-expression. They must be guarded as the foundation of individual freedom, the precious birthright of a man free to be himself and to possess his own soul.

Not only must the theoretical right to bestow or withhold labor power and patronage be maintained, but this must be given reality and effectiveness by permitting men to pursue lawful courses of action in exercising this right. If the end is lawful and worthy then the normal means for attaining that end must also be recognized as legal and necessary. Justice must be reasonable and practical. There has been an attempt—it matters not whether consciously or unconsciously—to build up a legal fiction which tends to nullify these rights by discrediting and misrepresenting the means by which they are exercised.

The legal mind is strongly influenced by the traditional element of the law developing out of the observance of precedents in its application. It is concerned for consistency, for continuity even when that necessitates the continuation of an antiquated concept.

Consequently, the old legal concept that labor unions and their normal activities for making their demands effective are either conspiracies or partake of the characteristics of conspiracies, is very hard to dislodge from the legal mind, and continues to influence many decisions and arguments. Lawyers of the legalistic type speak the orthodox vernacular, and their curiously twisted phrases take on the semblance of accepted principles and lines of reasoning. Yet the heterogeneous elements of their legal fictions appear somewhat incongruous and mystifying to laymen. They speak of an unlawful combination or conspiracy to accomplish a lawful purpose, and of a lawful combination to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means, as being equally criminal. Then by using one or more of these hypotheses, together with the use of precedents based upon the principle that labor combinations and collective action are conspiracies, lawyers and judges have restricted labor organizations in their elemental, normal activities intended to promote the welfare of those

who toil. In this connection permit me to call your attention to these memorable words of Junius upon the nature of precedent:

"If an honest man, and, I may truly affirm, a laborious zeal for the public service has given me any weight in your esteem, let me exhort and conjure you never to suffer an invasion of your political constitution, however minute the instance may appear, to pass by, without a determined, persevering resistance. One precedent creates another. They soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy. Be assured that the laws, which protect us in our civil rights, grow out of the Constitution, and that they must fall or flourish with it."

This legal fiction of theoretical justice and equal protection of all men under the law does not accord with the facts as experienced by those upon whom the burden of the world's heavy toil has fallen. This legal fiction represents what might be called visible or outward justice. But greater and more real than this is the invisible or real justice that is not bound by theory or convention, but goes straight to the heart of things, takes into account facts and modifying conditions, and is not circumscribed and bound by conventions and precedents. That is the justice too often gagged, bound, and well-nigh stifled by lawyers. That is the justice that must be rescued and established by our statesmen, if liberty and freedom are to be maintained. This was the course advocated by Edmund Burke in regard to the American colonies, the policy which Hon. Woodrow Wilson admirably expressed in his History of the American People, thus:

"Mr. Burke admitted that his theory was not a theory for the strict lawyer; it was a theory for statesmen for whom fact must often take precedence of law."

Law and legal interpretation have not divested themselves of all the influences of that time when men were not free and were looked upon as chattels and property. They have not yet come under the sway of the newer expressions of the social conscience which Prof. Charles E. Merriam has aptly termed "social politics."

Hostile lawyers, lawyers paid to present the cases of their clients, judges under domination of the employer's and the legalist's viewpoint, have misrepresented and misinterpreted acts and purposes of the workingmen to make them appear criminal and destructive, whereas the guiding purpose animating the labor movement is not destruction but construction, for the completion and perfection of general welfare.

It is charged that workingmen conspire to destroy business when they withhold labor power or patronage pending the securement of specific rights. As a matter of fact, destroying business would frustrate the end sought. This legal fiction called destroying business arises out of confusing physical property with the immaterial something called good will which is dependent on reputation and patronage. This latter emanates from individuals not concerned in the particular business under consideration; it has a direct relation to business, but it is not business. For detracting from patronage, either individually or collectively, workingmen can no more be charged with destroying business than can competitors who build up their business at the expense of others engaged in the same line. Workingmen have the right to pursue policies for their welfare which may entail losses by employers. To be sure, the employer has a right to his property and a right to do business, but the latter is a general right. He is not guaranteed the right to be protected against all hazards in a particular business. That is the principle involved in the reduction of the tariff, even though that may mean some decrease in the employers' or other business men's profits.

Whenever the activities of organized labor have raised new issues and problems or brought precedents into question, rather than adjust to meet new ideas and new conditions and blaze out newer and straighter paths to justice judges and lawyers have applied the well-nigh threadbare dictum, "criminal conspiracy," and have followed, figuratively if not literally, the old legal maxim, "When in doubt, hang the the prisoner." Legal fiction and misunderstanding have placed restrictions upon individual freedom through which it is hard to break.

Since the Sherman antitrust law has been so interpreted as to increase these limitations, labor has found the right to unite for mutual protection but a mere legalistic expression. The law as now interpreted has the effect of crippling and enervating labor organizations and of prohibiting the exercise of necessary activities. What we seek is not special privilege, immunity from prosecution for crimes, but the right to do those things necessary to organizations accomplishing a real work for human workers.

In regard to another point made by opponents, namely, that the Bartlett-Bacon bills if enacted into law would be regarded as unconstitutional, your attention is respectfully called to the exemption provision of sections imposing a tax on corpora-

tions embodied in the tariff law of 1909, approved and signed by Mr. Taft, then President. That proviso is as follows:

"*Provided, however*, That nothing in this section contained shall apply to labor, agricultural, or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

In Flint *v.* Stone, Tracy & Co., the Supreme Court of the United States, in rendering its decision on the validity of the proviso excluding labor and other organizations from this corporation tax, anticipated the objection raised by opponents. The court decided thus:

"As to the objection that certain organizations, labor, agricultural, and horticultural, fraternal and benevolent societies, loan and building associations, and those for religious, charitable, or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasions to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed, must be included the right to make exemptions such as are found in this act."

That there is nothing novel or pernicious in provisions of this nature is further proved by the tariff law recently enacted by Congress. That law contains, in the section dealing with the income tax, the following provision:

"*Provided, however*, That nothing in this section shall apply to labor, agricultural, or horticultural organizations, or to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, nor to cemetery companies organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues, nor to chambers of commerce or boards of trade not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual, nor to any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare."

Nor is this the only exemption; all annual incomes under $3,000 are exempt. The tax itself is graduated, making the burden not mathematically but really equal and in proportion to ability to pay. The compensation of all officers and employees of a State or any political subdivision thereof is exempt, except when such compensation is paid by the United States Government. In fact, all excise taxation is based upon class differentiations. The question to be considered is not whether a distinction is made, but whether the distinction is founded upon a real difference and whether the results from recognizing the distinction would promote the welfare of the greatest number.

The opponents of the legislation labor seeks assert that the principal activities and methods of organized labor are destructive and subversive to orderly progress. Quite the contrary is true. To be sure, things have been done by some connected with the labor movement which all right-thinking people deplore. These excrescences have been featured by the sensational and hostile press. The undue prominence given them tends to minimize or obscure the constructive, permanent, fundamental work of the movement. This side is often wholly hidden from persons whose lives do not come in contact with those who work in the ditches, the mines, the factories, and wherever the burden of toil is borne by those who can not enter the easier places.

This labor movement is a real, vital expression of human need and hope; it must conform to life as it is, and though it hopes to establish better things it can not deal with men and present conditions as though they were ideal. The men and women in the movement are human beings, with all the passions, frailties, and possibilities of human nature. Is what they are and do, not due in a large measure at least to existing social conditions? If they have at times done that which they should not, it has not infrequently been because they had been made desperate by denial of justice, and because protective measures had been declared illegal by those in judicial

and political control. As the thoughts of men have widened, practices and acts which had been held illegal have been legalized. The working people have won many such victories; by the adoption of the legislation under consideration they seek to establish recognition of the right to effective collective action not in itself unlawful.

Our opponents simulate great alarm as to the disastrous effect of the boycott. But is that such a new and anarchistic device? Quite the contrary. It is a weapon that has been successfully used for good purposes by men of all times. Our revolutionary fathers used it most effectively to defeat what they considered the unjust demands of the English Government. It may be interesting here to call attention to the placards reproduced in the second volume of Hon. Woodrow Wilson's "History of the American People," which illustrate the point so nicely. The one on page 159 is an "unfair list;" on page 162 is a "conspiracy" agreement; on page 173, an unmistakable boycott poster, though conceived in patriotism, and ended reverently with "for ever and ever, amen."

The boycott per se is not evil. Its purpose and the means employed to make it effective determine whether it should be given praise or condemnation. It has been used for innumerable purposes by all classes and kinds of people. Nor are the "interests" averse to these devices used by labor organizations. A short time ago the Missouri Legislature repealed a law legalizing rates filed in accordance with the statute, thereby reviving the State antitrust law. Ten insurance companies promptly withdrew from the State. Later the agents of over 100 companies were instructed by their respective superiors to do no more business in the State. That policy of the companies is to all intents and purposes a strike, ceasing to do work until their demands shall have been granted. There are innumerable illustrations of effective boycotts prosecuted by certain interests against other interests—for profit.

Organizations to promote temperance, prohibition, and like purposes, in making a campaign against the liquor traffic, are trying to institute an effective boycott against the liquor interests. The efforts of the Consumers' League to create a public sentiment hostile to establishments, business houses, factories, which pay low wages, fail to provide seats, conveniences, and sanitary conditions for their employees, and then to give this sentiment expression by refusing to purchase articles without the label which guarantees "fair" conditions of production, are, in the last analysis, a boycott against establishments where low standards prevail.

The boycott in itself can not, therefore, be condemned as pernicious, illegal, or as a class weapon. But opponents insist that if the Bartlett-Bacon bills, or the principle embodied in them, are enacted into law there would then be no recourse under existing law for violence or lawlessness in connection with a strike or lockout. As a matter of fact, existing Federal and State laws now provide penalties for violence or crime committed by persons whether in connection with a strike, lockout, blacklist, or boycott, with any other activity, or due to any other cause.

Acts of violence and crimes can be and are punished under proper laws made and provided to meet them. No one need fear but that all crimes of workingmen will be duly punished. It is not immunity from such punishment that labor asks, only exemption from a statute which was not intended to and should not apply to it, and which was framed to regulate an essentially different kind of organization.

Opponents usually say that the workingman may strike, agree to strike, and apply the direct boycott, but when it comes to going further and so acting as to impede and obstruct the natural and lawful course of trade in this country, then they say he shall stop.

That sounds well to those who can be content with mere phrases and paper declarations. But to those who know and who have felt the power of the invisible forces working in and through the Government, it is but an empty platitude, an expression of theoretical or academic rights which lack the effectiveness of reality. It is the old, old story of the employers who approve of unions, but only of unions that do nothing.

The workingman shall not interfere with the "natural and lawful course of trade." Forsooth, is there any trade independent and uninfluenced by some human agency and directing control? Is not its course determined by these human agents for their own satisfaction and benefit? If these agents who are now accorded, by law, limited powers to regulate and manipulate trade, and who by the domination of wealth, corrupt bargains, and secret agreements, exercise unlimited power over trade for personal interests, is it equitable that the workingmen should be barred from exercising control of themselves and their normal activities? The statement of our opponents, which I have quoted, is akin to the phraseology of the old-time idealistic sciences, the "natural" man of the political-rights school of thought, the

"economic" man of the early economists, the "average" man of statistical theories, straw creatures like unto nothing seen upon the earth nor in the spaces above or beneath.

Even Senator Root, scarcely recognized as a leader of progressive legislation, in the first of a series of lectures on "The Essentials of the Constitution," which he delivered last year at Princeton University, thus acknowledged the domination of the interests in political affairs:

"All of these new political methods are the result of efforts of the rank and file of voluntary parties to avoid being controlled by the agents of their own party organization and to get away from real evils in the form of undue control by organized minorities with the support of organized capital."

Government was first organized to protect property. Property owners and wealth possessors long controlled and directed it. With changing social and economic conditions, with the development of the social conscience, men have realized that political agencies may be made to serve social ends. Hence all should participate in the Government, and that the welfare of all may be secured in that way. The courts have been especially backward in recognizing the rights secured by legislation. As in the Danbury Hatters' case, the Supreme Court applied the Sherman antitrust law to the union and found a "conspiracy in restraint of trade" for three reasons—a strike at the factory, collective-bargain agreements by which 70 out of the 82 hat factories of the country agreed to union shop conditions, and a boycott of the hats of the Danbury firm. It is evident from this that theoretical rights do not always constitute real rights. The hatters were confronted by the following alternatives:

First, for the Loewe Co., with which the dispute arose, to pay whatever wages it pleased to its workmen, to force its employees to toil a longer working day, and to impose any other conditions at variance with those prevailing in the trade without resistance or strikes on the part of the union, and thereby to encourage other employers in the trade to follow the same policy, and even creating the necessity for their cutting wages, increasing hours of labor to meet the conditions prevailing in the Loewe establishment; or

Second, for the hatters to do as they wisely and justly did, to exercise their lawful, constitutional, and inherent right to quit work, to strike, and to endeavor to persuade their fellow citizens and friends to give their patronage to hat manufacturers disposed to be more just in their dealings with their employees, and thus to maintain a higher general standard of life afforded by the conditions prevailing generally in the trade.

As George W. Alger says in his book, Moral Overstrain, in discussing some equivocal rights of labor:

"Stated as concretely as possible, the principal difference between the working people and the courts lies in the marked tendency of the courts to guarantee to the workman an academic and theoretic liberty which he does not want, by denying him industrial rights to which he thinks he is ethically entitled. His grievance is that in a multitude of instances the courts give what seems to him counterfeit liberty in place of its reality." * * *

"The workman does not want the vain liberty so often declared to him by the courts, of throwing up his job and looking for another. He does not take kindly to the judicial affirmations to him of the right to be maimed without redress, or to be killed, by his employer's indifference to his safety. His grievance is not directly with the courts and law. The workman knows little about the law, and most of what he understands he does not like. He objects to the economics on which those killing decrees are rendered against him. He does not call it economics, but at the bottom the real trouble from the workman's point of view is the blindness of courts, which do not seem to notice or to understand the social and economic conditions under which he has to work. For the law still embodies in these decisions an outworn philosophy, the old laissez-faire theory of extreme individualism.

"The whole point to be noticed is simply this: That by the working class ideal of liberty a special demand is made on the law—a demand more frequently refused than granted. What it demands from the courts is the recognition and protection, and at times the creation, by law of the workers' economic rights. The law, on the other hand, guarantees to him the ancient and largely negative individual liberty, freedom from legal restraints, the right to do any unforbidden thing he wants to—if he can—and tells him to shift for himself for his economic rights. The workers' discontent with the law lies in the fact that it guarantees him individual and not social or industrial freedom."

The Hatters' case was retried last year and the men again found guilty of "illegal conspiracies" because they tried to establish a minimum standard of wages and conditions for all the workers in the trade and because they determined to withhold their patronage from an unfair firm which refused to conform to the union wage scale and conditions prevailing in the trade. For these reasons, their little property holdings and deposits were levied upon and held to satisfy the threefold damages allowed by the antitrust law.

Recently the Supreme Court of Errors of Connecticut, in Conners *v.* Connelly, rendered a decision ignoring the difference between trusts and labor organizations and declaring that there is danger in a monopoly of "anything" of which there is common need. Though a laboring man may be very humble, yet he is not a thing. The whole opinion is reasoned from that false hypothesis. It ignores the economic necessity for collective bargaining and ignores the difference between that human act and a monopoly or a trust in material things. The toilers grow weary and restive under laws and courts that promise them the rights of men; but judge them as "things." How long must they ask for relief?

In addition to the instances already cited, in which men of labor were indicted under the criminal provisions of the Sherman antitrust law because they sought to protect and advance the interests of their fellow workers as workers, proceedings were brought against the electrical workers' unions of Chicago, Ill. Since then the officers of the coal miners' unions were indicted under the provisions of that law, and for no other reason than that already mentioned.

Federal district attorneys and grand juries make so-called investigations of the normal activities of workers to see whether some indictment or other process can not be employed to estop the workers from protecting their rights and their interests against conscienceless employers. These investigations at the least result in harm to the workers by harassing the organizations of labor and leaving them with a burden of expense in legal defense. These prosecutions, which may better be termed persecutions, should come to an end. They can be ended by the enactment of the Bartlett-Bacon bills.

Unless the principles involved in this discussion are promptly and effectively enacted into law, securing to the working people freedom to unite for the purpose of safeguarding and exercising recognized rights necessary for their physical protection and the development of those qualities which determine their very being, the sense of injustice already stirring abroad in our land will be fostered by even a greater reason for existence.

The working people of our country ask nothing in the form of legislation—the subject we are discussing—that is not already statute law in Great Britain, for in 1906 the British Parliament enacted the British trade disputes act, which has been quoted.

The specific applications of the Sherman antitrust law to labor organizations have done violence to the right to strike—to cease work collectively—with all that that involves and the right to withhold patronage and to agree to withhold patronage. The issues in this legislation involve the same principles found in our contention against injunction abuses; namely, there is no property right which an employer has or can have in the labor power or the personality of another citizen, a workman. In a hearing before a subcommittee of the Senate Committee on the Judiciary, during the last session of the Sixty-second Congress, I presented some reasons why the law should be amended to protect workmen from present abuses. I had incorporated in the record documents substantiating the position of labor. They are as follows:

Why Injunction Should Not Apply. Edward J. Livernash.
Trial by Judge and Jury. Henry C. Caldwell.
Section 20 from High on Injunctions.
Arthur et al. *v.* Oakes et al. Opinion by Justice Harlan.
Contempt Case, Buck's Stove and Range Company *v.* Gompers, Mitchell, and Morrison. Dissenting opinion of Chief Justice Shepard.
Injunctions in Labor Cases. David Silverstein.
The Misuse of Equity Power. Andrew Furuseth.
Man's Ownership of Himself. Samuel Gompers.
Government by Law, Not Discretion. Samuel Gompers.
Essence of Labor's Contention in the Injunction Abuse. Samuel Gompers.

Another presentation of this same principle is found in the address of Mr. Jackson H. Ralston, made before the American Academy of Political and Social Science, and published in The Annals, July, 1910.

My presentation of the cause of organized labor has not been from the legal viewpoint, for I am not a lawyer. But even could I present the legal phases, I doubt whether that would aid in determining justice for the workers. Often justice is

obscured in the mazes of legal theories and technicalities. The law is not an unfailing source of justice; it can only approximate that ideal as it is rendered flexible enough to adjust to new conditions and needs. That is what we ask for in the legislation we seek.

It is not my purpose to present here a legal argument in defense or in furtherance of labor's position with respect to the principle involved in legislation of this character, nor can I herein make a full sociological or economic presentation of the subject.

The legislation sought, that is, the enactment of the principles embodied in the Bartlett-Bacon bills, is one of deep concern to the workers of our common country. It lies very close to their hearts, and vitally affects their rights, their interests, their progress.

A sense of duty and of the obligations devolving upon me as a citizen, a man, a worker, as well as president of the American Federation of Labor, impels me to impress in this form the thoughts, the hopes, and the aspirations of the toiling masses of America to whose welfare it has been my good fortune to devote the best efforts of which I am capable. It is this sense of duty and obligation which impels me to submit in this way, perhaps rather voluminously, something of the information and experience I have upon the subject under discussion. It is a duty not only to the toilers of America, to its citizenship, but also to the representatives of the people, their governmental agents, in the interest of the great principles upon which our Republic is based, to present the cause of justice and human welfare. That the facts and the arguments herein set forth may be available to all in determining their course upon this issue, fraught with such tremendous possibilities for weal or woe, directly to the millions of working people and generally to all the people of our common country is my warrant for the length of this statement.

It is earnestly hoped that the appeal may not be in vain and that the legislation sought may be promptly enacted.

AMERICAN FEDERATION OF LABOR,
Washington, D. C., May 5, 1914.

Hon. HENRY D. CLAYTON,
House of Representatives, Washington, D. C.

DEAR SIR: In view of the fact that the Members of the House of Representatives will at an early date be called upon to determine their course upon H. R. 15657 (committee print, May 2, 1914), it is essential that there be no misapprehension relative to its provisions, particularly as they affect the associations and their members which we have the honor to represent. We therefore respectfully call attention to the first paragraph of section 7, page 6, which reads as follows:

"That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof."

This section of the bill is not satisfactory. It does not afford the relief required. We have urged and do now repeat that the following words, "be construed to forbid the existence and operation of" be stricken out and the following words substituted, "apply to," so that the section would then read as follows:

"That nothing contained in the antitrust laws shall apply to fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof."

Again we urge that in section 18, on page 18, line 22, after the word "thereto" the following amendment be made: Strike out the period (.) and substitute therefor a comma (,), and then after the comma (,) add the following words: "nor shall any of the acts enumerated in this paragraph be considered unlawful in any court of the United States."

The undersigned are the representatives of the several organizations of working people in industry, commerce, and agriculture, who have been the victims of and who have been made to suffer from the wrongs which the above-named bill is designed to remedy, and it is submitted that this legislation should not fail effectually to accomplish its avowed purpose, for surely we have had sufficient experience with this species of legislation to warrant all in safeguarding any misapprehension as to its

purpose. We therefore respectfully request and urge you to support by your presence, voice, and vote the amendments suggested in this joint letter.

Respectfully submitted.

SAML. GOMPERS,
President American Federation of Labor.
FRANK MORRISON,
Secretary American Federation of Labor.
H. E. WILLS,
Assistant Grand Chief,
Legislative Representative Brotherhood of Locomotive Engineers.
P. J. MCNAMARA,
Vice President,
Legislative Representative Brotherhood of Locomotive Firemen and Enginemen.
N. M. CLARK,
Vice President,
Legislative Representative Order of Railway Conductors.
VAL FITZPATRICK,
Vice President,
Legislative Representative Brotherhood of Railroad Trainmen.
J. H. PATTEN,
General Counsel, Farmers' Union (1910 to 1914),
and Assistant Secretary Farmers' National Congress.

MEMORANDUM RELATIVE TO THE INJUNCTION FEATURES OF H. R. 15657.

[Submitted to the House Judiciary Committee on April 27, 1914, by Daniel Davenport, attorney for the American Anti-Boycott Association.]

To the Judiciary Committee of the House of Representatives:

I beg leave to submit for your consideration the following suggestions as to the invalidity of the injunction features of the Clayton antitrust bill.

A statute that does not leave to a party a substantial remedy for the protection of his property against unlawful attacks, according to the course of justice as it has immemorially existed, is void under the Federal Constitution. A statute that shows upon its face an intention to so clog, hamper, and embarrass the proceedings to enforce that remedy as to practically destroy it entirely, and thus to impair the property rights which depend upon it for protection, is void, because it is a practical deprivation of those rights. These propositions have been so often declared by the courts that they are elementary now and require no citation of authorities before your committee to support them.

Sections 14 to 22, inclusive, of H. R. 15657 (the Clayton antitrust bill), being those sections that relate to the issuance of injunctions by the Federal courts and to the trial of contempts for their violation, fall directly under the condemnation of the foregoing principles, and the scheme of regulation of the injunctive remedy therein attempted would be void both as a whole and in details. They are a studied attempt not only to expressly deprive the individual owners of property and property rights of their existing right to apply to the Federal equity courts in a most important class of cases, to wit, those growing out of labor disputes, for protection against unlawful acts which those courts have uniformly held may be the means of unlawfully injuring and destroying them, but also to so clog, hamper, and embarrass the injunctive remedy in all the other cases where it is still left to them by the bill, as to make it of no substantial value as a means of protection.

In placing manifold and multiplied, unusual, and extraordinary obstacles in the path of private litigants who must resort to such courts for restraining orders and injunctions to protect their most important interests, and in requiring, at the same time, that all private litigants must have the violations of their injunctions tried by a jury, if the accused shall demand it, which the Supreme Court has said would destroy the efficiency of such injunctions, while carefully securing to the Federal Government its right to have all violations of injunctions granted in its behalf tried by the court because that mode of trial is necessary to the enforcement of those injunctions, a purpose is plainly manifested in this bill to so clog, hamper, and embarrass the whole proceeding of obtaining and enforcing injunctions by private parties as to practically destroy the remedy and the property rights dependent thereon. I think there is no doubt that the scheme of regulation of injunctions proposed in the bill would, as a whole, be declared void by the courts.

Moreover, notwithstanding the fact that the fifth amendment of the Federal Constitution expressly declares that no person shall be deprived of his property without due process of law, and section 2 of article 3 of that Constitution declares that the judicial power shall extend to all cases in law or equity arising under the Constitution and laws made in pursuance thereof, and to controversies between citizens of different States, section 17 of the proposed bill attempts, expressly, to deprive the individual owners of property and property rights of all right to resort to the Federal courts of equity for protection of the same, when assailed by any or all the acts specifically enumerated therein, however unlawful they may be in the particular case, by which acts such courts have uniformly held that property and property rights may be unlawfully injured and destroyed.

It aims to do this by absolutely forbidding such courts to issue any restraining order or injunction to prohibit the doing of such enumerated acts, however unlawful they may be, and however necessary such order or injunction may be to preserve the subject matter of such litigation and to maintain the court's jurisdiction, although, by the statutes creating them and by the general law, those courts are expressly given equitable jurisdiction over such cases when the matter involved exceeds $5,000 in amount.

In attempting this, the bill violates, not only the due process clause of the Constitution, but that other clause which declares that the judicial power of Federal courts of equity shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction. For a statute to say that a court shall have equitable jurisdiction over a certain case or controversy and then for another statute to deny it the fundamental and essential power to issue and enforce the usual and necessary process required by that jurisdiction would be a direct invasion by Congress of the judicial department and void on that account.

But what will inevitably insure the overthrow by the courts of this scheme of regulation of the injunctive remedy are the provisions of sections 18 to 22, inclusive, which relate to the proceedings to enforce orders and injunctions, after the same shall have been willfully violated by any person. These are such as to justify comment more in detail.

After having undertaken in sections 14 to 17, inclusive, to deprive the Federal courts entirely of the power to issue orders and injunctions in a most important class of cases, to wit, those growing out of labor disputes, and to clog, hamper, and embarrass them in granting such orders and injunctions in all other cases, section 18 proceeds to direct that a person violating such orders and injunctions shall be proceeded against in the manner provided in the following sections, in case the act or thing done by him shall also be a criminal offense under any statute of the United States or at common law. And since it is well settled by the decisions of the Supreme Court that every willful violation of an order or injunction of a Federal court is also a criminal offense, under the statutes of the United States against obstructing the administration of justice in such courts, the proposed scheme of regulation embraces, of course, every case of a willful violation of such orders and injunctions, by whatever acts committed, except of those which have been granted at the instance of the United States, as excepted in this bill.

Section 19 then provides that in case there is reasonable ground to believe that any person has committed such contempt, he shall be brought before the court in a certain specified manner, which is to be by rule to show cause, and not by attachment, however urgent the matter may be, and, if he demands it, he shall be tried by a jury, to be summoned, selected, and impanelled as in misdemeanor cases, and the trial must conform as near as may be to the practice in criminal cases. If found guilty, he is to be punished by fine or imprisonment, or both, and the fine shall be payable either to the party injured by the contempt or to the Government, or both. The judgment or conviction shall be reviewed on writ of error and bill of exceptions only, the same as is now the case in criminal cases, and the judgment shall be stayed in the meantime and the accused, if sentenced to jail, shall be admitted to bail, and no such contempt shall be prosecuted except within one year after the commission of the act complained of.

It will be observed that the foregoing provisions entirely obliterate the fundamental distinction which has always prevailed between contempt proceedings to give relief to a party for a violation of an injunction by punishing the offender by fine or coercive imprisonment, which are usually called civil contempt proceedings, and contempt proceedings to vindicate the authority and dignity of the court for the violation of its orders, which are usually called criminal or punitive proceedings. By the provisions of this bill both objects are to be pursued in the same way, the trial of the contempt in both proceedings is to be by a jury if demanded, and is to be conducted as in criminal cases, and the review in both cases is to be by writ of error and bill of exceptions, and never by appeal from the final judgment in the main case, as is the law and practice now in all cases of remedial contempt proceedings.

It would extend this communication too far to point out the many objections to the validity as well as to the practicability of these particular features of the scheme as embraced in sections 18 to 22, inclusive. One will suffice, since it goes to the very root of the matter.

The bill, in thus requiring a trial by jury of the violations of the orders and injunctions of a court of equity, either in remedial or in punitive proceedings, or in both, as is here contemplated, is plainly unconstitutional, first, because invasive of the inherent and necessary power of such courts to themselves try and punish contempts of their authority as has often been declared by the Supreme Court, and second, because it destroys the right of the party who has obtained an injunction in equity to have those equitable remedies and the procedure thereon which is established by the Constitution in the fundamental distinction between cases at law and those in equity, as has been repeatedly declared by the courts.

It only remains to point out that the provisions of sections 18 to 22, inclusive, are self-contradictory and therefore void, because section 21 provides that the aforesaid provisions shall not be construed to extend to any contempt committed so near to the court as to obstruct the administration of justice therein. Since it is well settled that all contempts which obstruct the administration of justice in courts, wherever the same may be committed, are committed so near thereto as to so obstruct the administration of justice therein, irrespective of the place where they actually occur, all violations of the orders and injunctions of a court of equity, because they obstruct the administration of justice therein, are committed so near to the court as to obstruct the administration of justice therein. It is apparent that this provision contradicts the others and the whole scheme is therefore void on that account.

The foregoing suggestions will sufficiently outline some of the constitutional objections to the provisions of the Clayton antitrust bill herein referred to. They are of sufficient importance to require a most thorough discussion before your committee, and I deeply regret that you can not find time to allow it.

Respectfully submitted.

DANIEL DAVENPORT,
Attorney for the American Antiboycott Association.

WASHINGTON, D. C., *April 27, 1914.*

MEMORANDUM RESPECTING CERTAIN PROPOSED SECTIONS OF H. R. 15657 RELATING TO THE REGULATION OF INJUNCTIONS AND PROVIDING FOR TRIAL BY JURY FOR CERTAIN CONTEMPTS.

[Submitted to the House Judiciary Committee on Apr. 29, 1914, by James A. Emery, counsel, National Council for Industrial Defense, including some 200 industrial, commercial, and employer associations.]

To the Judiciary Committee of the House of Representatives:

GENTLEMEN: Through your courtesy I beg leave to submit the following considerations with respect to the validity and expediency of certain proposals now pending before you, being sections 14 to 22, inclusive, of H. R. 15657.

For the purpose of brevity and convenience, I shall, with your indulgence, consider the proposed legislation under three heads:

1. Sections 14 to 17, inclusive, regulating the issuance of injunctions generally and providing certain special restrictions in labor controversies.

2. Sections 18 to 22, providing for trial by jury for certain alleged contempts, a procedure therefor, and making certain exceptions thereto.

3. A brief consideration of the grounds upon which labor combinations seek exemption from the Sherman act, or special and peculiar treatment thereunder.

Sections 14 to 17, inclusive, comprehend in almost identical terms the so-called Clayton anti-injunction bill, H. R. 23635, which passed the House in May, 1912. It was at no time publicly discussed before this committee in the form in which it passed the House. We have, therefore, in its present consideration, the advantage of the interpretation given to it by its proponents on the floor of the House and in subsequent discussion before the Senate Judiciary Committee in the fall of 1912 and the spring of 1913, and to these discussions I shall take the liberty to refer.

I now submit:

I.

The proposed sections are divisible into two parts; some relating to procedure, and the others to specific prohibitions causing radical changes in substantive law and right.

(*a*) Those relating to procedure contain some proposals the legal effect of which will be to deprive the suitor of his remedy in equity while others are impracticable, am-

biguous, and antagonize the rules of equity practice recently promulgated by the Supreme Court of the United States which fully cover any desirable change in procedure.

(b) Section 17 is construed and explained by its proponents in terms that deprive both individuals and the public of essential constitutional remedies in equity. It must either be given a construction that would revolutionize the law of conspiracy and deny the equal protection of the law to citizens involved in labor disputes, or it is futile declaratory legislation, the enactment of which would reflect upon the judiciary and, without accomplishing the purpose sought by the real proponents of this legislation, would intensify and stimulate discontent which it can not allay.

EXISTING LAW AND PROCEDURE.

The present statutory law on the subject of injunctions will be found in sections 263, 264, 265, and 266 of the Judicial Code, and in section 129 of the same, which provides that an appeal may be taken within 30 days from any order or decree of a court or judge granting, continuing, refusing, or dissolving an interlocutory injunction or decree, or refusing to dissolve such an order or decree, and such appeal shall have precedence. The Supreme Court of the United States in rules promulgated November 4, 1912, and in effect since February 1, 1913, has covered the subject of preliminary injunctions and temporary restraining orders and injunctions pending appeal in rules 73 and 74.

WHAT THE BILL PROPOSES.

These sections would practically add four new sections to the judicial code. The proposed sections 14, 15, and 16, apply generally to all injunctive orders, but section 17 applies only to injunctive orders in controversies over employment. All of the proposed sections apply to actions in which the United States or a State is a party equally with private individuals.

As the law now is a Federal court having jurisdiction may, "if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion." (Federal Judicial Code, sec. 263.) The Supreme Court has further provided, in equity rule 73, and it is now the necessary practice, that a temporary restraining order may be granted without notice to the opposite party only when it shall appear from specific facts shown by affidavit or the verified bill that immediate and irreparable loss or damage will result to the applicant before the motion can be heard, and such restraining order so issued without notice is returnable at the earliest possible date and in no event later than 10 days from its issuance, its hearing taking precedence over all except older matters of the same kind. The possessor of the restraining order must then proceed with his motion for a preliminary injunction or the court dissolves his restraining order. Further, upon two days' notice to the plaintiff the defendant may appear and move the dissolution or modification of the restraining order.

SECTION 14 OF THE BILL.

The chief proposal of section 14 of the bill is that a restraining order when granted without notice shall expire 10 days after entry, as the court or judge may fix, unless within that time it is renewed for not to exceed a like period after notice to those previously served.

Since the section provides that every such order must be "forthwith entered," it follows that it expires not to exceed 10 days from its issuance unless the conditions for its extension are complied with. Such a statute would be rigid and could not adapt itself to any circumstance necessitating an extension of the restraining order beyond at the most 20 days from its issuance. Such a proposal is—

1. Impracticable, and this committee will take notice of the tremedous territorial extent of some of the Federal judicial districts, which make the service and return of process, the making of argument, and the rendering of deliberate judgment physically impossible in some circuits within such a limitation of time.

2. In actions to which the Nation or States are parties the public interest would be seriously embarrassed, and in actions affecting common carriers the number of individuals involved and the circumstance of litigation are frequently such that an evasion of service during the first period of the order would utterly defeat its purpose. For, if all the essential parties are not served in the first instance the extension of the order, however grave the reasons and however willing the court, is readily defeated by the evasion of defendants already served, so that every extension, however necessary, renews the conditions of original service.

3. Apart from the physical and legal difficulties of securing service or any necessary extension of the order, the production of witnesses, books, and papers, the period of trial, the argument of counsel, and the decision of the court are all events which occupy a greater period of time in accordance with the magnitude and importance of the proceeding. The illness or death of important witnesses, counsel, or a judge might, under the conditions of the bill, defeat the most important public litigation or compel the court to proceed without the power to protect the subject matter of litigation from removal, dissipation, or destruction.

4. No restraining order is of value unless served. While it remains unused it is as though it were unissued, and we can conceive of no conditions within legal experience in which the life of such an order should not run from its service and not from its entry. It is a contradiction in thought to presume that an individual requiring a restraining order to protect him from irreparable harm and, possessing his remedy, refuses or neglects to use it.

5. We submit to the committee that such a proposal would in many instances operate to deprive both individuals and the public of an essential remedy in equity and to deprive a constitutional court of that essential and inherent element of the judicial power, the right to protect the subject matter of litigation before it, without which it can neither perform its functions nor "establish justice."

Equity rule 73 of the Supreme Court, taken in conjunction with the existing statute, provides at once ample security against irreparable injury and adequate protection for the parties restrained. While it definitely fixes the time of hearing, an extraordinary situation would permit the court to prevent the rule from working injustice by molding it to meet some unusual circumstance that might be presented to its notice. (Ex parte Poultney, 41 Peters, CCC, 472.)

We further submit to the committee that under the long-existing custom and rule of practice parties restrained by injunction have at all times possessed and exercised the right to either accept service, and thus force an issue, or to move for the modification or dissolution of any order issued or for the advancement of the cause for hearing, while section 129 of the Judicial Code merely expresses a long-existing statute, giving the right of immediate appeal from orders granting, denying, dissolving, or refusing to dissolve injunctions. This long-established practice, we now submit, has been reduced to a definite rule of action, which adequately provides against even the possibility of abuse, and goes as far as such a rule may without imperilling private or public interests.

SECTION 16 OF THE BILL.

Section 266b of the bill requires "that every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall by personal service or otherwise have received actual notice of the same." We submit that no order ought to contain the opinion or a history of the case, in the interest of simplified pleading and that, indeed, any such requirement is in direct variance with equity rule 71 of the Supreme Court fixing the form of a decree or order and providing "that neither the bill nor answer, nor other pleading, nor any part thereof, nor the report of any master, nor any other prior proceeding shall be cited or stated in the decree or order," etc.

If to be "specific in terms" and to describe "in reasonable detail" means that counsel in drawing an order must anticipate every scheme of conduct by which individuals or combinations may in a given controversy violate the rights of the plaintiff, it must be evident that this section would require him to be both a historian and a prophet. If the section is to be understood as excluding the use of general clauses, prohibiting acts of the same general kind or character, or for the same unlawful purposes as those specifically described, it must be evident that the remedy is greatly weakened or the pleading made so complicated that courts undertaking to give effect to the will of Congress would be confused by the varying interpretations which may be given to such clauses and new elements of discord introduced into judicial decision, while real justice would be subordinated to ambiguous technicalities.

No construction has ever been placed upon general clauses at the end of sentences or in reference to previous acts that has in the least interfered with the just rights of individuals. As Mr. Justice Harlan said of such clauses in Arthur v. Oakes (63 Fed., 310):

"The general inhibition against combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operation of the railroads must be construed as referring only to acts of violence, intimidation, and wrong

of the same nature or class as those specifically described in the previous clauses of the writ."

The ambiguity created by such provisions for pleading continues in the declaration that an order shall be binding only upon "the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them."

We submit that neither directly nor indirectly should a statute contain phraseology the effect of which under the circumstances of its adoption would incline any class of citizens to believe that only the parties actually served and before a court were bound to respect its decrees; yet the effect of thus specifying the parties enumerated is to create this impression, and if anything it is intensified by so ambiguous a phrase as "in active concert with them." If this is meant to exclude, or would have the effect of excluding, independent but sympathetic activity on the part of individuals or combinations who undertake to execute the illegal purposes of defendants enjoined, without, if you please, the knowledge or consent of such defendants, it would obviously work in the interests of injustice. (Ex parte Lennon, 166 U. S., 548.) In an economic structure as vast and complicated as that in which we live, public as well as private interest requires that the powers of courts of equity to practically and efficiently deal with combinations of influential employers or employees, numerous, intimately associated, and motived by common purposes, should not be narrowed, but if anything enlarged to meet a repetition of the serious conditions which we have already experienced. The Debs combination, threatening the complete obstruction of intercourse between the States essential to the comfort, employment, and even existence of thousands of individuals, disclosed the absolute necessity of preserving to the court of equity the power to deal with those who undertake to defeat its decrees, whether they are actually named in its orders or whether, sedulously endeavoring to evade judicial authority, they become the instruments and agents of those who defy its decrees.

We submit that it would be retrogressive to substitute for the clearly established authority of the courts in these matters a statute obviously undertaking to narrow their jurisdiction, but expressing its limitations in uncertain and indefinite phraseology.

SECTION 17 THE MOST SERIOUSLY OBJECTIONABLE.

However serious the objections which may be made to the substitution of a statute full of ambiguity and indefinite phraseology for the certain and definite authority established by a long line of uniform decisions of the courts of the United States, and crystallized into a clear and definite procedure by the recently adopted equity rules of the Supreme Court, the most serious objections against the bill are those to be directed against the provisions of section 17.

The provisions of this section are limited to restraining orders or injunctions granted in any case "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment." In this contingency it is provided that no restraining order or injunction shall issue except to prevent irreparable injury "to property or a property right of the party making application, for which injury there is no adequate remedy at law." It is further required that "such property or property right must be described with particularity in the application." And finally it declares that certain enumerated acts shall not be prohibited by any restraining order or injunction; with a final proviso that no injunction shall prohibit any person or persons "from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

The intimation conveyed by the limitations of this section and insisted upon by Mr. Gompers is that different principles shall apply in the issue of injunctions in labor disputes from those which prevail in other controversies. To that assertion reply is made hereafter; but we submit to the committee that even if the condition alleged were true, which it is not, it will be impossible for Congress to deny an injunction to protect rights menaced in a labor dispute which could be issued by the same court and under the same circumstances in any other controversy. So that if the restriction is to be placed upon the exercise of the equity powers it is to be determined by the character of the parties, irrespective of the rights to be protected, the denial of the equitable remedy under such circumstances would make the legislation plainly invalid under the principle laid down in Union Sewer Pipe *v.* Connelly (184 U. S., 540) and Pierce *v.* The Stablemen's Union (156 Cal., 70). In the former case an antitrust statute of the State of Illinois was invalidated because it excepted from its inhibitions agriculturists and stock raisers, thus under the same circumstances making it criminal for all others to engage in those combinations, contracts, and conspiracies in which it was lawful for the excepted parties to engage. In the latter case the Supreme Court

of California passed upon a statute which it was asserted exempted certain combinations from injunctive process while acting in "furtherance of a trade dispute," and that court, declining to give such interpretation to the statute, declared that to do so would be to invalidate the statute, since it would deny to those engaged in labor controversies the remedies which protected the same rights in all other controversies and would create a privileged class exempt from the arm of an equity court, even as in the Connelly case the Illinois statute created a privileged body of wrongdoers.

EQUITABLE PROTECTION NOT CONFINED TO "PROPERTY RIGHTS."

The section in question further undertakes to declare that the injunction may issue to protect only property or a property right, and it must be that of the party making the application. Nothing is more certain, from the decided cases no less than from standard textbooks, than that equity will not only protect rights of property but those of persons, especially when the circumstances of their exercise makes them, as Mr. Justice Brewer described them in the Debs case, "rights of a pecuniary nature."

"The primary right that one's personal liberty should not be interfered with by combinations of persons is protected by equity. Thus the interference of the right of the laborer to travel on the highway by means of numbers of men or by physical force will be enjoined where its continuance is threatened." (6 Pomeroy's Equity Jurisprudence, par. 599.)

Even Mr. Spelling, in his work on Injunction, section 24, tells us—

"In other words, the subject of equity jurisdiction is the protection of civil rights and private property, and not punishment or prevention of crime or immoral acts, when not in connection with violations of private rights."

High on Injunctions, volume 2, paragraph 20, declares—

"The subject matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private rights."

This part of the bill in thorough consistency with all its provisions, illustrates the persistent determination with which every effort is made to contract the basis of equity jurisdiction, and make its application more difficult in the class of controversies covered by this section. Strictly construed, the provision requiring that the property or property right to be protected "shall be that of the party making the application," could be pleaded against the Government in the endeavor of the Nation to remove economic or physical obstructions from the pathway of commerce; and the particularity of description required would in all large operations, in actions of the Government, of common carriers, and of many private individuals and corporations overtax the descriptive powers of a pleader.

CONSTRUCTION GIVEN TO SECTION 17 BY PROPONENTS.

But assuming these provisions to be curable by amendment, the root of this measure and the chief evil of its proposal lies in the provisions of its last paragraph. A variety of interpretations have been given to its context. In the debate upon this measure in the House in 1912, Mr. Martin of Colorado, an enthusiastic and sympathetic proponent of the legislation, declared it to be the purpose of the measure that "no restraining orders or injunctions shall prohibit any person or persons from doing any of the following acts, to wit," and he then proceeds to enumerate the prohibitions of this final paragraph. (Congressional Record, vol. 48, No. 143, p. 7393.)

Mr. Wilson, then recognized spokesman for the American Federation of Labor on the floor of the House, and who may be assumed to express the opinion of those who chiefly demand this legislation, declared in the same debate:

"This bill does not legalize the boycott or picketing. It does not deal with the question of the legality of either of them. What it does do is to prevent the equity court from stepping in in a case of possible picketing, or stepping in in a case of a boycott, and, by the writ of injunction, undertaking to adjudicate it. There has been a great deal of criticism of the right to use the boycott by workmen in their trade disputes and for that reason some men are opposed to a proposition that prevents the equity court from stepping in with the writ of injunction to prevent a boycott.

"But, Mr. Speaker, I want to say to this House now that the boycott itself lies at the very foundation of our moral code, and if you take away the boycott, if you wipe out the boycott, your moral code itself fails." (Vol. 48, No. 139, p. 7096.)

Mr. Davis, of West Virginia, the present Solicitor General, who chiefly expounded this measure upon the floor of the House, with marked ability and eloquence, said of this paragraph of the bill:

"It is an effort to crystallize into law the best opinions of the best courts as to those things which may be lawfully done in a trades dispute without interference by injunction." (Vol. 48, No. 138, p. 7102.)

And again—

"All that is attempted here is to say that certain acts are not amenable to the process of injunction, whatever other rights or remedies may grow out of them." (Idem, p. 7103.)

Again—

"The bill does not undertake to regulate to a limited extent the procedure in cases arising from such disputes, but in doing so it simply announces rules common to other cases in equity, and it does declare that certain acts lying within the rights of the party shall not be infringed upon by any injunction." (Iden., p. 7104.)

The practical interpretation, then, given to this section by its friends is that the acts enumerated are to be removed from the injunctive process. This is what they believe it does and this is why they want it. Two theories of the extent to which this is done were presented to the Senate committee, the one by Mr. Gompers, who, while he can not be prevailed upon to express directly his notion of the effect of the bill, does so inferentially in his letter to the chairman of the Senate committee. (Senate Judiciary Committee hearings, 1912, pt. 2, Gompers, p. 9101.) In that letter it will be observed that the specific acts which he complains have been interfered with by process of injunction are the acts eliminated from equitable reach by this section of the bill. It is therefore to be inferred not less from this statement than from his frequently reiterated statements upon this subject at other times and other places that the acts enumerated in this section of the bill are matters of absolute right, and it is his expectation that were this statute enacted no court could interfere with their exercise, irrespective of the circumstances of their being. But Mr. Spelling, who represented proponents before Senate committee in 1912, while elaborately undertaking to argue that each of these acts is a personal right and ought therefore not to be reachable by injunction, assures you that the whole paragraph is colored by the last phrase, "or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." But that phrase itself, we submit, is of dubious meaning. It may imply either that anything that may be done when there is no labor dispute may still be done when such dispute exists, thus eliminating the dispute itself as the distinguishing factor which colors the acts done and practically declaring that "circumstances do not alter cases," or it means that no injunction shall prohibit any number of persons from doing acts which, in the absence of the existing dispute, could be done by a single person. The latter construction eliminates the elements of conspiracy and makes the test of the legality or illegality of the acts of combination whether or not the acts complained of could be lawfully done by an individual. Such a construction would indeed "color" the whole paragraph, for it would carry with it radical changes in substantive rights and remedies that, if valid, would revolutionize the principle of conspiracy and subvert the exercise of the judicial power in equity.

MERE "PEACEFULNESS OF" AN ACT NO TEST FOR LEGALITY.

A serious error, shared by the sincerest and ablest proponents of this legislation, underlies this whole paragraph. In the course of his remarks in the House in 1912, Mr. Davis, of West Virginia, emphasizes, in discussing this section, that—

"It will be seen that all throughout the section there runs the requirement of peacefulness." (P. 7103).

And again and again before this and the House committee proponents of this legislation indignantly denying the contemplated use of any form of coercion or violence, manifestly indefensible, have, like the distinguished gentleman from West Virginia, insisted that any of the acts enumerated must be lawful, and therefore unenjoinable if "peacefully done." This assertion is particularly made with regard to any form of persuasion. Thus, the section provides that "no restraining order shall prohibit any person or persons from peacefully persuading any person to work or abstain from working, or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means to do so."

No proposition is more firmly established in the very fundamentals of English and American law than that—

"If one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." (Angle v. Chicago, etc., Railway, 151 U. S., 13.)

Leading modern English cases illustrating the applicataion of the same principle to trade disputes are Quinn *v.* Leathem (1901, A. C., 495), and South Wales Miners' Federation *v.* Glamorgan Coal Co. (1905, A. C., 279). The same principle is elaborately expounded by Mr. Justice White in another field of controversy, in Louisville & Nashville Railroad *v.* Bitterman (207 U. S.), a case in which an injunction was issued against scalpers, prohibiting them from inducing or persuading holders of nontransferable excursion tickets to dispose of the same. These cases establish the principle that the breaking of a contract being an unlawful act, a combination to procure its breach is an unlawful combination, and the aggrieved party may not only recover damages, but when, as in the railroad cases, there is a continuing injury, and many defendants, requiring a multiplicity of suits, and therefore no plain and adequate remedy at law, an injunction will issue to protect the property right existing in the contract. Yet in all these cases "peaceful persuasion" is the means by which the breach of the contract is sought to be obtained. The scalpers did not intimidate or coerce the holders of the excursion tickets. They merely offered money for the unused portion. Where the element of coercion enters the case is merely made stronger. Thus, in cases like that of the Hitchman Coal & Coke Co. *v.* Mitchell, both elements are present. But it is evident that the determining factor in the legality of the act of a combination is not "merely its peacefulness," but its purpose.

This important consideration was emphasized by Judge Taft in his decision in Thomas *v.* Cincinnati (52 Fed., 819), thus:

"Boycotts, though unaccompanied with violence or intimidation have been pronounced unlawful in every State of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England."

Since that decision was rendered the same doctrine was approved in Minnesota in Gray *v.* Building Trade Council (91 Minn., 171), and is the prevailing opinion to-day.

We therefore submit to the committee that the acts referred to in this section, against which no injunction may issue when "peacefully" executed, may be steps in the unlawful effort of a combination to procure a breach of contract or to carry on a boycott, and to refuse to any individual the right to his remedy by injunction, which arises only when no remedy at law exists, would be to deny him any remedy for the protection of the rights involved against unlawful acts which have been condemned and enjoined since time immemorial.

OTHER PROVISIONS OF SECTION 17 WITHDRAW INJUNCTION RELIEF FROM BOYCOTT AND SYMPATHETIC STRIKE.

So, too, to prohibit the issuance of an injunction "prohibiting any person from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do," would prevent the application of the injunctive remedy to the condition which existed in the well-known case of Toledo, etc., *v.* Pennsylvania Railroad Co. (54 Fed., 730). In that case, it will be recalled, the employees of the Pennsylvania Co., in obedience to the then existing rule 12 of the brotherhood, refused, while remaining at work, to handle any cars of another road with which the brotherhood was in controversy. The members of the brotherhood were enjoined in that instance from refusing to handle the cars in question while remaining in the service of the road, inasmuch as it constituted a conspiracy to prevent the railroad in question from fulfilling its duties under the interstate commerce act. It is to be clearly observed that the men were not enjoined from quitting, which, as the court says, "they had a perfect right to do," but from combining while remaining in the employ of the company to prevent the performance of the carrier's public obligations and of their own statutory duties as employees of the carrier. Yet, under the provisions of this section, the employees in question could not be enjoined "from ceasing to perform any work or labor," nor could their officers or leaders be enjoined from advising and persuading them to execute this unlawful combination.

It must be obvious to the committee that even if the courts did not exhibit evidence of the fact that acts enumerated in this section have repeatedly been steps in the execution of unlawful designs, it must be certain that they may be.

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." (Aikens *v.* Wisconsin, 195 U. S., 194.)

So, too, this section obviously amends the Sherman Act, for its restrictions apply to the Government as well as private individuals, and would embarrass the public authority by preventing a restraint of specific acts which might be a step in a restraint of trade.

Even if it be finally assumed that the section as it is written is intended and may be construed merely to forbid the issuance of an injunctive order against any or all of the acts enumerated when lawfully performed, the argument for the provision gains no strength. With the single exception of a phrase in the injunction issued by Judge Jenkins, and modified by Mr. Justice Harlan, in Arthur v. Oakes, no case has been presented to this committee, nor can one be offered, in which any act enumerated in this section has been enjoined, unless it was a step in the execution of an unlawful combination or a conspiracy threatening individuals or the public with irreparable damage. In this aspect it is futile legislation, which neither satisfies the demands of those who most persistently seek its enactment nor answers any existing need for a mere declaration.

Sections 14 to 17, inclusive, having undertaken to deprive the Federal courts almost entirely of their power to issue injunctions in labor controversies, sections 18 and 19 would abolish the customary and immemorial mode of proceeding against persons alleged to have committed a contempt, and direct that such persons, upon demand, may be entitled to trial by jury if the act or thing alleged to constitute his contempt is also "a criminal offense under any statute of the United States or at common law." Such person is not to be attached, but brought into court upon an order to show cause, and, if he demands, shall be tried by a jury summoned, selected, and impanelled as upon a misdemeanor charge, the subsequent trial conforming to the practice in criminal cases, and the party, if found guilty, to be punished by fine or imprisonment, the fine being payable to the party in contempt, the Government, or both. The conviction may be reviewed by writ of error, as is now the law in criminal cases, and the granting of a writ acts as a stay entitling the accused to be admitted to bail. No contempt may be prosecuted except within one year after the commission of the act complained of, and no natural person may, upon conviction of contempt, be fined more than $1,000 nor imprisoned more than six months.

The right to trial by jury conferred by section 21, does not apply "to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice," nor to a contempt committed in any suit or action "brought or prosecuted in the name of or on behalf of the United States," in which cases the present practice is to prevail.

It is first to be observed that if sections 18 and 19 were otherwise valid, they would apply to every contempt save those excepted in section 21 by reason of the standard established, since under sections 37 and 135 and various provisions of chapter 6 of the Criminal Code of the United States, every contempt of a Federal court, whether by an individual or a combination, is a criminal offense under the Federal statute as an endeavor "to influence, obstruct or impede the due administration of justice" in courts of the United States, and has been so held by the Supreme Court of the United States. The words "or at common law" would merely add an additional ambiguity, since there is no "common law of the United States," and the common law of the various States would be a most variable and unenforceable standard, unknown to the Federal criminal jurisdiction. (Wheaton v. Peters, 8 Peters, 592; United States v. Hudson, 7 Cranch, 32.)

It is, furthermore, to be observed that the essential distinction which has always been observed, and in our day is being continually emphasized, between proceedings for so-called civil and criminal contempts, is abolished by sections 18 and 19. So that whether the purpose of a contempt proceedings be remedial and coercive or merely punative, whether it be to compel some act for the benefit of a private individual, or to vindicate the dignity and authority of the court, the proceeding to punish a contempt would be identical. It is impossible to conceive that Congress would enact a provision which made a court not only dependent upon the findings of a jury for its own protection, but permitted it to enforce its own decrees, after the trial of a cause, only when a jury had passed upon the transgressions of a person who violated them. If, finally, it is true that a serious contempt obstructs the administration of justice, if it halts or impedes the machinery of adjudication, no matter what the physical distance separating the actor from the effect of his act, a contemnor may be triable even under this proposal by the court itself, no matter how distant he may be from the tribunal with which he interferes, and there are numerous adjudications to indicate that the long-standing phrase "so near thereto as to obstruct the administration of justice" must receive such an interpretation.

There are, however, two elementary grounds upon which the proposals of sections 18 to 22, must be invalid:

1. Because it destroys the fundamental distinction between cases in law and equity which the Constitution establishes, and denies to the individual the protection and enforcement of his rights in an equity proceeding in the manner inflexibly fixed by our courts as a matter of constitutional right.

2. Because it impairs and destroys the inherent and necessary power of the judiciary to be the sole judges of contempts of their authority.

I.

Numerous cases could be cited in support of the first proposition, but it should be sufficient to refer to two standard authorities which established on fundamental the constitutional incapacity of the legislature to require that a jury shall be the judge of fact or law in an equity case.

The Legislature of Wisconsin undertook to compel courts of equity to accept as conclusive the findings of a jury in questions of fact. The legislation was invalidated in Callahan *v.* Judd (23 Wis., 343). The court said in part:

"I think the act invalid, and my reasons are, briefly, as follows: The power to decide questions of fact in equity cases belonged to the chancellor just as much as the power to decide questions of law. It was an inherent part and one of the constituent elements of equitable jurisdiction. If, therefore, it shall appear that by the constitution the equitable jurisdiction existing in this State is vested in the courts, I think it will necessarily follow that it would not be competent for the legislature to divest him of any part of it and confer it upon juries. If they can do so as to a part, I do not see why they may not as to the whole. If they can say that in an equity case no court shall render any judgment except upon the verdict of a jury upon questions of fact, I can see no reason why they may not say that a jury shall also be allowed to decide questions by law."

The same question was presented in another way in Brown *v.* Kalamazoo Circuit Judge, 75 Mich., 277. The court there said:

"It is within the powers of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcements of rights. * * *

"The function of judges in equity cases in dealing with them is as well settled a part of the judicial power and as necessary to its administration as the functions of juries in common-law cases. Our institutions are framed to protect all rights. When they vest judicial power, they do so in accordance with all its essentials, and when they vest it in any court, they vest it as efficient for the protection of rights and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts of the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how the facts appear to such unprofessional men, it can only be done by submitting single issues of pure facts, and they can not foreclose him in his conclusion unless they convince his judgment.

"Theory amounts to nothing in the history of jurisprudence. The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and must always include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore."

II.

The courts, both State and Federal, have had occasion many times to determine the power of the legislature to impair the independence of the judiciary by depriving it of the authority to protect itself and compel obedience to its orders, without reference to a jury or any other tribunal. Without quoting at length, it may be observed that the last statement of the Supreme Court of the United States upon that subject, in Gompers *v.* Buck's Stove & Range Co. (221 U. S., 450), is as follows:

"For while it is sparingly to be used, yet the power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it, they are mere boards of arbitration, whose judgments and decrees would be only advisory."

The same court said again:

"There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal, or to a jury in the same tribunal." (Bessette *v.* Conkey, 194 U. S., 337.)

In the Debs case (158 U. S., 594), Mr. Justice Brewer emphasized the inherent power of the courts to punish for contempt, and quoted with approval a declaration of the Supreme Court of Mississippi that—

"It is a power inherent in all courts of record and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees, against the recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it."

Mr. Chief Justice Wilmot, one of the most distinguished of English judges and common-law authorities, is quoted in Smith *v.* Speed (11 Okla., 108), as pointing out that the power of the courts of Westminster Hall to vindicate their own authority "is as ancient as any part of the common law."

But we are not left to inferential conclusions in this matter. In specific cases the supreme courts of the various States, with the issue squarely before them, have held that it was not within the power of the legislature to require that contempts should be tried by a jury. The issue was first clearly presented in Carter's case (96 Va., 808). The statute was invalidated and the same issue was re-presented to the same court in Burdette *v.* Commonwealth (103, Va., 839), and the conclusions reached in the Carter case reaffirmed and emphasized. The same question was likewise presented in Smith *v.* Speed (11 Okla., 95), the court invalidating an act of the legislature requiring all cases of indirect contempt to be submitted to a jury.

We finally submit to the committee that this is a most impracticable and unworkable proposal, a view confirmed by the fact that section 21 proposes to exempt from the privilege of jury trials contempts committed in any action prosecuted by the United States. This becomes the more significant when it is realized that the cry of "Government by injunction" originated in an injunctive proceeding prosecuted by the United States in re Debs. The proposal therefore excludes the very class of cases in which the right to trial by jury in contempt proceedings was first raised and most frequently emphasized.

The theory upon which the proponents of such legislation proceed is that under the guise of punishing a contempt. Persons, particularly in labor disputes, have been tried and convicted of crime without trial by jury. If this were true in that department of litigation, it would be equally true in any other case in which the act constituting the contempt was likewise a crime, viewed through the spectacles of criminal law. Through countless years, courts have endeavored to emphasize the distinction between various jurisdictions involved in various aspects of the same act. Thus it must be evident that the same person by the same action, might commit a contempt, a crime, and a tort. But obviously the proceeding for one or the other would not exclude a remaining jurisdiction. This was never more powerfully nor clearly put than in the famous case of Elvertob Chapman, a contumacious witness, before a Senate committee. In an ultimate effort to escape punishment for contempt, he pleaded that Congress, by making the contumacy of a witness a crime against the United States, had deprived itself of the power to punish for contempt. Reviewing this contention and distinguishing the two offenses, the court said—

"but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu and capable of standing together." (In re Chapman, 166 U. S., 661.)

SHOULD LABOR COMBINATIONS BE EXEMPTED FROM THE SHERMAN ACT.

In view of the real purpose sought by those behind a propaganda of which some of the proposals of this legislation is a part, I venture to very briefly examine the three general reasons for urging, in one form or another, the exemption of labor combinations from the provisions of the Sherman Act, a proposal constantly before you in several forms.

It is urged that labor organizations should be exempted from the Sherman Act:

1. Because Congress did not intend to include them within its scope.

2. Even if the Congress did, the act has been so interpreted as to threaten the very existence of combinations of labor and to penalize their necessary and proper activities.

3. Such combinations by the very nature of their purpose and methods ought to be excluded from an act aimed at monopolies and restraints of trade, for they are neither conducted for profit nor have they capital stock, and they sell not commodities but the physical activities and skill of their members.

The first contention is conclusively answered by the uniform decisions of the courts of the United States beginning in 1893 and culminating in the famous decision of the Supreme Court in the Danbury Hatters' case, in which that tribunal, confirming the opinions of many district and circuit courts, declared:

"The act made no distinction between classes; it provided that every contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt by legislation organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us." (Loewe v. Lawler, 208 U. S., 301.)

But it may be said that in this day, when none are too humble to set their judgment up against that of a court, that this is but a technical conclusion of law. I therefore ask you to consider other circumstances that should justify this conclusion, even to the critical lay mind.

Just a few months before Senator Sherman introduced his original bill, the Supreme Court of the United States, in a unanimous decision, obtained at the instance of labor organizations themselves, held that a boycott as presented in the case at issue, a combination of workmen to prevent the employment of a fellow workman, was an indictable conspiracy at the common law and a "heinous offense. (Callan v. Wilson, 127 U. S., 540.) The Sherman Act was regarded by its authors as but a translation to the Federal jurisdiction of the common law against combinations and conspiracies in restraint of trade and monopolies. The decision to which I refer was familiar to every lawyer in Congress, and what more natural than that the grave offense condemned by the Supreme Court should have been included within the prohibitions of the act.

As further contemporaneous evidence of the intention of Congress in 1890, let me call your attention to the now generally recognized fact that Senator Edmunds, chairman of the Judiciary Committee of the Senate, was the actual author of the Sherman Act, for between the original proposal of the Senator from Ohio and the law which now bears his name there is but an historical relation. His original suggestion, amended out of all recognition, disappeared into the Judiciary Committee of the Senate and emerged therefrom in the hand of Senator Edmunds possessing the identical form of the existing law. Edmunds vigorously opposed every effort to exempt labor combinations from its terms, and long before any court interpreted the act, he made the following statement of its purpose, in this city, in an interview in the Chicago Inter-Ocean, on November 21, 1892:

"It is intended to and I think it will cover every form of combination that seeks in any way to interfere with and restrain free competition whether it be capital in the form of trusts, combinations, railroad pools or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong, both are crimes, and indictable under the anti-trust law."

Surely, if the intention of Congress had been defeated by the courts that body would long since have corrected that miscarriage of purpose, but, on the contrary, it has approved the judicial view by three times refusing passage to amendments to the Sherman Act directly or indirectly intended to exempt combinations of labor. One of these efforts possesses unusual significance. In 1900, the House passed the following amendment:

"That nothing in this act shall be so construed as to apply to trade-unions or other labor organizations organized for the purpose of regulating wages, hours of labor or other conditions under which labor is to be performed."

On reaching the Senate, the amendment was referred to the Judiciary Committee of the Senate, of which Senator Hoar was then chairman. He is frequently referred to as one who gave personal assurances that the original act was not intended to include combinations of labor. On February 21, 1901, he discussed the proposed amendment in the Senate saying:

"There is a further provision that no labor organization or association shall be liable under the act to which this is an addition. I gave, as chairman of the committee, several full hearings to the representatives of the labor organizations of the country who were interested in promoting this legislation, and also to the representatives of the great organization, the Brotherhood of Locomotive Engineers, and they agreed with me, all of them, that these objections were well taken and that the legislation ought not to pass."

At the same time he proposed an amendment intended to remove the alleged fear that the act threatened the right of organization itself. His proposal was as follows:

"That nothing in said act shall be so construed as to apply to any action or combinations, otherwise lawful, of trade-unions or other labor organizations, so far as such action or combinations shall be for the purpose of regulating wages, hours of labor, or other conditions under which labor is performed, without violence or interfering with the lawful rights of any person."

You perceive at a glance the fundamental difference between the House amendment, which is the identical demand of to-day, and Senator Hoar's proposal, which was neither received with enthusiasm then or would be now, thus demonstrating that those who sought exemption from the law then, like those who seek it now, do not fear that their lawful existence is threatened, but seek to avoid the law's prohibition against methods of whose illegality and immorality they are conscious. If that was a good method of setting at rest an honest doubt, then why is it not equally good if an honest fear exists now?

The second contention is, however, far more important than the first, for if the act had been construed so as to threaten the right of organization itself or to embarrass trade-unions in the performance of legitimate and proper activities, they would indeed have just cause to complain against it. But I assert, without fear of contradiction, that not only has every proper activity of labor combinations been vindicated in proceedings under the Sherman Act, but I know of no other kind of litigation in which such rights have been so fully and frequently recognized. In 1894, one Phelan, an agent of Eugene Debs during the great strike which commemorates his name, undertook, in combination with others, to coerce the employees of the Cincinnati, N. O. & T. P. Ry. Co., into refusing to handle the cars of the Pullman Co., which that road had a contract to haul. In the contempt proceedings which grew out of these acts and in which the Sherman Act was construed in its application to the combination disclosed, the judge, now our distinguished President, spoke as follows:

"Now, it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interests and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices, is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in anyone, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employees by 10 per cent, and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court." (Thomas *v.* Cincinnati, 62 Fed., 817.)

About the same time District Judge Speer, upon application of the Brotherhood of Locomotive Engineers, directed a receiver of that court, in charge of the Central Railroad of Georgia, to enter into a trade agreement with that union against the receiver's objection. (Waterhouse *v.* Comer, 55 Fed., 149.) The court condemned, under the Sherman Act, a condition of the proffered agreement by which the receiver was asked to consent that the employees be permitted to refuse to handle the cars of any other road with which members of the brotherhood might be engaged in a trade dispute. In the Debs case in which the Sherman Act was applied by the circuit court (U. S. *v.* Debs, 64 Fed., 763), the lower court in the first instance as well as the Supreme Court, on appeal, recognized the right of organization and collective action as axiomatic, while in the most recent application of the act to combinations of labor in the Buck's Stove and Range case, the Supreme Court of the United States, while sustaining an injunction against the boycott, approved labor combinations, limiting their activities only by consideration with which every reflecting mind must accept. The court says:

"Society itself is an organization and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have acquired a vast power, in the presence of which the individuals may be helpless. This power, when unlawfully used against one, can not be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such

rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one." (Gompers *v.* Buck Stove & Range Co., 221 U. S., 418.)

What, then, have courts condemned in construing the Sherman Act to which combinations of labor object? They have condemned the boycott, just as by applying the same principles they condemned it when prosecuted by business men in the case of Montague *v.* Lowry (193 U. S., 38), where a number of tile dealers combined to prevent the purchase or sale of tiles by any save those who could obtain membership in their organization. They have condemned a combination to prevent the operation of a railroad by the intimidation and coercion of its employees or to cause them to concertedly quit their employment unless the road broke existing contracts with other roads, or a manufacturing corporation engaged in a dispute with its employees to which the railroad in question had no relation. (U. S. *v.* Debs, 64 Fed., 724; Thomas *v.* Cincinnati, 62 Fed., 817; U. S. *v.* Alger, 62 Fed., 824; U. S. *v.* Elliott, 64 Fed , 27; Waterhouse *v.* Comer, 55 Fed., 149; U. S. *v.* Cassidy, 67 Fed., 700.) It has condemned a combination to procure the stoppage of all railroad communications throughout the United States by inciting the employees of all the carriers of the country to quit their service without any dissatisfaction with the terms of their employment, in order to paralyze all traffic and thus, through the injury to the carriers and the public, induce pressure to be brought upon a third person unrelated to either the railroads or the public and who was not even the employer of any members of the combination. (Thomas *v.* Cincinnati, 62 Fed., 817.) It has condemned the combination to procure a strike of every union member in a given city and to intimidate nonunion men remaining at work, thus to prevent the movement of any commerce through that city until a dispute between one set of employers and a particular union was adjusted in accordance with the demands of the combination (U. S. *v.* Workingmen's Amalgamated Council, 54 Fed., 994; 57 Fed., 85.) and, finally, it has condemned a combination "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." (Loewe *v.* Lawler, 208 U. S., 300.)

These are the limitations which the courts of the United States, interpreting the Sherman Act, have imposed upon the activities of workmen in combination. Which of these prohibitions are novel? Which of them has not been applied to every form of combination under principles of law recognized and approved by English-speaking people since the memory of man runneth not to the contrary? Which of these prohibitions could now be removed without irreparable injury to private rights and public interests? Which of them could be withdrawn without encouraging the possibility of disorder and, on occasion, producing far-reaching public distress? What right, which any organization may exercise with benefit to its members and without prejudice to the essential necessity of maintaining uninterrupted communication between the States and without impairing the constitutional freedom of employer and employee, is denied or menaced by any decision under the act? What, in last analysis, do these decisions forbid but the effort of the many, by unlawful means or for an unlawful purpose, to compel the one to do their bidding, "a proceeding outside of the law, in defiance of the law and in spirit and effect an attempt to strip from one that has that which of right belongs to him—the full and undisturbed use and enjoyment of his own?" (Mr. Justice Brewer to the American Bar Association, "The Movement of Coercion.")

But it is finally urged that by their very nature and methods, by the fact that they are not conducted for profit, and because they dispose of physical energy or skill and not completed commodities, labor organizations ought to be excluded from inhibitions against restraints of trade.

Surely the theory that such combinations of labor can not be a restraint of trade is destroyed by the fact that they frequently have been and are found physically obstructing, as well as economically restraining, and even preventing, the movement of trade and aggressively trespassing upon the liberty of the trader. Nor is the possession of capital stock or the conduct of an organization for profit any standard by which to determine the capacity of a combination to stop the movement of commerce. From the Debs' strike to the McNamara conspiracy, it has again and again been practically demonstrated that the most potent force to disrupt communication between cities and States, essential not only to the continued employment of labor but to the transmission and diffusion of the necessities of life, is a voluntary combination of men absolutely devoted to a single purpose, the interruption of commercial intercourse, by any means their ingenuity devises or their courage risks, until the demands of the combination are conceded.

What possession of man has ever been privileged to be the instrument of illegal action, whether he uses his land or his chattel, his tongue or his hand, the skill of his

body, the cunning of his thought, his physical energy or his material possessions, to evade the law or to violate it. No possession of the lawless is or should be beyond the condemnation of the law or the reach of its executors. The giving or withholding of the physical energy of man to work unlawful injury to others is and must be condemned as strongly as the giving or withholding of any external possession for the same purpose.

Let it be granted that the combination of labor is an association of human energy to lawfully protect the conditions of its disposal by concerted action, so long as it possesses and exercises the power to work harm, public and private interest demands protection against its possible action.

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." (Aikens *v.* Wisconsin, 195 U. S., 194, Mr. Justice Holmes.)

Whether you approve or disapprove of the Sherman Act in its persent form, you must recognize that its purpose, and more than that, the very object of the constitutional power from which it springs, is to effectually protect trade and transportation between the States and the persons engaged therein with a shield of national power. To attain this end, the law must provide against every source of attack and every kind of an assailant. It must meet all comers at every point. To preserve the freedom of interstate commerce it must regulate every form of combination possessing the power or intention to trespass upon it. It makes no difference whether it be threatened with obstructions physical or economic, a mob, a monopoly, or a sand-bank; an association of individuals or the solemn enactment of a sovereign State; against every subterfuge the wit of man can devise, against every force the power of man can employ, it is no less the right than the duty of Congress to protect intercourse between the States.

BARBER, WATSON & GIBBONEY,
New York, May 5, 1914.

Hon. HENRY D. CLAYTON,
Chairman House Judiciary Committee,
House Office Building, Washington, D. C.

DEAR JUDGE CLAYTON: At a conference held in New York about 10 days ago of representatives of practically all the large public utility holding companies, it was decided after careful examination of the Clayton trust bill that the provision of section 7 would be extremely harmful to public utility holding companies, and accordingly it was agreed to submit a brief to your committee, and suggest the following exception in favor of public utilities companies, viz:

To add to page 6 of the printed bill at line 18, after the sentence ending "completion," the following:

"nor to corporations acquiring or holding the stock of, or engaged in the business of conducting a public utility which is subject to State regulation, other than common carrier as defined in the act to regulate commerce, approved February 4, 1887, and the amendments thereto."

This brief will come from the printer tomorrow, and it was our intention to submit it to your committee on Tuesday next. However, we learn from this morning's paper that your committee has reported the bill. As we know your committee desires to injure no legitimate business interest, and as the objections to intercorporate stockholding do not apply to public utility holding companies, we respectfully ask that the bill be amended so as to include the above exception, and we will submit copies of our brief in support thereof, to Congress.

Your committee has doubtless not had called to your attention the recent decision (not yet reported) of the United States Circuit Court of Appeals for the sixth circuit, wherein it was held that the buying and selling of bonds constituted interstate commerce. If this decision is affirmed by the United States Supreme Court, practically all public utility holding companies would be prohibited by section 7 of the Clayton bill and the public utility development of this country would be checked if not destroyed.

In making this appeal to you I speak on behalf of almost all the public utility holding companies in the United States, representing an investment of five and one-half billion dollars, which have operated so satisfactorily in every State in the Union, and which are now operating in the two leading cities in your own State, Birmingham and Montgomery.

Very respectfully, yours,

STUART G. GIBBONEY.

Brief on Behalf of Public Utility Holding Companies.

[Before the Judiciary Committee of the House of Representatives. In the matter of House bill 15657, entitled "A bill to supplement existing laws against unlawful restraints and monopolies, and for other purposes."]

There having been introduced into the House on April 14, 1914, a bill to supplement existing laws against unlawful restraints and monopolies, and for other purposes, and section 7 of this bill having been drawn to prohibit unlawful restraint of trade through intercorporate stockholding, this brief is submitted generally in support of said section, but suggesting that an amendment be added thereto specifically exempting public utility or public service corporations from its provisions on account of—

The peculiar service rendered by such companies;

The fact that they are regulated by State commissions and subject to State control; and

The great benefits received by the public from the combination of public utility companies and their operation and the holding of their stock by a common holding company.

The amendment suggested is to add to page 6 of the printed bill, at line 18, after the sentence ending "competition," the following:

"nor to corporations acquiring or holding the stock of, or engaged in the business of conducting a public utility which is subject to State regulation, other than common carriers as defined in the act to regulate commerce, approved February 4, 1887, and the amendments thereto."

We desire to say at the outset that we are in favor of legislation directed at the evils of unlawful holding companies, for it is undeniable that such companies have been frequently used to stifle competition.

But the exception of public utility companies is urged because we realize that Congress is only desirous of enacting legislation which will eradicate the evil and does not wish to injure or prohibit such holding companies as serve a useful purpose and do not lessen or prevent competition between corporations which are or should be competitive.

In presenting our argument for the exception of such holding companies we should like to bring to the attention of the committee:

I. The magnitude of the interests involved and the large amount of capital invested in such companies.

II. The great economical advantages of combining public utilities serving different communities through the means of a holding company.

III. The indispensable service rendered by the holding company as a means of financing public utilities and in securing the necessary capital for their extension and development.

IV. The fact that the objections to intercorporate stockholding do not apply to public-service corporations, for they are natural monopolies and are subject to State regulation.

I.

The Magnitude of the Interests Involved and the Large Amount of Capital Invested in Such Companies.

The total capital employed in electric, gas, street, and interurban railway companies, commonly called public utility corporations, in this country to-day is estimated to exceed $8,000,000,000. Of this capital, nearly $5,500,000,000 are controlled by holding companies and their subsidiary companies. Of the approximately 89,000,000 of people served by electric light and power and gas companies, over 62,000,000 (approximately 70 per cent) are served by holding company systems.

ELECTRIC LIGHT AND POWER.

The electric light and power companies represent approximately $2,000,000,000 of capital, of which approximately 76 per cent is controlled by the holding company form of organization. These utilities serve over 50,000,000 of people, approximately 38,000,000 of which are served by holding companies. Of 577 cities of 10,000 or more population served, 428 are served by holding company systems. Of the 114 cities in the United States of a population in excess of 50,000, 103 are served by holding companies. Of the 54 cities in this country having in excess of 100,000 population, 49 are served by the holding company.

GAS.

Artificial gas companies represent a capital of approximately one and one-third billion dollars. Of that capital, approximately two-thirds is controlled by holding companies. The gas utilities of the country serve approximately 38,500,000 people. Of this number, nearly 25,000,000 are served by holding companies or their subsidiaries.

STREET RAILWAYS.

Street and interurban railway companies represent a total capital of approximately $5,000,000,000. Of this sum it is estimated that not less than two-thirds is controlled by holding companies. In the 28 cities of the United States having a population in excess of 200,000 the mileage of track controlled by holding companies is in excess of 61 per cent. Here, again, it is of interest to note that only four of these cities have more than one principal operating company, and only two of these cities have companies that are really independently and separately owned.

II.

THE GREAT ECONOMICAL ADVANTAGES OF COMBINING PUBLIC UTILITIES SERVING DIFFERENT COMMUNITIES THROUGH THE MEANS OF A HOLDING COMPANY.

It is almost self-evident that, in the realm of public utilities, the large holding company possesses great economic advantages over the independent small local company.

DISADVANTAGES OF INDEPENDENT COMPANIES.

In small towns and in sparsely settled districts the independent company is, as a rule, unable to supply good service at reasonable cost. The business is too small to warrant the employment of the high-grade but expensive staff needed to insure efficiency in construction, administration, maintenance, and operation. Then, owing to the limited output, the unit cost of production and distribution is necessarily high. Again, because of its limited local character, the entire business is likely to be completely paralyzed by some calamity, and the company so seriously embarrassed as to be unable for a protracted period, or perhaps permanently, to continue its service to the community.

ADVANTAGES OF HOLDING COMPANIES TO INVESTOR.

Many of these causes for the lack of success of the independent local companies have been eliminated by the device of the holding company which unites under one control and management the public utilities of several communities. The increased volume of business so obtained enables the holding company to make the expenditure necessary to secure a thoroughly competent executive, engineering, and operating staff, whose services are available to all of its subsidiaries. Thus, along with the resulting increase in efficiency, the expenses of each subsidiary are materially reduced. Expenses are further reduced by the standardization of materials and supplies, and by the purchasing of such supplies by skilled purchasing agents in large quantities in a far wider market and upon much better terms of credit than could possibly be secured by the separate local companies acting independently. The centralized expert management effects further economies in the cost of production by the standardization of operating and accounting methods. Plants are combined and construction work is standardized, so that equipment outgrown by one community can be utilized by transfer to another smaller community, instead of being discarded as useless; in this way the enterprise is run with a minimum amount of capital, and depreciation charges are materially lessened. The distribution of the business over an enlarged territory "averages the risk" and secures the holding company against irreparable damage from purely local causes. All of these improved conditions operate to increase the attractiveness of the enterprise to the investor, and, consequently, to bring about the very great economy of decreased cost of capital and the resultant fixed carrying charges.

From the point of view of salability, the securities of the large holding company and of its subsidiaries are so greatly superior to those of the small independent company that the two are scarcely comparable. The safety and stability due to the large volume and diversified character and location of the business, the reduced expenses, and the increased efficiency of the management eliminate one of the greatest obstacles to the successful financing of public utility companies. And the risk to

the investor is further reduced by the ability of the holding company to carry the losses of its subsidiaries during the accumulation of business and through periods of stress, to provide working capital for their temporary needs, and to protect them against prolonged or permanent curtailment or suspension of operations by furnishing immediate financial and engineering assistance in case of accident or calamity. The securities of subsidiary companies controlled by holding companies are valuable, in a broader market, at a higher price, and with a more ready demand on the part of investors, by reason of the fact that these securities are advertised as securities having priority over the securities of a well-known and established holding company.

ADVANTAGES OF HOLDING COMPANY TO PUBLIC.

In a large measure the economic advantages of the public utility holding company inure to the benefit of the general public. The community enjoys more efficient and more extended service at the same or lower cost. It is protected against any crippling, interruption, or discontinuance of that service, due to local causes. Where individual consumers are served, as in the case of light, heat, and power companies, there is a direct and distinct saving to the community and to the taxpayer. One set of house connections takes the place of several, thereby reducing the costly and inconvenient interference with traffic and injury to pavements caused by the necessary openings in the streets.

The actual record of the public-utility holding companies affords ample proof of their great economic advantages. That the securities of these companies offer an investment astonishingly free from risk appears from the steady gain in earnings over a period of years. In ten years, the gross earnings of gas and electric-light and power companies in the United States increased 110 per cent, and those of electric railways 75 per cent, the net earnings for the same period being 100 and 60 per cent, respectively—a far better record than that of railroads and industrials, the two other large classes of securities. And this increase has been steady, and almost free from fluctuation, showing remarkable independence of the effects of general business depression.

The receivership risk of the public utility holding companies over a period of years is only 37 cents for $100 of capital invested. This is but little in excess of that of national banks actually closed for insolvency, and only one-fifth of that of steam railroads and two-elevenths of that of industrials. The safety of the investment has appealed to the general investor, has brought the securities of the public-utility holding companies through the experimental stage, and has resulted in opening up a market for them throughout the United States and abroad, where they are now competing on equal terms with the older classes of securities.

That there has, in general, been a great improvement in the character of the service since the development of the public-utility holding company is patent to almost every one. In the electrical field alone, in 14 years the efficiency of the electric lamp has been increased 268 per cent, while the cost of current has been reduced 61.5 per cent. The lowered cost of public-utility service has been practically the only reduction in the cost of living in recent years.

The advantage to the public of the public utility holding companies has been generally recognized by the public service commissions which now exist in most of the States. They are practically unanimous in holding that public utilities are best supplied to the community by a single large company subject to State regulation and control. Indeed, the general objections to intercorporate stockholding are eliminated, in the case of State regulated corporations, by the supervision and control of the public service commissions. These commissions prevent overcapitalization and the manipulation of the securities of subsidiaries by their control over the issuance of securities. They prevent overcharge to the public for service by their power to fix the legal rates upon which that service shall be furnished. They also have power to compel adequate and efficient service.

DISASTROUS EFFECT OF PROHIBITING PUBLIC UTILITY HOLDING COMPANIES.

A refusal to permit the continued existence of holding companies in the public utility field would be a widespread public calamity. Such action would retard the development of many small communities whose immediate needs and resources are not sufficient to attract capital. This loss can not readily be measured, but is reflected in the universal desire of local boards of improvement and trade to secure for their localities such favorable conditions for industrial plants and such public conveniences as will render them profitable locations for business enterprises and attractive for residence purposes. The supply of light and power through a large central station and transmission lines is the only means of reaching the farmer and the dweller in the small village.

As the result of the development of the public utility holding company, the farmer can to-day in many districts pump his water, operate his farm machinery, light his house, by electricity, and give his wife electric power for laundry and other household purposes. He enjoys the tremendous advantages of having electricity brought to his very door to the same extent and at practically the same cost as does the dweller in the largest city. Such a state of affairs could never have existed were each small community compelled to pay the cost of a local independent service or do without.

The prohibition of the combination of public utilities by means of the holding company would deprive the small communities of the sure reduction in the cost of living due to the decreased cost of such modern necessities as power, heat, light, and transportation facilities. It would result in a direct tax on the consumer (the general public) to the extent of the reduction in cost securable through the larger enterprise. Charges for operation, financing, etc., are essential elements in the cost of production; they are properly considered by the public utility companies in fixing their rates for service; they must be, and are, considered by the public service commissions in confirming or changing those rates. Any increase, therefore, in these charges is sure to be shifted to the consumer, and not borne to any degree by the stockholder. It is clear, therefore, that legislation depriving a community of the economic advantages of a large holding company will operate to impose an increased financial burden on that community, even if it be sufficiently large to secure the public utility service at any price.

III.

The Indispensable Service Rendered by the Holding Company as a Means of Financing Public Utilities and in Securing the Necessary Capital for Their Extension and Development.

CONSTANT NEED FOR NEW CAPITAL.

The total capital employed in electric light and power, gas, street, and interurban railroad companies in this country to-day is approximately $8,000,000,000. New capital at the rate of approximately $400,000,000 per year—$8,000,000 per week—will be required for several years to come if the present rate of progress is to be maintained. Figures and experience prove that for every dollar of new annual revenue to an electric utility a capital expenditure of $5 must be made. The public, as it has a legitimate right to do, demands up-to-date service and is impatient of any delay in securing it. This natural growth and development of existing plants and the requirements of new fields of service make so great a demand for new capital that the entire revenue derived from the operation of all existing utilities in the country, without the deduction of 1 cent for the payment of interest or dividends, if devoted to this purpose would be utterly inadequate to supply the necessary new capital for these extensions and developments.

A consideration of the above facts makes it obvious that the public utility companies must continually enlist new capital in order to finance their business and shows how vital both to the utility and to the public is the ability on the part of these companies to secure the necessary funds. This ever-present necessity, in fair and stormy financial weather, of new financing presents, possibly, the most serious and difficult problem faced by American public utilities companies. It was to meet this situation and to facilitate this necessary financing that the holding company was first used in the field, and it has proved to be indispensable.

REASONS FOR INDISPENSABILITY OF HOLDING COMPANY.

Any analysis of the reasons why may not include all the causes, but among the very apparent advantages of this form of organization may be enumerated the following:

1. The holding company combines in one concrete, responsible, and convenient business-doing form of ownership all the resources and advantages, tangible and intangible, of all the utilities owned or controlled by it. The combined credit of the former separate and comparatively small properties can now be readily pledged to any given project and the necessary business details satisfactorily and expeditiously performed. The total resources of the various properties when combined make an impressive total and secure for the holding company recognition by and credit with the large metropolitan banking and bonding houses, with which it is quite impossible for the separate and small constituent companies to establish connections and secure for themselves the advantages of the services rendered by such establishments.

As a practical matter, it is impossible to secure these very real advantages resulting from the combination of small and separate utilities except through the organization of

a holding company. The ownership of any large number of separate plants by one corporation is impossible for the reason that, generally speaking, the laws of each State require that the utilities within their limits must be owned and operated by domestic corporations. Furthermore, the State laws establishing public-utilities commissions vary greatly and provide different requirements relative to accounting, issuance of securities, etc., so that it is fairly a legal necessity that the utilities in each State shall be owned and operated by a corporation organized under the laws of the particular State.

2. The securities of the holding company, owning and controlling a large number of separate utilities located in wide and separate areas, present a greater element of security and stability, due to the fact that the risk is prorated and averaged over a large number of physically entirely separate plants located in many different localities. As a result, if any one or more plants, due to any local condition or to any casualty or any other cause, fails to prosper, the remaining and comparatively large number of plants, free from the misfortune of the particular plants, are able to make good the securities issued by the holding company. Where the earnings of one plant or company are low, those of a corresponding company are high, and so the average earnings of all the plants operated by the holding company are maintained at a satisfactory rate. From the investor's point of view, this is simply an application of the homely but time-honored adage with reference to putting all your eggs in one basket.

3. The borrowing power of the holding company is much greater than that of the separate constituent companies, for it can seek the capital in large financial centers. The credit with local banks, where local companies operate, is still retained. This enables the holding company to meet emergency demands and to provide funds pending the marketing of securities.

4. The facilities of the holding company for the sale and distribution of its securities are greatly enlarged by reason of its connections with large bond houses. An efficient organization is indispensable in the marketing of securities. This advantage the separate companies are unable to secure, because of the small and local character of the issues of their securities.

5. The holding company is in a position to finance temporarily with its own funds the emergency requirements of any of its subsidiary companies. This was illustrated in the instance of certain Indiana companies during the severe floods of a year ago. Certain local companies suffered severe and extensive losses and would have been unable to finance successfully the necessary replacements. The holding company, however, advanced these funds at once and enabled the local companies to continue their service with the least possible interruption.

6. The holding company system of organization presents greater elasticity in that it makes possible additional forms of financing to meet any particular condition of the money market. When it is impossible to dispose of bonds of subsidiary companies, the holding company can issue short-term notes or debentures secured by the bonds of subsidiary companies. These notes and debentures with the diversified security back of them can ordinarily be disposed of to provide funds temporarily and until conditions permit of the marketing of other long-time securities.

7. Another advantage in financing enjoyed by the holding company is the feeling among those who purchased securities that the properties operated and controlled under the supervision of a holding company are, as a rule, more successfully operated than the independent plants.

IV.

THE OBJECTIONS TO INTERCORPORATE STOCKHOLDING DO NOT APPLY TO PUBLIC SERVICE CORPORATIONS, FOR THEY ARE NATURAL MONOPOLIES AND ARE SUBJECT TO STATE REGULATION.

THE PARTICULAR OBJECTIONS AGAINST WHICH THE BILL IS DIRECTED, NAMELY, THAT THE DEVICES OF INTERCORPORATE STOCKHOLDING AND HOLDING COMPANIES MAY LEAD TO UNLAWFUL RESTRAINTS OF TRADE OR MONOPOLIES, ARE NOT APPLICABLE TO PUBLIC SERVICE CORPORATIONS, BECAUSE IT IS NOW UNIVERSALLY RECOGNIZED THAT SUCH CORPORATIONS CAN BE ECONOMICALLY AND SUCCESSFULLY OPERATED ONLY AS MONOPOLIES, AND THAT COMPETITION IN THIS FIELD IS AN EVIL WHICH SHOULD BE ELIMINATED WHEREVER POSSIBLE.

The interests of the public are best subserved by protecting monopoly in such corporations and supervising and regulating them in the public interest. Competition is wasteful and expensive. It is bad for the public and the investor alike.

Many of the States have recognized this principle and require certificates of public convenience and necessity as a prerequisite for a competing company.

PUBLIC UTILITIES ARE NATURAL MONOPOLIES.

The principle that a monopoly regulated by governmental authority is a sounder economic principle than unrestricted competition is the basis of the widespread State legislation creating public service commissions. Including Colorado and Maine, whose utility laws are in referendum and will be voted on in the fall of 1914, 30 States and the District of Columbia intrust their commissions with more or less complete powers to regulate utilities.

Actual experience is the foundation for this principle. It was experience of the evils of uncontrolled competition among railroads that led to the creation of the railroad commissions now acting in 45 States. It was experience of the actual workings of competition that has led 19 jurisdictions to give their commissions power to restrict competition among utilities to a greater or less degree.

Striking conclusions may be drawn if attention is focused on the States of largest population, where presumably the best facilities have been offered to judge of the advantages and disadvantages of competition: Of the 13 States which in 1910 had more than two and one-quarter million inhabitants, namely, in order of population, New York, Pennsylvania, Illinois, Ohio, Texas, Massachusetts, Missouri, Michigan, Indiana, Georgia, New Jersey, California, and Wisconsin, no less than 11 have given their commissions power to restrict competition in the utility field.

A fair sample of these provisions is that in the very recent Illinois Public Utilities Commission law (effective January 1, 1914):

"Sec. 55. *Certificate of convenience and necessity.*—No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facilities or in extension thereof or in addition thereto, unless and until it shall have obtained from the commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this state at the time this act goes into effect shall transact any business in this State until it shall have obtained a certificate from the commission that public convenience and necessity require the transaction of such business."

In addition to providing against competition by new construction, etc., a number of States exempt public utility companies from the operation of the local antitrust acts by permitting the merger of competing utilities with the approval of the State commission. As a rule these provisions permit utilities to purchase each other's stock as well as to purchase each other's franchises and property, always, of course, assuming that the consent of the commission is obtained.

NATURE AND EXTENT OF STATE REGULATION.

It is of interest here to note the extremely broad powers of supervision and regulation with which the commissions have been entrusted. In general these commissions have been empowered to insure safe and adequate service, at fair and reasonable rates in respect of both consumers and producers, without discrimination or favoritism among the former.

Of these powers, the first and foremost is that to regulate rates and see that no utility earns more than a fair compensation for the service rendered. Allied to this is the power to prevent discrimination or favoritism. Then comes the power to require safe service, involving therein adequate security and protection not only to the users of the service but to the employees of the company furnishing the service. The numerous regulations made for the protection, comfort, and convenience of motormen and conductors, the installation of safety devices in electric generating stations, etc., are examples of the exercise of this power. The power to compel adequate service involves the duty of seeing that plants are kept in good repair and not allowed to fall into poor condition for the sake of showing increased profit. The commissions also can require the establishment of depreciation funds and thus insure that no disaster shall befall through failure to provide for the renewal of machinery, etc., after it is worn out. In addition to this, the commissions may regulate the accounting systems of utilities, classify expenditures and determine what shall be charged against capital and what must be charged against income. Furthermore, the commissions regulate the stocks, bonds, and other securities issued by the utilities, they pass upon the amount that shall be issued, the type of security that shall be issued, the price at which the securities shall be sold, the persons to whom they shall be offered for sale, and, in addition, they specify the way in which the funds secured shall be spent and have power to follow the funds in the course of their expenditure and see that they are actually applied to the purposes enumerated. The commissions even

prescribe how the bond discount shall be handled, that is, whether it shall be amortized out of earnings or may be provided for by the sale of new securities.

As a result of these elaborate and detailed powers the commissions have such control over the utilities within their jurisdiction that it is practically impossible for the owners of public utility plants to operate them except for the good of the public or in fact do anything but render good service in return for a fair profit.

Conclusion.

It would seem from the foregoing argument that your committee must reach the conclusion that intercorporate stockholding companies have an unquestioned economic value in the public utility field, and that through them the great development of our public utilities in this country has been made possible. To check this development by Federal legislation, which might conflict with State regulation, would work a great hardship on both the public and the companies as well. The exception asked for is in the interest of all and if inserted in the bill will remove all doubt as to the policy of Congress and will further the great progress which has been made in this field in the interest of those necessities of the twentieth century—light, heat, power, and traction.

Dated May 1, 1914.

Respectfully submitted.

Barber, Watson & Gibboney, 165 Broadway, New York, Stuart G. Gibboney, of counsel, representing Bertron, Griscom & Co., of New York and Philadelphia, interested in United Gas & Electric Corporations operating public utilities in the following States: Connecticut, Pennsylvania, Indiana, Texas, Louisiana, New York, Kansas, Illinois, and Colorado; also interested in The American Cities Co., operating public utilities in Alabama, Louisiana, Tennessee, Arkansas, and Texas. Bernard Flexner, Ralph D. Stevenson, 112 West Adams Street, Chicago, Ill., representing Middle West Utilities Co., which operates in 315 cities in Illinois, Indiana, Kentucky, Oklahoma, Missouri, Michigan, New York, Vermont, New Hampshire, Maine, Wisconsin, and Nebraska. H. Alexander Smith, Daniel W. Knowlton, George B. Hatch, Colorado Springs, Colo., representing Wm. P. Bonbright & Co. (Inc.), New York, interested in public utilities operating in the following States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Appendix.

This appendix to the brief on behalf of public utility holding companies contains (1) quotations from the opinions of experts and from the decisions of courts and public service commissions on the subject under discussion; and (2) references to legislation illustrating recognition of the principle of regulated monopoly.

Extracts from Opinions of Experts.

Woodrow Wilson, President of the United States. From an address before the students of the University of California in 1911:

"Public service corporations are in a very interesting sense natural monopolies. They generally used the pieces of land and roads and highways which are most convenient for their purposes, and most direct for effecting the communication which they effect; and it is perfectly obvious that if other companies are allowed to compete with them there is a wasteful duplication in outlay and equipment, so that competition generally results in an eventual combination of the competing companies and the necessity to charge a price on what they supply that will pay the interest on twice as great an investment as was really necessary for the service."

John H. Roemer, chairman of the railroad commission of Wisconsin. From an address delivered at the Association Island meeting, September 4, 1913, entitled "Commission control of public utilities." From Electrical World, September 13, 1913, pp. 531, 532:

"That public utilities are virtually monopolies by nature and must be dealt with as such in any just and comprehensive system of State regulation is the fundamental economic principle upon which the law was constructed. Without protection of such monopolies only a limited and inadequate supervision of their affairs by public authorities can be morally justified. At the very foundation of the Wisconsin system lies a uniform indeterminate franchise, denominated 'an indeterminate permit,' which gives the corporation a legally protected monopoly."

Halford Erickson, member of the Wisconsin railroad commission. From an article entitled "Regulation of public utilities in Wisconsin," in Public Service for May, 1913, pp. 179-181:

"It is recognized by the railroad and public utility laws of Wisconsin that public service corporations are in their nature monopolies, and that the interests of the public are best conserved by protecting monopoly in these industries and at the same time supervising and regulating them in the public interest. To carry out this purpose, competition among public service companies in the establishment of new lines and plants is prohibited, except under conditions as make its existence a benefit to the public. * * *

"The indeterminate permit thus recognizes the monopolistic character of the public utility business, and provides for continuance of the monopoly, but at the same time safeguards the public by admitting competition when the public interest requires it * * *.

"It is therefore only in very exceptional cases that a commission could be justified in admitting competition among public utilities in a municipality for the waste in equipment and other inconveniences generally more than offset all benefits to be derived."

Harry E. Wilson, formerly a member of the Public Service Commission of Washington. From an address at Seattle, Wash., entitled "A General Review of Regulation," reported in Public Service Regulation, October, 1913, pp. 523 et seq. In the course of this address, and referring to conditions in gas, electric, water, and telephone utilities, Mr. Wilson says:

"These industries are essentially natural monopolies, and competition as a regulative force is worse than useless. It is expensive, dangerous, and pernicious. Many cities, to their bitter sorrow, have tried competition by granting franchises to two telephone companies, or two gas or electric light plants, or two street railway systems. What are the results? Unnecessary duplication of properties and operating expenses, rate wars, financial loss, poor service, public inconvenience, receivership, consolidation, reorganization, long period of recovery, perhaps higher rates than ever. There is absolutely nothing that can be said in justification of the policy of competition. It is wrong in theory, principle, and practice. It is bad for the companies, bad for the investors, and bad for the public."

George A. Lee, ex-chairman of the Public Service Commission of Washington. From a paper read before the Northwest Electric Light and Power Convention at Seattle, Wash., September, 1913, entitled "The Regulation of Public Service Utilities." From Public Service, October, 1913, pp. 124-126:

"While we have an admirable public-service-commission law in this State, yet the absence of this fundamental economic principle, prohibiting duplication of public service properties, is regrettable. It should by all means be incorporated into our statute at the next session of the legislature. Wisconsin, New York, Massachusetts, California, and other States which have successfully regulated utilities have all recognized the necessity of avoiding the expensive, wasteful, and disastrous duplication of public-service properties. A certificate of convenience and necessity law should engage the careful and thoughtful attention of the next legislature and should be placed on the statute books. A careful study of court decisions, opinions of eminent public-service commissions and writers and students of the subject discloses in a convincing manner that the trend of modern, progressive thought, with reference to the regulation of public-service corporations, is to discourage and prevent unnecessary and wasteful duplication of plants.

"The regulation and control of public-service corporations supplying light and power in the State of Wisconsin is conceded by all to be the most satisfactory and efficient of any State in the Union. In no other States does the public receive better service; in no State are the rates more fair or reasonable. Beyond question, the one chief reason for good service and reasonable rates in Wisconsin consists in the fact that utility properties serving the public have not been duplicated at random. In Wisconsin before a light, power, or other company can start business in any municipality a certificate must be secured from the State showing that public convenience and necessity require the new service. In other words, if a light and power company is serving a community efficiently and at reasonable rates, and the locality is not large

enough to support another competing plant, the right of such competing company to enter is invariably denied. Experience in Wisconsin and other States has abundantly demonstrated that unrestricted competition in the public-service field has resulted ruinously to the public."

W. D. Standrod, member of Idaho Public Utilities Commission. From an article entitled "Public utility commissioner's view of municipal ownership," in Public Service, November, 1913, pages 151, 152:

"Public utilities are almost of necessity virtual monopolies, and I think it is now considered that it is for the benefit of the public that they be conducted on noncompetitive lines. In most cases competition is a needless economic waste and an entirely inefficient method of securing the necessary regulation and control. Competition alone fails to secure adequate service at reasonable rates in an industry which is naturally monopolistic. Being of this character, it is necessary that they be directed and controlled by the elected or appointed representatives of the people. * * *

"I believe this is the consensus of opinion among the students of political economy of the day and almost universally indorsed by the general public, as is evidenced by the establishment of public utilities commissions, under whatever name they are called, by nearly all of the States of the Union. This latest form of securing the necessary intelligent regulation and control is attended with the least possible expenditure of money and time necessary to secure the desired results. Such a commission, established by State authority, becomes a permanent administrative body, by trained experts, whose services are always available for the purpose of investigating and adjusting the conflicting rights and liabilities that are necessarily constantly arising between the opposing parties in furnishing or using any public utility service."

Edward B. Rosa, chief physicist of United States Bureau of Standards. From a paper read before the American Association for Advancement of Science at Atlanta, Ga., December 31, 1913, entitled "Standardization of public utilities service." From Electrical World, January 10, 1914, pages 79, 80:

"Public utilities are no longer regarded as private business corporations, entitled to charge all the traffic will bear and to make all the money they can. On the contrary, they are now regarded as of a public character, enjoying a monopoly of the market but owing a duty to the public and entitled only to a reasonable return on their investments. Their duty to the public consists in rendering safe and adequate service at just and equitable rates. In return the utility is entitled to protection of its investment and to such dividends that the stockholders will have no just cause for complaint and that money may be had whenever necessary for extensions and improvements. Under this system, if a city wishes to own a given utility or all of its utilities, it may not build anew and disregard the property rights of existing utility companies, but should purchase such properties at fair valuations. Neither should a city grant a franchise to a second company which proposes to compete with the first, even though it were offered a valuable consideration for such franchise. The justification for all this, of course, is that one company with all the business of a given utility can usually render better service than two or more could do with the business divided between them.

"Thus it appears that the utility company is guaranteed a monopoly of the business, protection of its capital, and a fair rate of return thereon. It in turn is expected to render the best service possible for the charges made."

Robert H. Whitten, librarian for New York Public Service Commission, first district; author of "Valuation of Public Service Corporations." From an article entitled, "Risk and Public Service Control," in Electrical World, January 3, 1914, page 8:

"It is an interesting fact that in the general upward trend of prices since 1896 public-utility services and products have grown steadily cheaper. While the prices of labor, materials, and products have increased tremendously and the cost of living has been going up and up, the price of gas and electric light and the price also of street railway and telephone service, if measured by absolute amount and quality, have shown an almost continuous decline. * * *

"In Massachusetts the average price of gas decreased 47½ per cent between 1886 and 1910. It is estimated that the average price of electric light per kilowatt hour in Massachusetts cities decreased 48 per cent between 1890 and 1910. While in the case of street railway transportation there has been a quite uniform 5-cent fare, and while during the past few years there has been a tendency to increase the cost of city transportation by curtailing transfers and establishing fare zones, the general trend has been decidedly downward if we take into consideration the possible length of ride and the great improvement in the quality of the service rendered. In general, we know that the small, poorly heated and lighted horse car has been superseded by a more commodious, better lighted and heated electric surface car, and this, to a considerable extent, by the more comfortable and much more rapid elevated and

subway car. We know also that at first the surface lines radiated 2 or 3 miles from the city center and that now they may radiate 6, 10, or even 15 miles from the center.

"*Monopoly versus competition.*—The above comparison furnishes abundant justification for a régime of virtual monopoly as opposed to competition, as applied to the above public utility services. The favorable showing of virtual monopoly is due to reduced capital expenditures, reduced operating costs, and, more important still, reduced risk.

"Public service regulation is a recognition by the State of the essentially monopolistic character of these enterprises. The power of the State to regulate rests largely upon their character as virtual monopolies. A virtual monopoly of the supply of any commodity or service that is important to the welfare of any considerable portion of the community is a delegation of sovereignty. Any corporation in which monopoly is vested is an agent of the sovereign, the State. This monopoly exercises governmental functions, and such a delegation of governmental power is only conceivable on the theory that it is accompanied by a well-defined and effective responsibility to governmental authority."

Edgar H. Farrar, ex-president of the American Bar Association. From an address before the American Bar Association, as president of that body, in 1911. While severely condemning the operation of holding companies in general, Mr. Farrar excluded from his denunciation those holding companies engaged in the operation of public utilities, saying on this point:

"As regards quasi public corporations, which are under or which can be put under strict governmental supervision and control, and whose rates can be regulated by law, the right to hold stock in other similar corporations does not lead to the same consequences as in industrial private corporations, which are exempt from any such regulation, and therefore these corporations require in this regard a somewhat different treatment from industrial corporations."

Charles R. Van Hise. From "Concentration and Control," at page 32:

"Industries in which the element of natural monopoly enters are likely to become concentrated. Here are included the public utilities."

Samuel Insull, president of the Commonwealth Edison Co., of Chicago. From an address before the Franklin Institute, June, 1913, entitled "The Production and Distribution of Energy." After exhibiting various maps and charts and statistics, Mr. Insull, in concluding his address, said:

"The figures I have presented to you show absolutely that the business in which I am engaged can be run only as a monopoly—successfully run, I should say, as a monopoly. * * * A study of such figures as those I have thrown on the screen must lead any man of ordinary intelligence * * * to the conclusion that the only possible way to operate the business of energy production and distribution is by operating it as a monopoly in so much of the territory as you may want to serve from one organization. It does not necessarily follow that that organization shall cover the whole of a State or the whole of a county, provided the county is large enough for more than one. It does follow, however, that so far as any particular piece of territory is concerned, whether the energy produced be used for operating urban transportation * * * or the lighting of your streets or for supplying the thousand and one purposes that a community like this requires it for, such production and distribution of energy must, for reasons of economy, be a centralized one."

Mortimer E. Cooley, dean of University of Michigan. From an address delivered at the annual dinner of Western Society of Engineers, Chicago, Ill., January 7, 1914, entitled "Factors Determining a Reasonable Charge for Public Utility Service." From Public Service, February, 1914, page 45:

"The public-service corporation has in the past ignored the fact that its right to do business as a public grant, a grant which in the very nature of it precluded others from engaging in the same business in the same locality. True, in theory at least, others might be admitted to the field and thus create competition, but practically it has not worked out that way. Ordinarily there is not enough business for two, and even if there were, great inconvenience is likely to result. * * * It is much to the advantage of the public, both in convenience and expense, to have a single utility * * * serve it when that service can be had on fair terms."

H. V. Bozell, director of the School of Electrical Engineering, University of Oklahoma. From an article entitled "Legislation affecting public utilities," in Public Service, July, 1913, page 13:

"The public utility differs from other forms of business in the way it meets the average individual. In order to perform the best service it is, of course, monopolistic in nature."

Balthasar H. Meyer, member of the Interstate Commerce Commission; formerly chairman Wisconsin Railroad Commission. From Central Utilities Commission and

Home Rule, in the American Political Science Review for August, 1911, page 374. The following statement on competition is interesting not only because it is the utterance of a member of the Interstate Commerce Commission, but also because it is a statement which shows that the issue was deemed settled by experienced men as far back as 1911. Mr. Meyer says, at pages 386-388:

"It should be too late in the day to discourse upon the limitations and general disadvantages of competition in the utilities business. Nevertheless, there are so many ideas current with reference to the alleged benefits of competition in this class of enterprises that one can not forego alluding to the matter in a few brief sentences.

"There are few things which the industrial history of advanced nations prove more conclusively than that competition in the field of public utilities has failed to insure reasonably adequate service at reasonable rates. The public has had occasion to learn this lesson many times and on a large scale. * * * Certainly we have had enough repetition of disasters to the public as well as to investors to lift this subject out of the field of controversy, but somehow these lessons must not have been on a sufficiently large and overwhelming scale, for the fetish of competition is still being worshipped, and the cry of competition is still raised by many as the touchstone capable of dissolving every obscure entanglement which strained relations between the utilities and the public sometimes create.

"The city of La Crosse in our own State furnishes a most valuble object lesson. * * * Thousands of unjust discriminations, the unnecessary hundreds of thousands of dollars invested in the individual plants, the lack of a physical plant constructed on principles of unity and efficiency, years of warfare and strife with the permanent wounds and scars which consolidation peace can not eradicate are the price which the good people of La Crosse have paid for their faith in competition and which they will continue to pay until they have amortized the capital wasted.

* * * * * * *

"The Wisconsin public utilities law is a repudiation of the fallacy of competition as a guarantor of good service at reasonable rates and is planted squarely upon the idea of monopoly in the utility business except in the case of telephones. Give a utility plant a definite field and compel it to do its proper work reasonably well within that field; this is one of the basal ideas in the law."

EXTRACTS FROM OPINIONS OF COURTS AND PUBLIC SERVICE COMMISSIONS.

CALIFORNIA.

The California Railroad Commission sometimes admits competition to punish the existing utility for failure to render good service in the past, differing in this particular from the commissions in most other States. It does not always do this, however. Its attitude is set forth fully in the matter of the application of the Oro Electric Co. (2 Cal. R. C., 748, 1913, pp. 754, 755, 756):

"This section represents a new State policy in the relationship between public utilities and the public. Heretofore, while the various counties and incorporated cities and towns have had the legal right to fix the rates of certain public utilities, as a matter of fact only a few of them have, except as to water companies, acted under the authority. * * * On the one hand the utilities were in most cases left unhampered to make profits as large as they could, while on the other they were subject to possible competition. The result of such competition was only too often an ultimate consolidation of the competing companies after a period of more or less fierce competition, whereafter the consolidated utility claimed the right in the courts to receive from the public rates high enough to yield the company a return on all the property of the original competitors, including the property which had been duplicated and a large portion of which had been 'junked.' Regulation of these utilities in the interest of the public was largely sporadic and ineffective.

"Under the new State policy these conditions are radically different. In the first place, the railroad commission is given the right to establish the rates of all utilities in territory over which the commission has jurisdiction. The result will be that while the utilities will be allowed a just compensation of the value of their property used and useful for the public purpose, they can not continue to expect the public to pay to them rates high enough to yield unreasonably high returns on the property. As the right to the former high returns has, in effect, been taken away, it is only fair that the utilities shall receive a degree of protection from possible competition, in case they are doing their full duty, so that what they lose in the way of

possible unreasonably high returns they shall, in a measure, gain in greater security to their investment. * * * A wise public policy demands that utilities which are doing their full duty to the public shall be treated with fairness and justice and liberality, and they shall receive such protection to their investments as they may deserve, subject always to the contingency that if another utility can, by reason of superior natural advantages or patented processes or other means, give to the public a service as good as the existing utility, at rates materially less, the interests of the public must be deemed paramount and the new utility must be given an opportunity to serve the public.

"Under this new State policy competition between public utilities is not itself necessarily a good thing. Whether or not it is a good thing depends upon the results which flow from it in each particular case. If just as good results can be secured by regulation and supervision under State authority of an existing utility which is a natural monopoly, so that the rates and service enjoyed by the public are as good as they reasonably could be under normal competition, the consuming public has nothing to gain by competition, while that portion of the public which invested its funds in the securities of an existing utility may have much to lose by a competitive condition which, while not helpful to the consuming public, can be extremely hurtful to the investing public, and particularly discouraging to persons who are proposing to invest their money in the development of new utilities in this State in sections thereof where there are no existing utilities of the same character and where they are imperatively demanded for the development of the State."

GEORGIA.

While the Georgia Railroad Commission has no power at present to prevent competition between public utilities, it has expressed itself forcibly on the subject.

In granting the application of the Georgia Light, Power & Railway Co. to increase electric light and power rates in Macon, such rates having been demoralized by past competition, now eliminated by the absorption of a competing company, the commission says (see full report in Public Service Regulation for March, 1914, at pp. 143-146):

"We do not believe that a business which supplies to a community a public utility like gas or electricity is one in which full and free competition between two companies engaged therein can be expected to permanently prevail. Experience has demonstrated the world over that when there is more than one such company in a city, sooner or later the competing companies find it to their interest to reach an understanding as to prices, or to a division of territory, or both, and in the great majority of cases the two companies either become one or the control of both passes into the same hands. * * *

"We do not believe competition can ever be a consistent and proper regulator of rates and other conditions in the public-utility field. Real competition in such a field means duplication of plants, which, when once built, are generally useless for other purposes.

"In 1912 there was in Macon an established light and power company, with plant and capacity sufficiently large or capable of enlargement to serve the city for many years. Instead of coming to this commission for fair and reasonable rates or for improvement in service, if unsatisfactory; instead of taking steps to compel this established company to furnish all proper and reasonable service or fair rates, the city adopted the policy of granting franchises to another company to come in and share the business, or to compete for it. This company, before it could serve the public, had to provide itself with an expensive plant and equipment, as well as with business and operating organizations. The result is that real competition is now gone, and there is invested in these duplicate plants and organizations in this city much more property, much more labor, supplies, and services for supplying electric light and power than is needed or would have been made with only one company, upon which, under the law, so long as bona fide devoted to public uses the public must pay returns.

"This commission earnestly believes that it would be wise if the legislature would prohibit the building of duplicate public utilities, or the grant of franchises to such prior to application to and issuance by this commission of certificates of public convenience and necessity. In our opinion the government which properly assumes to prescribe reasonable rates and compel adequate services by public utilities should also protect such utilities and the public from unwise or useless competition and the wasteful investment of money in unnecessary plants."

IDAHO.

Application of Gustad & Hill, order No. F-7, decided October 16, 1913, reported Public Service Regulation for November, 1913, page 611.

The commission says that the public-utility law of the State—

"was not enacted for the purpose of creating a competitive action between two or more individuals or corporations, furnishing such service, but rather to control and regulate them, so as to avoid the evil effects of monopoly; and where a utility occupying a field has generally served such field, so that the advent of a second utility would merely serve to divide the business, such competition becomes an economic waste by reason of the duplication of investment, which it was and is the intention of the statute to eliminate."

Application of Swan Creek Electric Co., order No. F-14, decided December 15, 1913, reported Public Service Regulation for January, 1914, page 15, from which we quote:

"The Utah Co. has about $8,000 investment devoted to serving the village. * * * Applicant would have to spend not less than $8,000 to reach the village.

"The commission says: 'There would then be an investment of $16,000 to serve a village capable of producing $100 maximum gross revenue per month. Certainly sound business judgment would argue against any investment built on such a promise of future profitable return. Applicant hopes, if allowed to enter the field, to destroy the income of the present company entirely and render its investment valueless. Just how this is to be done is not made clear, but assuming for the sake of argument that this can be done, we do not believe that the purpose of this statute is to encourage or countenance such action. On the other hand, if the applicant should fail to gather to itself all of the revenue derived from the village of St. Charles it then follows that the two companies must divide what is already a very meager income for the one company already in the field, with a loss to both companies.'"

In re Ashton & St. Anthony Power Co., decided November 12, 1913, reported Electrical Review for March 28, 1914, page 625:

"The commission is opposed to unnecessary duplication and in favor of protection from competition of a company already in the field."

In re Great Shoshone & Twin Falls Water Power Co. *v.* Idaho Power & Light Co., decided February 18, 1914, reported Electrical Review for March 28, 1914, page 625:

"We can not avoid the conclusion that we have heretofore reached as to the purpose of this statute, that it was enacted to avoid duplication of power plants in fields where the necessity for such duplication does not exist, thereby avoiding what is termed economic waste, and such being the case, by the terms of the statute only a limited latitude is given to such public service corporations when attempting to enter the field already served by another public utility. If such public utility desires to enter such field already served, it must apply to the commission for certificate that public convenience and necessity require such service, and it can only enter such field after a hearing has been had before the commission and the commission finds that it had prior to the time the statute became effective begun actual construction work and was prosecuting such work in good faith, uninterruptedly and with reasonable diligence under a franchise granted it before the statute took effect."

Extract from Current News Notes in Electrical Review for March 7, 1914:

"Certificate of public necessity denied to competing telephone company. The commission has denied certificate of convenience and necessity to the Bethany Mutus Telephone Co. to operate in Macon County. The Macon County Telephone Co. is furnishing service in this territory and the commission held that public interests would be best conserved by regulation of the rates and service of the company furnishing the service rather than by authorizing a competing company to offer duplicate service."

INDIANA.

Hawks Electric Co. *v.* City of Goshen, decision No. 34, September 8, 1913. Recorded in full in Public Service Regulation for October, 1913, p. 551.

The commission holding that under section 98 of the Shively-Spencer Utility Commission Act, it lacked authority to prevent the rejuvenation of an existing plant, even against an objection that such a course would mean wasteful competition, nevertheless said, on the general subject of competition:

"That the spirit of this act is monopolistic, that a single utility furnishing a product or service in the end leads to better service and lower prices when properly regulated, is no longer questioned by economists."

KANSAS.

In re application F. E. Workman. First Report of Public Utilities Commission of Kansas, p. 86 (1912).

In this case the commission denied an application for permission to build and operate an electric light and power plant in the city of Parsons, on the ground that the field was already occupied. The commission says, page 86:

"Under the provisions of section 31 of chapter 238 of the Sessions Laws of 1911, no common carrier or public utility, governed by the provisions of the act, is permitted to transact business in the State of Kansas until a certificate has been obtained from the public utilities commission that public convenience will be promoted by the transaction of such business.

"The duty rests upon the applicant to show that public convenience and necessity will be subserved by permitting another utility to enter the same field.

* * * * * * *

"It was pretty conclusively shown that the plant of the Parsons Railway & Light Co. is adequate for all present and prospective needs of Parsons.

"The obvious purpose of the legislature in enacting section 31 of chapter 238 of the Session Laws of 1911, commonly known as the public utilities law, was to prevent a duplication of utilities, where one is rendering reasonably satisfactory service."

MARYLAND.

While the Public Service Commission of Maryland has had power to restrain competition since 1910, the terms upon which it will exercise this power do not appear to have been discussed in any formal opinion.

The only utterance by the commission on this subject appears to be in the first annual report for the year 1910, at page 17, where, after noting that "very few new corporations have asked approval of plans of construction * * *," the commission continues:

"New concerns will be required at the outset to conform to the requirements of law by satisfying the commission that the 'exercise of the franchise is necessary or convenient for the public service.'"

MASSACHUSETTS.

In re Worcester franchise of 1893, Ninth Annual Report Massachusetts Gas and Electric Light Commissioners, 23 (1893:)

In discussing the franchise granted to a new company by the city, the commission says, at page 26:

"The evidence as presented to the board seems to afford no reasonable ground for the expectation that the proposed company could afford its lights for less than the existing company. * * * It does not possess and probably does not expect to acquire the exclusive control of any invention by which special saving in cost may be effected, and it can not reasonably be expected to possess any higher technical or business talent than lies within the reach of the existing company.

"It is the duty of the board and its only purpose to secure to the people of Worcester, so far as it lies within its power, the best service at the lowest reasonable price. * * * The history of corporations doing an electric lighting and similar business in competition in various parts of the country affords strong ground for believing that a new company, if allowed to engage in business, would not long remain by itself, as competition for a period would probably be followed, as elsewhere, by consolidation or absorption. * * * But combinations and consolidations, as is well known, afford the opportunity and usually a temptation to stock development too great to be resisted. Such needless outlay should be avoided and saved, for when it has once been incurred or the money expended in an enterprise not required to supply the public wants, so great is the expectation of gain, and so persistent and unyielding the demands of capital for dividends, the remedy is not then easily found or applied, and the better policy avoids the evil at the outset by preventing the expenditure. * * *

"If to sustain this appeal shall seem to secure to the existing company a monopoly of the business, it must be remembered that it can only retain this as long as the public interest is best served thereby, and that such monopoly is conditional and restricted. The company claims and exercises a general franchise throughout the city. It may be compelled to meet all reasonable demands. If it unreasonably fails or neglects to supply light when requested, this board has power to compel such supply and has frequently exercised this authority in other localities. Consumers have a right to the

lowest remunerative rates, and if they believe the prices charged are too high they can petition for a reduction, and the order of the board as to price is binding upon the company."

In re Haverhill, 19th Annual Report, Mass. G. & El. Lt. Comm., 24 (1903). In this case the board said, at p. 25:

"If the request of the new company be granted, it may naturally be expected that for a time both city and commercial lighting will be offered by both companies at considerably less than present rates, but such competition, under the conditions in this case, is sure to be expensive, even though for a time apparently economical or profitable. We may confidently expect first losses, then profits; losses in the conduct of the business and the struggle for a control of the situation; profits in the later union or consolidation; losses for a time in the supply of electricity, to be converted later into new capitalization as a perpetual and irremedial burden of the public. The temporary advantage to a portion of the public is reasonably sure to be followed by an undue burden upon the public as a whole, through the larger capital demanding a return, much of it representing unnecessary duplication of properties as well as losses."

In re Weld *v.* Gas & Electric Light Commissioners, 197 Mass., 556.

In upholding the decision of the board, the court says, at pp. 558-559:

"In reference to this department of public service, we have adopted in this State legislative regulation and control as our reliance against the evil effects of monopoly rather than competitive action between two or more corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. The State, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same street would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of streets from time to time and the interference with pavements, street-railway tracks, water pipes, and other structures.'

MICHIGAN.

In re application Michigan State Telephone Co., decided August 6, 1912 (from advance sheets).

In this case, in granting permission for the consolidation of competing telephone companies in Detroit, the commission says:

"The telephone, from its very use, is a natural monopoly; it will not reach its fullest efficiency until within the limits of the appliances themselves anyone who has a telephone can converse with anyone else who has a telephone. * * * With statutory machinery effective to insure adequate facilities and proper service at reasonable rates, duplication of telephone facilities is economic waste and a limitation upon the fullest possible use. It does not follow that, in the opinion of the commission, efficient service can only be insured through the unity of ownership and organization of all telephone facilities, but it unquestionably does follow that to obtain the highest degree of telephone use and service there must either be the voluntary or enforced cooperation of the various telephone properties, and that each should be exclusive in the particular territory it seeks to serve. Such is the plain intent of the statute conferring jurisdiction in matters of telephone regulation upon this commission."

In re application Vermontville Farmers' Independent Telephone Co., decided August 29, 1912 (advance sheets).

In this case, in denying an application to commence competition, the commission says:

"Indeed, the purpose of the provision of the Michigan statute requiring the certificate of public convenience and necessity and the language of the section itself are so clear as to require no judicial interpretation to point the way to the law's proper administration. The general purpose of the provision can only be to prevent the needless duplication of telephone facilities; to prevent the financial loss and unsatisfactory service incident to the struggle of two or more companies within a territory that can supply no more than sufficient business for one."

MISSOURI.

In re Enterprise Telephone Co. (1 Mo. P. S. C., 55, 1913). In this case the commission, though authorizing a competing company because of special and unusual conditions, expressed its disapproval in general of the principle of permitting competition, saying, at pages 56 and 57:

"It is true that in order to obtain complete and satisfactory telephonic communication which has become necessary at this day, the residents of a given territory have frequently been required to become subscribers of two or more systems operating over the same field, thereby being burdened with multiplied expense and inconvenience, when a single system, if properly regulated and directed would have answered every demand to better advantage with a lesser cost to the public and better return to the company. In such a case we would decline to grant a certificate of convenience and necessity."

NEW HAMPSHIRE.

In re White Mountain Telephone & Telegraph Co., first report of Public Service Commission of New Hampshire for the year 1911, at page 498.

Here the commission, in authorizing a consolidation of companies, says, at pages 499 and 500:

"The regulation of the rates of public service by public authority is based upon the theory that the service of such corporations must of necessity in large measure be noncompetitive. The provision * * * which forbids any public utility to extend its service into any city or town in which it is not already engaged in business without the approval of the commission would seem clearly to indicate the legislative intent to restrain the competition of rival corporations in the same territory, and to depend upon the regulatory powers of this commission to protect the public against unjust rates, rather than upon such competition."

In re petition of Cascade Electric Light & Power Co. et al. Third report Public Service Commission of New Hampshire for the year 1913, at page 170.

Here the commission, in authorizing the sale of the property of one company to another, says at page 179:

"But the fact that the legislature inserted in the act a provision to prevent the establishment of competitive plants where competition does not now exist, except with the consent of the commission, indicates very clearly that it did not expect those beneficient results ordinarily to flow from competition. * * *

"It is well known that so generally expensive and unprofitable is competition between public utility enterprises that the almost inevitable final result is consolidation. To secure this result it is common knowledge that extravagant prices have often been paid by one public utility for the properties of a competitor.

"If it is ordinarily—but not always—contrary to public policy to create competitive conditions when not existing, it would seem that it must ordinarily—but not always—be public policy to allow consolidations and the termination of competitive conditions where they do exist, assuming that such consolidations are not made upon terms which will operate to the detriment of the public."

James E. Parker et al. *v.* Hudson Water Co., reported in Public Service Regulation for February, 1914, page 69.

This case was continued by the commission pending the completion of improvements by the existing water company which were ordered by the commission and which the commission stated if done satisfactorily, would avoid the necessity of admitting the competition urged. The commission said:

"What was the purpose of this legislative provision which grants to a utility already established in any town a monopoly of the service there, until the commission, by an order, shall permit the entrance of another utility in competition? We think that it was to secure to the public the service of public utilities at the lowest cost consistent with efficient service."

NEW JERSEY.

In its third annual report (1912) the Board of Public Utility Commissioners for New Jersey says, at page 16:

"The board is of opinion that the approval of a franchise affording a competing company entrance into a district already adequately supplied by a public utility is ordinarily neither necessary nor proper for the public convenience and jeopardizes rather than conserves the public interests."

In re approval of Ordinance Atlantic Islands Gas Co. (1 N. J. P. U. C. 7, 1911).

In this case the board refused to approve an ordinance granting a franchise to supply gas in a field already supplied, saying, at pages 10 and 11:

"It is true that for a time a public utility may compete with another supplying the same body of consumers with the same service; but experience demonstrates that such competition is likely to be short-lived. The two competitors are influenced by the considerations of securing higher prices by the mutual cancellation of their competition, and not infrequently by the possibility of reducing costs by a union of parts

of their productive apparatus. Where actual fusion of the two erstwhile competing concerns does not result, a division of territory or joint agreements as to rates, prices, or service not uncommonly operate to leave consumers at the mercy of a virtual monopoly. The low prices prove but temporary, and the transient gain is succeeded by a long period of loss.

"That public opinion has come to recognize the almost inevitable outcome of such temporary competition between public utilities is evidenced by much recent legislation. The creation of various boards and commissions with supervisory powers over public utilities, and often with eventual powers of rate-fixing, demonstrates that the illusive doctrine of competition in this field is being superseded by an experimental régime of strictly regulated monopoly.

"Two other influential considerations operate in the same general direction. Where competing companies, with franchises, serving the same consumers, finally unite, the unnecessary duplication of plant and appliances entails a permanent burden upon the public. Even where prices, after due hearing, may be prescribed by public authority, some regard must be paid to the interests of bona fide investors. The prices set must have some reference to the capital legitimately sunk in the equipment of the formerly competing plants. It not infrequently results that the prices eventually authorized are higher than they would need to be, if no more than the necessary amount had been originally invested in plant and appliances adequate for the supply of consumers. Thus the evils of an ill-judged competitive experiment in a field unsuited therefor perpetuate themselves and burden the consuming public.

"It is hardly necessary to add that the unnecessary installation of pipe, conduits, mains, wires, tracks, and the like by two competing public utilities in the same region augments unwarrantably the disturbance of traffic through the public thoroughfares, and creates gratuitous nuisance."

In re application for approval of ordinance of city of Millville (1 N. J. P. U. C. 650, 1913).

Here the board refused to approve an ordinance granting a franchise to construct a competing gas plant, saying, at page 660:

"The approval of the franchise in question would threaten or seriously impair the legitimate investment now existing in the works and mains of the Millville Gas Light Co., and by implication every investment similarly circumstanced in this State. Such impairment can not be said to conserve the public interests. Bona fide investments in a public utility affording good service at a fair price are an essential part of the public interests."

In re application of Eastern Telegraph Co. for approval of ordinance (1 N. J. P. U. C., 733, 1913).

Here the board refused to approve an ordinance granting a franchise to construct a competing telephone line, saying, at pages 739 and 740:

"The communication of the Merchants' Association of New York, addressed on June 29, 1905, to the board of estimate and apportionment in opposition to the grant of a franchise to any independent company in that city, puts the matter in a nutshell, where it says:

" 'Competition in telephone service does not offer a choice of benefits, but compels a choice of evils—either a half service or a double price.'

"The New Orleans Board of Trade, in its report in 1903, reached the same conclusion, and concluded that 'the interests of the city will be best served by having only one system, provided always that the proper regulations as to service, rates, and extension of its business can be enforced so as to safeguard the rights of the public.' * * *

"The unnecessary duplication of plant in competitive telephone service, whether proportionately greater or less than in the case of other public utilities, is another weighty consideration against competitive service."

NEW YORK.

Electric Light & Power Co., 1 N. Y. P. S. C. 1st D. 226 (1903).

Here the commission refused to authorize a large issue of securities on the ground that they were to be used to construct a competing plant, which was unnecessary. The commission says at pages 249, 250, and 251:

"The whole electric history of New York City points the futility of competition. In the early days of the industry numerous companies were organized. From time to time they were absorbed, only to be followed by new companies frequently encouraged by the city with the idea that competition was the life of trade and that the more competition there was the better would be conditions. But the same procedure occurred again and again. The new companies were merged or swallowed up, until at the

present time there are but two electric supply companies operating in Manhattan, and these two companies, although nominally independent, are owned and controlled by the Consolidated Gas Co.

"The history of New York City has been duplicated in nearly every large city in the United States and in most of those in Europe, until at the present time there are few cities where there is genuine competition or where a customer who is dissatisfied with the service or the rates of one company may discontinue the service of that company and connect with another. Either the companies have been merged or consolidated, or the city has been apportioned among those still in existence, so that, even in the few instances where there is apparent competition in theory, there is in practice little real competition. This tendency is coming to be recognized as almost inevitable, and the many methods which at first were used to prevent it are being abandoned not only as futile but as detrimental to the best interests of the public. It is coming to be generally recognized that monopoly control of electric light, heat and power may be very beneficial to the public if the one company or the few noncompeting companies can be placed under such public regulation and control as will secure for the public a fair share in the many benefits arising from unified management. That competition can not be depended upon to protect the consumer from high prices and poor service has been fully demonstrated.

"*The advantages of united control.*—But putting to one side for the moment the question of how a fair share of these benefits is to be obtained for the public, let us ascertain in what they consist. In the first place, the existence of competing companies necessitates constant opening of the streets to provide service connections to the houses and street mains for the distributing wires. It is axiomatic that if there is but one company in an area, there will be but one service to a building ordinarily and but one system of street mains. If there are several companies, more than one service must be provided whenever a customer changes from one company to another, and duplicate distributing systems must be provided wherever there is real competition. To provide and maintain these additional services and mains means more frequent opening of the streets, more injury to pavements and ultimately more expense to the taxpayers—conditions which the public has been urging should be removed or reduced and not increased.

"Competition also involves duplication of generating plants and substations. Each company must provide sufficient plant not merely to supply the peak of the load, but to meet any accident which may occur. Machinery must at all times be held in reserve and when there are several independent companies, no one of which may take a momentary advantage of the reserve of the other, they all must maintain reserves very much in excess of what one company must keep where it may fall back upon any and all of its stations to meet a failure at one of them. Again, it is well known that one company can generate current for the whole of Manhattan much more cheaply than can several companies, each one of which undertakes to supply the entire borough. Further, the loss due to distribution is larger where there are several systems.

"The result of such duplication of capital and the less economical methods of production and distribution is that the cost of delivering current to the consumer is larger under competition than under efficient monopoly. It may be and often has been true that that competition has temporarily lowered rates and improved service, but this does not controvert the statement that the cost to one company of current is less than the cost to several. Competition has forced prices nearer to or below cost for the moment, but everyone knows that when the rate war has ceased, due to agreement or merger, prices have gone up and the consumer ultimately has paid the bill and has continued to pay interest and dividends upon duplicate capital, unless the State has stepped in."

In re Lockport Light, Heat & Power Co. (1 N. Y. P. S. C., 2d D. 12, 1907).

In authorizing a merger of competing gas and electric-light and power companies, the commission says:

"A business which supplies to a community a public utility, like gas or electricity for light or power, is one in which free and full competition between two companies engaged in the same business can not be expected to prevail permanently. Experience has, we think, amply demonstrated the fact that when there is more than one such company in a municipality engaged in the same business, while active competition may prevail for a more or less brief period, the companies generally find it to their interest to reach an understanding either as to prices or division of territory, and in the great majority of cases the two companies either become one or the control of both passes into the hands of the same parties. It can doubtless be demonstrated beyond any possibility of successful contradiction that better service and fairer prices in furnishing such public utilities to a community can, as a general rule, be given by one corporation than by several, and that this can be done with the use of less capital. The existence of more than one corporation fur-

nishing the same public utility leads, for a time at least, to duplicate development, to the building of plants which are not needed to serve the community, to the duplication of unsightly and expensive pole lines and distributing service, to costly and unnecessary tearing up and destruction of pavements, to administrative expenses greatly in excess of those which a single company would have to meet, and to increased leakage of gas or electric current. Undoubtledly municipalities have many times enjoyed periods of better service and lower prices by reason of temporary competition prevailing between two or more companies in the same field. After the almost inevitable consolidation, understanding, or division of territory, however, the service often becomes poor, and prices are raised in an effort to make the city and its inhabitants bear the burden involved in paying returns on the unnecessary capital invested in the duplicated plants. It is our belief that the provisions of the public-service commissions law show a full appreciation of these facts by the legislature of the State; for while the law forbids consolidation, either directly or indirectly, without the approval of this commission, it, at the same time, permits such consolidation whenever in the opinion of this commission it is for the public advantage; and recognizes that this may be the case by placing in the hands of the public-service commission great power designed to secure the community in that case against poor service or extortionate rates."

In re Niagara Falls Lighting Co. (2 N. Y. P. S. C., 2d D. 116, 1909).

In denying an application to establish a competing electric plant in the city o Niagara Falls, the commission says, at page 124:

"It is the opinion of the commission that reasonable rates to consumers in the city of Niagara Falls can be obtained through the exercise of the powers of the commission, with greater advantage to the public than by attempting to regulate such service through competition with all of its attendant disadvantages."

And continues at page 126:

"The policy of this commission, in cases where one lighting company seeks to enter a field already occupied by another, requires that the applicant shall show that the company already serving the community is not doing so adequately and efficiently and that its failures are such that they can not well be corrected by the exercise of the regulative powers of the commission. Good service may now be obtained at reasonable prices in less expensive ways than by unnecessary duplication of plants, and the public interest does not demand that capital invested in good faith in the public service should be destroyed or impaired without good reasons to be shown affirmatively."

In re Attorney General (124 App. Div. N. Y., 401, 1908).

In interpreting the action of the legislature in establishing the public service commission, the court says, at pages 406–408:

"It is the settled policy of the State to discourage competition of this character, and the reasons for the adoption of this policy have been clearly stated by the court of appeals (People ex. rel. N. Y. Electric Lines Co. *v.* Ellison, 1907; 188 N. Y., 523). By section 11 of the Gas and Electric Commission act of 1905 (ch. 737 of the Laws of 1905) it was provided that no corporation for the manufacture and supply of gas should exercise its power without first obtaining a certificate of authority from the commission, and the commission was authorized to withhold its certificate 'if the territory within which such corporation proposes to operate is already supplied by an ample and well-constructed system, furnishing the service which such corporation proposes to furnish at a fair and reasonable rate,' and while the act containing this provision has been superseded and repealed by the public service commissions law (ch. 429, Laws of 1907), that act continued the prohibition of the exercise of its powers by any gas or electrical corporation until it shall first have obtained the permission and approval of the proper commission provided for by the act. * * *

"As has already been shown, the power which the State retains and has exercised to fix a reasonable price upon the commodity, and to compel its delivery to any person desiring to purchase it, removes any danger of the especial vice which attaches to monopolies in other articles in common use, and, as has also been shown, the consolidation of control brought about by the purchases of stock complianed of does not in any proper sense create such a monopoly as the common law and our statutes condemn."

OKLAHOMA.

The Corporation Commission of Oklahoma has not yet been entrusted with power to regulate competition between utilities.

In its Fifth Annual Report for the year 1912, volume 1, page 11, it recommends that it can be given this authority by the legislature:

"We further recommend that a law be passed conferring jurisdiction upon the commission to [illegible]

light, telephone, or gas companies. The rates of all these utilities are now prescribed by the State through the commission, and if two telephone plants are established in one town it is only for the purpose of the stronger to drive out the weaker and forces the subscribers and especially the business portion of the town, to maintain two telephones, and interrupts service. In some cities we have gas plants established by the local citizens and the larger gas companies are securing franchises and driving the weaker ones out of business or making them sell their property at a great sacrifice. Such investments should be protected by the law of this State.

"This law should also include the paralleling of a telephone toll line for the purpose of driving the original line from the fields."

OREGON.

While the Railroad Commission of Oregon as yet has no express power to regulate competition between public utilities, its attitude may be seen plainly from the following;

Extract from letter of Railroad Commission of Oregon to Mr. P. W. Todd, city recorder, Tillamook, Oreg., dated October 18, 1913:

"For the reason that the State has supervision over service as well as rates and can compel reasonable and adequate service and reasonable and just rates for all public-utility companies doing business within the State, we can see no particular reason for competition, especially in small cities and communities. Because the public-service corporations are supposed to be entitled to a reasonable return on their investment, we do not believe that the public should be burdened with a return on duplications of investment and the territory of an existing public-utility company be invaded by a competing company while the utility already in existence can be required to serve the public wherever there is a sufficient demand, and for these reasons we have discouraged competition among utilities where there is no absolute necessity therefor.

"This commission, however, is not given authority to issue a certificate of public necessity and convenience, as is done in many of the States, and prevent companies from competing with each other for such service as may be demanded of them. We believe that reasonable restrictions should be placed by those having authority so to do upon ruinous and unjust competition, for the burden eventually falls upon the public. One or the other of the competing companies is absorbed or fails, and the stronger competitor in the end controls the situation."

Extract from letter of Railroad Commission of Oregon to Mr. E. J. Claussen, Tillamook, Oreg., dated October 27, 1913:

"It is now coming to be recognized that competition can not in all instances regulate rates in public utilities and that one company properly regulated and administered can generally give better and cheaper service than two. It is waste of capital and a disadvantage to a city to have two sets of telephone or electric-light wires and poles encumbering the streets when one can be made to serve the same purpose. Most utilities are natural monopolies, and the highest efficiency and the lowest rates are only possible when each one has the entire business of a given city or territory. Now that we have the right and duty to regulate all public-service corporations, the ill effects of monopoly may be escaped and at the same time the beneficial results of economy and efficiency realized. * * *

"Wherever competition exists it has been the history of the past that the weaker competitor is absorbed by the stronger and the benefits to be derived from competition thereby lost."

PENNSYLVANIA.

In re application Schuylkill Light, Heat & Power Co.

Reported Electrical Review for April 18, 1914, at page 780.

Here the commission dismissed an application to furnish service in competition with a company which already occupied the field. The commission said:

"Long experience has shown that while the temporary effect of competition between public utilities occupying the same territory is to secure lower rates, the final result is likely to be the absorption of one by the other and then an increase of rates to pay the expense of the warfare."

Reported also in New York Evening Post, April 30, 1914.

The commission held "that a reliance upon competition between public-service companies for securing adequate service and proper rates has not been successful, and that hereafter supervision by properly constituted authorities is to be substituted."

This was the first case of its kind before the public-service commission of Pennsylvania.

In re application Harmony Electric Co.

Here the commission dismissed an application for permission to render service pursuant to an ordinance of the borough of Ellwood, Ellwood City, on the ground that the district was already served by the Pennsylvania Power Co. The commission said:

"Vested rights and interests must be duly conserved and protected. The commission has no warrant to invite or permit limited competition anywhere unless the area and population served, the need of the community or the prospects of the municipality, as based on its growth and development, reasonably show that the public welfare demands it. This principle of protection must be extended to the public utility to the end that the individual citizens, who have invested in its plant equipment in good faith, may be duly protected in their interests."

WISCONSIN.

In re application La Crosse Gas & E. Co. (2 W. R. C. R. 3, 1907).

In granting an application to increase rates for electric light and power, on the ground that owing to competitive conditions rates had been reduced below cost of production, the commission said, at page 5:

"There are many important differences between public-service corporations and ordinary commercial enterprises. The former usually require a much larger investment in plant, equipment, and other fixed property, which in turn means heavy annual charges for interest, repairs, and maintenance. The conditions which surround the former are also of such character that the services which they render can usually be furnished at a much lower cost by one plant than by two or more in the same locality. The differences between them are not even limited to the facts named and to other facts of a similar character, but extend to the principles of competition. In most of the ordinary commercial undertakings the expenses can usually be stopped whenever competition has reduced prices below a profitable level. But this can not be done in the case of public-service corporations. The investment in these corporations can not be withdrawn or often converted into other purposes. The interest and the maintenance charges go on at about the same rate whether the plant is in operation or not. Hence it often happens that it is better for the owners that such plants should be kept in operation, even if they fail to earn more than the actual operating expenses. Duplication of such plants is a waste of capital whenever the services can be adequately furnished by one plant. It necessarily means that interest and maintenance must be earned on a much greater, if not twice as great an investment, and that the actual cost of operation is likely to be relatively higher. Competition in this service therefore usually means a bitter struggle and low rates until one of the contestants is forced out of the field, when the rates are raised to the old level, if not above it, or to a combination or understanding of some sort between them which also ultimately results in higher rates. In this way it often happens that the means which were thought to be the preventative of onerous conditions become the very agents through which such conditions are imposed. In fact, active and continuous competition between public-utility corporations furnishing the same service to the same locality seems to be out of the question. This has been shown by experience. Such competition is also contrary to the very nature of things. Two distinct and separate corporations are not likely to remain separate very long after it becomes clear that the services rendered by both can be more cheaply and more effectively furnished by only one of them."

In re investigation Milwaukee lighting rates (9 W. R. C. R., 511, 1912).

The commission says, at pages 553 and 554:

"That competition in the very nature of things can not be a proper regulator of rates and other conditions in the public utility field would seem to be too well understood for discussion. A real competition in this field means duplications of plants, which duplications, when once put in, are for the most part useless for any other purpose than that for which they were intended, and which duplication, unlike current capital, can not be withdrawn from the service and used for other purposes. It also means excessive outlays for fixed and operating expenses. Again, it stands for unnecessary tearing up and occupation of already overcrowded streets and alleys, the possible duplication of services on customers' premises, and for many other inconveniences and costs.

"The question in point is illustrated by the situation in Milwaukee. In this city the Milwaukee Electric Railway & Light Co. obtained a franchise to serve the entire city. This company is so situated that when the size of its business, the reserve requirements, the probable extra demand upon it that may arise at any time, and other factors are taken into consideration, it is quite obvious that the plant and equipment it has to maintain can not be much if any smaller than would be

required if it had to furnish all the services needed in the entire city. Instead of requiring this company alone to furnish all of these services, the city adopted the policy of permitting other companies to come in and share it, or compete for the business. These companies also must be provided with plants and other equipment, including reserve requirements, as well as business and operating organizations. The inevitable result of this is that in this city much more property, much more in the way of supplies, labor, and services of all kinds, are employed in furnishing electric energy for lighting and power purposes than would be the case if only one company with one set of organizations had been required to perform all this work. These duplications cost money. They stand for greater depreciation and interest charges as well as for higher operating expenses than would otherwise be needed. Just how much these extra costs foot up to is a matter that can only be fully determined by detailed investigations. But from the fact that each of the separate companies maintain separate plants and separate organization all along the line, it is fair to assume that it amounts to large sums each year."

Calumet Service Co. v. City of Chilton, decision of Wisconsin Supreme Court, reported in Public Service Regulation for April, 1912, at pages 223-226.

The court, in affirming the powers of the Wisconsin commission under section 1797m (77 of the Wisconsin law), says:

"That one of the principal mischiefs sought to be remedied by the new system was elimination of the conditions promotive of hostilities between municipalities and public-utility companies, after making large investments by permission and invitation to serve the public directly as well as indirectly—bitter controversies, sometimes for good reasons and sometimes not, but in any event at the expense of consumers of the product—seems quite certain.

"It likewise seems certain that one of the major means for attaining the desired end was elimination of excessive investments, and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments or threatened encroachments upon an occupied field of public service without any public necessity therefor. Doubtless an unvarying and invariable economic law was squarely faced and appreciated that all such subjects for elimination represent waste, which if not avoided would, in the main, fall on the product, increasing the cost of service per unit and be paid by the consumers. It was the interests of consumers which was the prime subject of legislative solicitude, such object to be conserved without injustice to others.

"In the situation pictured it could not have escaped legislative consideration and necessarily would not have been considerately left unguarded against that in the cities and villages of the State; in general, public-utility service at the lowest practicable rates with the highest practicable efficiency is impossible without combining the municipal service with that of others.

"Further, it could not well have escaped appreciation and been left unguarded against, that one of the fruitful sources of waste to ultimately fall, largely if not wholly, on consumers, and fruitful sources of wasteful controversies and injustice to owners of existing investments, many of whom were bondholders, as in this case, was opportunity for municipalities to unreasonably menace existing investments by threatening to displace, or actually displacing, in whole or in part, existing public utilities in cases where proper regulation would secure efficient operation."

UNITED STATES.

Mayor and Aldermen of the City of Knoxville v. Knoxville Water Co. (212 U. S., 1).

The United States Supreme Court, recognizing the monopolistic character of the public utility, said:

"Regulation of public-service corporations which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on."

Willcox v. Consolidated Gas Co. (212 U. S. 19, 1909).

Peckham, J., at page 49, says:

"In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply."

Legislation Illustrating Recognition of the Principle of Regulated Monopoly as a Method of Control for Public Service Corporations.

POWER TO PURCHASE STOCK.

The following States have laws which empower their commissions to permit one utility to purchase the stock of another:

Arizona. Laws, 1912, chapter 90, section 51b.
California. The public utilities act of 1912, section 51b.
Colorado. Laws, 1913, chapter 127, section 36b (in referendum).
District of Columbia. Public acts, No. 435, approved March 4, 1913, section 8, paragraph 54, but see section 11, which apparently requires express congressional authority also.
Illinois. The public utilities commission law of 1913, section 27e.
Indiana. The Shively-Spencer utility act of 1913, section 95.
Kansas. Laws, 1911, chapter 238, section 27.
Maine. The public utilities commission act of 1913, section 38 (in referendum).
Maryland. The public service commission law of 1910, section 35.
Missouri. Public service commission law of 1913, section 74-2.
New Hampshire. Laws, 1911, chapter 164, section 13c.
New Jersey. Laws, 1911, chapter 195, section 19.
New York. Laws, 1907, chapter 429, sections 54, 70, and 100.
Ohio. The general code, section 614-60.
Pennsylvania. The public service company law of 1913, Article III, section 6c.

As a rule the laws cited above require that before any public utility can purchase the stock of another it shall secure the permission of the commission, or the same idea is expressed in reverse fashion by providing that no utility shall purchase the stock of another without previous permission from the commission. Frequently these laws make express provision for the consolidation of utilities competing in the same city.

POWER TO PURCHASE PROPERTY AND FRANCHISES.

The following States have laws which empower their commissions to permit one utility to purchase the property and franchises of another:

Arizona.—Laws 1912, chapter 90, section 51a.
California.—The public utilities act of 1912, section 51a.
Colorado.—Laws 1913, chapter 127, section 36a. (In referendum.)
District of Columbia.—Public acts, No. 435; approved March 4, 1913, section 8, paragraph 54.
Illinois.—The public utilities commission law of 1913, sections 95 and 95½.
Indiana.—The Shively-Spencer Utility Act of 1913, section 95.
Kansas.—Laws 1911, chapter 238, section 36.
Maine.—The public utilities commission act of 1913, section 38. (In referendum.)
Maryland.—The public service commission law of 1910, section 35.
Massachusetts.—Revised laws, chapter 121, section 22; acts 1908, chapter 529, sections 2, 4, and 5.
Missouri.—Public service commission law of 1913, section 74-1.
New Hampshire.—Laws 1911, chapter 164, section 13b.
New Jersey.—Laws 1911, chapter 195, section 18h.
New York.—Laws 1907, chapter 429, sections 54 and 70.
Ohio.—The general code, section 614-60.
Pennsylvania.—The public service company law of 1913, article 3, section 3c.
Wisconsin.—Laws 1911, chapter 593.

As a rule, the laws cited above, require that before any public utility can purchase the property or franchises of another, it shall secure the permission of the commission, or the same idea is expressed in reverse fashion by providing that no utility shall purchase the property or franchises of another without previous permission from the commission. Frequently these laws make express provision for the consolidation of utilities competing in the same city.

63D CONGRESS, 2D SESSION.

H. R. 15657.

IN THE HOUSE OF REPRESENTATIVES.

APRIL 14, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; section seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend

sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or within the District of Columbia or any Territory of the United States.

SEC. 2. That any person engaged in commerce who shall discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy the business of a competitor, either of such purchaser or the seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court. Corporations shall be deemed persons within the meaning of this section, and when any corporation shall be guilty of a violation of this section, the offense shall be deemed to be also that of the individual directors or other officers or employees of such corporation ordering or doing the prohibited act, and upon conviction

they shall be punished as provided in this section: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers. It shall be unlawful for the owner or operator of any mine engaged in selling its product in commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

SEC. 3. That any person engaged in commerce, who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, or understanding, that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or both, in the discretion of the court. Corporations shall be deemed persons within

the meaning of this section, and when any corporation shall be guilty of a violation of this section, the offense shall be deemed to be also that of the individual directors or other officers or employees of such corporation ordering or doing the prohibited acts, and upon conviction they shall be punished as provided in this section.

SEC. 4. That any person, copartnership, association, or corporation, which shall be injured in his or its business or partnership by any person, copartnership, association, or corporation, by reason of anything forbidden by section two or section three of this Act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him or it sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That whenever in any suit or proceeding in equity, brought by or on behalf of the United States under any of the antitrust laws, there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of

the antitrust laws, said judgment or decree shall to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such defendant, constitute in favor of or against such defendant, conclusive evidence of the same facts, and be conclusive as to the same issues of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws. Whenever any suit or proceeding in equity is brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 6. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural or horticultural organizations, orders or associations operating under the lodge system, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders or associations from carrying out the legitimate objects of such associations.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole, or any part, of

the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment, and not using the same by voting or otherwise to bring about, or in attempting to bring about, the lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches thereof, or from owning and holding all, or a part of, the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make legal stockholding relations between corporations when, and under such circumstances that, such relations constitute violations of the anti-trust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the construction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent any railroad company from extending any of its lines.

A violation of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000, or by imprisonment, not exceeding one year, or both, in the discretion of the court, and any violation by a corporation shall be deemed to be also the offense of its individual officers or directors, ordering, doing, or partici-

pating in, the prohibited act, and upon conviction, they shall be punished as herein provided.

SEC. 8. That from and after two years from the date of the approval of this Act, no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or maintenance of, railroads, or other common carriers engaged in commerce, shall act as a director or other officer or employee of any common carrier engaged in commerce, to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he, or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance; and, after the expiration of said period, no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company, shall act as a director, or other officer or employee, of any such common carrier, for which he, or such partnership, or bank, or trust company, acts, either separately or in connection with others, as agent in the disposal of, or is interested in the underwriting of, or from which he or such partnership, or bank, or trust company, purchases, either separately, or in

connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized and operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker, or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000, shall be elligible to be a director in any bank or banking association organized and operating under the laws of the United States.

No bank, banking association, or trust company organized and doing business under the laws of the United States in any city or town or more than one hundred thousand inhabitants shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place.

That from and after two years from the date of the approval of this Act no person at the same time shall be a

director in any two or more corporations engaged in whole or in part in commerce, other than common carriers, subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 9. That any suit, action or proceeding under the antitrust laws, against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 10. That subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the Federal antitrust laws, may run into any other district.

SEC. 11. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws, the offense shall be deemed to be also that of the individual

directors, officers, and agents of such corporation authorizing, ordering, or doing any of such prohibited acts, and upon conviction thereof they shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

SEC. 12. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition, setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the

court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 13. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damgae by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier, subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 14. That no injunction, whether interlocutory or permanent, in cases other than those described in section two hundred and sixty-six of an Act entitled "An Act to

codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, shall be issued without previous notice and an opportunity to be heard on behalf of the parties to be enjoined, which notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction will be based, shall be served upon the parties sought to be enjoined a reasonable time in advance of such application. But if it shall appear to the satisfaction of the court or judge that immediate and irreparable injury is likely to ensue to property or a property right right of the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon, the court or judge may, in his discretion, issue a temporary restraining order without notice. Every such order shall be endorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension

shall be entered of record, and section two hundred and sixty-three of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

SEC. 15. That no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 16. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 17. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seek-

ing employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing

which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 18. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 19. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be

directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if, for any reason, it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or

imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct; but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 20. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge, of any district court of the United States.

SEC. 21. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command

entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section eighteen of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 22. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

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[SECOND COMMITTEE PRINT.]

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

APRIL 22, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend

sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular or other possessions of the United States, or between any such possession and any State or Territory of the United States or the District of Columbia or with a foreign nation, or within the District of Columbia or any Territory or any insular or other possession of the United States.

That the word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That any person engaged in commerce who shall discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy the business of a competitor, either of such purchaser or the

seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or imprisonment not exceeding one year, or both: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transporattion: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section four of this Act.

SEC. 3. That it shall be unlawful for the owner or operator of any mine engaged in selling its product in commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase, and any persons violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

SEC. 4. That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares,

merchandise, machinery, supplies, or other commodities, of a competitor or competitors of the lessor or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 5. That any person who shall be injured in his business or property by reason of anything forbidden in the preceding sections of this Act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him or it sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has nor monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree

would constitute in any other proceeding an estoppel as between the Government and such defendant, constitute in favor of or against such defendant, conclusive evidence of the same facts, and be conclusive as to the same issues of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws. Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations, operating under the lodge system, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders or associations from carrying out the legitimate objects of such associations.

Nor shall anything herein contained be construed to forbid associations of traffic, operating, accounting, or other

officers of common carriers for the purpose of conference and agreement among themselves as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission; but any agreement in the premises shall likewise continue to be subject to the regulating or supervisory jurisdiction of the commission.

SEC. 8. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by

voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make legal stockholding relations between corporations when and under such circumstances that such relations constitute violations of the antitrust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the construction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial com-

petition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent any railroad company from extending any of its lines through the medium of the acquisition of stock or otherwise of any other railroad company where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

A violation of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 9. That from and after two years from the date of the approval of this Act no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or maintenance of railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of

construction or maintenance; and after the expiration of said period no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company shall act as a director or other officer or employee of any such common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized and operating under the laws of the United States either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker, or person, who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000, shall be eligible to be a director in any bank or

banking association organized and operating under the laws of the United States: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares.

No bank, banking association, or trust company organized and doing business under the laws of the United States in any city or town of more than one hundred thousand inhabitants shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, either of which has capital stock, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore by virtue of their business and location of operation competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be

punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 10. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 11. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the Federal antitrust laws may run into any other district.

SEC. 12. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual directors, officers, and agents of such corporation who shall authorize, order, or do any of such prohibited acts, and upon conviction thereof they shall be deemed guilty of a misdemeanor and punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 13. That the several district courts of the United States are hereby invested with jurisdiction to prevent and

restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 14. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threat-

ened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 15. That no injunction, whether interlocutory or permanent, in cases other than those described in section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, shall be issued without previous notice and an opportunity to be heard on behalf of the parties to be enjoined, which notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction will be based, shall be served upon the parties sought to be enjoined a reasonable time in advance of such application. But if

it shall appear to the satisfaction of the court or judge that immediate and irreparable injury is likely to ensue to property or a property right of the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon, the court or judge may, in his discretion, issue a temporary restraining order without notice. Every such order shall be indorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record, and section two hundred and sixty-three of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

SEC. 16. That, except as otherwise provided in section fourteen of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge

may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 17. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 18. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees,or betweeen employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in

the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 19. That any person who shall wilfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so

done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 20. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if, for any

reason, it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct; but in no case shall the fine to be paid to the United States

exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 21. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now procided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge, of any district court of the United States or any court of the District of Columbia.

SEC. 22. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section eighteen of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 23. That no proceeding for contempt shall be

institued against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

[THIRD COMMITTEE PRINT.]

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

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A BILL

To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government,

and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

That the word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That any person engaged in commerce who

shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy the business of a competitor, either of such purchaser or the seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or imprisonment not exceeding one year, or both, in the discretion of the court: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this Act.

SEC. 3. That it shall be unlawful for the owner or operator of any mine engaged in selling its product in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

SEC. 4. That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities, of a competitor or competitors of the lessor or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 5. That any person who shall be injured in his business or property by reason of anything forbidden in the preceding sections of this Act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him or it sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have

been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such defendant, constitute in favor of or against such defendant, conclusive evidence of the same facts, and be conclusive as to the same issues of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws. Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural

organizations, orders, or associations operating under the lodge system, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders or associations from carrying out the legitimate objects of such associations.

Nor shall anything herein contained be construed to forbid associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conference and agreement among themselves as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission; but any such matter that shall be made the subject of agreement by any such association shall likewise continue to be subject to the regulating or supervisory jurisdiction of the commission.

SEC. 8. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect

of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or substantially lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make stockholding relations between corporations legal when such relations constitute violations of the antitrust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the con-

struction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent any railroad company from extending any of its lines through the medium of the acquisition of stock or otherwise of any other railroad company where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

A violation of any of the provisions of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 9. That from and after two years from the date of the approval of this Act no person who is engaged as an individual, or who is a member of a partnership, is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or

maintenance of railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance; and after the expiration of said period no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company shall act as a director or other officer or employee of any such common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized and operating under the laws of the United States either of which has

deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker, or person, who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000, shall be eligible to be a director in any bank or banking association organized and operating under the laws of the United States.

No bank, banking association, or trust company organized and doing business under the laws of the United States in any city or incorporated town or village of more than one hundred thousand inhabitants shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, either of which has capital stock, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the Act to regulate commerce, approved February fourth, eighteen

hundred and eighty-seven, if such corporations are or shall have been theretofore by virtue of their business and location of operation competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 10. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 11. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district.

SEC. 12. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual directors, officers, and agents of such corporation who shall have authorized, ordered, or done any of such prohibited

acts, and upon conviction thereof they shall be deemed guilty of a misdemeanor and punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 13. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 14. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carirer subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 15. That no injunction, whether interlocutory or permanent, in cases other than those described in section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, shall be

issued without previous notice and an opportunity to be heard on behalf of the parties to be enjoined, which notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction will be based, shall be served upon the parties sought to be enjoined a reasonable time in advance of such application. But if it shall appear to the satisfaction of the court or judge that immediate and irreparable injury is likely to ensue to property or a property right of the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon, the court or judge may, in his discretion, issue a temporary restraining order without notice. Every such order shall be indorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record, and section two hundred and sixty-three of the Act entitled "An Act to codify, revise, and amend

the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

SEC. 16. That, except as otherwise provided in section fourteen of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 17. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 18. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute

concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 19. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 20. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a certain day why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided,*

however, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if, for any reason, it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such

fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct; but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 21. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge, of any district court of the United States or any court of the District of Columbia.

SEC. 22. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the

name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section nineteen of this Act, may be punished in conformity to the usuages at law and in equity now prevailing.

SEC. 23. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

[FOURTH COMMITTEE PRINT.]

63D CONGRESS, 2D SESSION. } **H. R.**

IN THE HOUSE OF REPRESENTATIVES.

MAY 1, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government,

and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price be-

tween different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the court: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this Act.

SEC. 3. That it shall be unlawful for the owner or operator of any mine or for any person controlling the product of any mine engaged in selling its product in commerce to refuse arbitrarily to sell such product to a responsible

person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

SEC. 4. That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or of the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceding one year, or by both, in the discretion of the court.

SEC. 5. That any person who shall be injured in his business or property by reason of anything forbidden in

the antitrust laws, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such defendant, constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws.

Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof.

Nothing contained in the antitrust laws shall be construed to forbid associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conferring among themselves or of making any lawful agreement as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission, but all such matters shall continue to be subject to such jurisdiction of the commission, and all such agreements shall be entered and kept of record by the carriers, parties

thereto, and shall at all times be open to inspection by the commission: *Provided*, That nothing in this Act shall be construed as modifying existing laws prohibiting the pooling of earnings or traffic, or existing laws against joint agreements by common carriers to maintain rates.

SEC. 8. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring

about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or substantially lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make stockholding relations between corporations legal when such relations constitute violations of the antitrust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the construction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring

the property or an interest therein, nor to prevent any railroad company from extending any of its lines through the medium of the acquisition of stock or otherwise of any other railroad company where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

A violation of any of the provisions of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 9. That from and after two years from the date of the approval of this Act no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or maintenance of railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance; and after the expiration of said

period no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company shall act as a director or other officer or employee of any such common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized or operating under the laws of the United States either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director under the

foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election.

No bank, banking association, or trust company organized or operating under the laws of the United States in any city or incorporated town or village of more than one hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section

shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be

punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 10. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 11. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district.

SEC. 12. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual directors, officers, and agents of such corporation who shall have authorized, ordered, or done any of such prohibited acts, and upon conviction thereof they shall be deemed guilty of a misdemeanor and punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 13. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the

several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 14. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by

courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 15. That no injunction, whether preliminary or permanent, in cases other than those described in section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, shall be issued without previous notice and an opportunity to be heard on behalf of the parties to be enjoined, which notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction is based, shall be served upon the parties sought to be enjoined a reasonable time in advance of the hearing of such application.

No temporary restraining order shall be granted without notice to the opposite party, unless it shall clearly appear from specific facts shown by affidavit, or by the verified bill, that immediate and irreparable injury, loss, or damage will result to property or a property right of the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record. Such matters shall be given precedence of all matters except older matters of the same character; and when such matters come up for hearing, the party obtaining the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so, the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order

the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

SEC. 16. That, except as otherwise provided in section fourteen of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 17. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 18. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving

to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 19. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 20. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the

affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the

practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 21. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in ciminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge, of any district court of the United States or any court of the District of Columbia.

SEC. 22. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section nineteen of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 23. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

[COMMITTEE PRINT.]

63D CONGRESS, 2D SESSION. } **H. R. 15657.**

IN THE HOUSE OF REPRESENTATIVES.

MAY 2, 1914.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen

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hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or

different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this act.

SEC. 3. That it shall be unlawful for the owner or operator of any mine or for any person controlling the product of any mine engaged in selling its products in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United

States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

SEC. 4. That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 5. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue therefor in any district court of the United States in the district in which the defendant

resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws.

Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each

and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof.

Nothing contained in the antitrust laws shall be construed to forbid associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conferring among themselves or of making any lawful agreement as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission, but all such matters shall continue to be subject to such jurisdiction of the commission, and all such agreements shall be entered and kept of record by the carriers, parties thereto, and shall at all times be open to inspection by the commission: *Provided*, That nothing in this Act shall be construed as modifying existing laws prohibiting the pooling

of earnings or traffic, or existing laws against joint agreements by common carriers to maintain rates.

SEC. 8. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of sub-

sidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or substantially lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make stockholding relations between corporations legal when such relations constitute violations of the antitrust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the construction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent any railroad company from extending any of its lines through the medium of the acquisition of stock or otherwise of any other

railroad company where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

A violation of any of the provisions of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 9. That from and after two years from the date of the approval of this Act no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or maintenance of, railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance; and after the expiration of said period no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation which is engaged in the conduct of a bank or

trust company shall act as a director or other officer or employee of any such common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized or operating under the laws of the United States either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $2,500,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking asso-

ciation, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election.

No bank, banking association, or trust company organized or operating under the laws of the United States in any city or incorporated town or village of more than one hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 10. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 11. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district.

SEC. 12. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws, the offense shall be deemed to be also that of the individual directors, officers, or agents of such corporation; and upon the conviction of the corporation any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 13. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain

such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 14. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the

danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 15. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to property or a property right of the applicant before notice could be served or hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix. In case a temporary restraining order shall be granted

without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 16. That, except as otherwise provided in section fourteen of this Act, no restraining order or interlocutory

order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 17. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 18. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which

injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 19. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the

District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 20. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer,

and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct,

but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 21. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge, of any district court of the United States or any court of the District of Columbia.

SEC. 22. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section nineteen of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 23. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceeding in contempt pending at the time of the passage of this Act.

House Report No. 627, Sixty-third Congress, Second Session.

ANTITRUST LEGISLATION.

MAY 6, 1914.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

(To accompany H. R. 15657.)

The Committee on the Judiciary, having had under consideration the bill (H. R. 15657) to supplement existing laws against unlawful restraints and monopolies, and for other purposes, report the same back with the recommendation that the bill be amended as follows, and that, as amended, it do pass.

Amendment: Strike out all after the enacting clause and insert in lieu of the language stricken out the following:

That "antitrust laws," as used herein, includes the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United State or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either

such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of difference in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this act.

SEC. 3. That it shall be unlawful for the owner or operator of any mine or for any person controlling the product of any mine engaged in selling its product in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

SEC. 4. That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 5. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws.

Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity.

SEC. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof.

Nothing contained in the antitrust laws shall be construed to forbid associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conferring among themselves or of making any lawful agreement as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission, but all such matters shall continue to be subject to such jurisdiction of the commission, and all such agree-

ments shall be entered and kept of record by the carriers, parties thereto, and shall at all times be open to inspection by the commission: *Provided*, That nothing in this act shall be construed as modifying existing laws prohibiting the pooling of earnings or traffic, or existing laws against joint agreements by common carriers to maintain rates.

SEC. 8. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to eliminate or substantially lessen competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this paragraph shall make stockholding relations between corporations legal when such relations constitute violations of the antitrust laws.

Nor shall anything herein contained be construed to prohibit any railroad corporation from aiding in the construction of branch or short line railroads so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch line, nor to prevent any railroad corporation from acquiring and owning all or any part of the stock of a branch or short line railroad constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent any railroad company from extending any of its lines through the medium of the acquisition of stock or otherwise of any other railroad company where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

A violation of any of the provisions of this section shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 9. That from and after two years from the date of the approval of this act no person who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation that is engaged in the business, in whole or in part, of producing or selling equipment, materials, or supplies to, or in the construction or maintenance of, railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he, or such partnership or corporation, sells or leases, directly or indirectly, equipment, materials, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance; and after the expiration of said period no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company shall act as a director or other officer or employee of any such common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carrier.

That from and after two years from the date of the approval of this act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized or operating under the laws of the United States either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more that $2,500,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director has been elected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter under said election. No bank, banking association, or trust company organized or operating under the laws of the United States in any city or incorporated town or village of more than one hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association, or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter.

That any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of $100 a day for each day of the continuance of such violation, or by imprisonment for such period as the court may designate, not exceeding one year, or by both, in the discretion of the court.

SEC. 10. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found.

SEC. 11. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district.

SEC. 12. That whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws, the offense shall be deemed to be also that of the individual directors, officers, or agents of such corporation; and upon the conviction of the corporation any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

SEC. 13. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 14. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 15. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to property or a property right of the applicant before notice could be served or hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 16. That, except as otherwise provided in section fourteen of this act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 17. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 18. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

SEC. 19. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or at common law, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 20. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

SEC. 21. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 22. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same and all other cases of contempt not specifically embraced within section 19 of this act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 23. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this act.

Your committee, after the delivery of a message by the President of the United States, on January 20 last, to the Congress, making certain recommendations relating to the matter of trusts and monopolies, immediately prepared and published tentative bills which were designed to give legislative expression to the views contained in the President's message, and in order that the country might be given ample time to discuss them, the committee conducted public hearings until April 4, at which time they were concluded. This method of dealing with so large a question, though new, met with general response from the business interests of the country, large and small; and though these hearings imposed upon the committee months of tedious labor they were exceedingly helpful to all concerned. The salient principle of the tentative bills as finally agreed upon with additional provisions have been embodied in the one comprehensive bill now reported.

The atmosphere of antagonism which such legislation might ordinarily be expected to encounter has not always been present and the entire question has consequently been approached with dispassionate fairness. There has been a liberal exchange of views between the committee and those who, from a business standpoint, must first adjust themselves to new conditions, and prduent, thoughtful, patriotic men seem to be agreed that the bill as proposed will go far to bring about business readjustment with as few, as slight, as easy, and simple changes as the object sought will admit of. "Nothing essential has been disturbed, nothing torn up by the roots, no parts rent asunder which can be left in wholesome combination."

The bill is not designed to destroy or hinder business, but on the contrary, to help business and the whole people of the country who

are related to or affected by it. The able and patriotic message of the President has been ever before us and the program which he proposed is contained in the provisions of the bill, and if enacted into law will in truth be " additional articles in our constitution of peace—the peace which is honor and freedom and prosperity."

ANALYSIS OF THE BILL.

I.

DEFINITIONS OF TERMS.

Section 1 of the bill defines technically for the purposes of this bill certain words, phrases, and terms used in the body of the bill. The definitions thus given are designed merely for convenient reference and to avoid repetition. The definition of commerce, it will be observed, is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts. The act approved July 2, 1890, and commonly referred to as the Sherman law, and supplementary legislation pertaining to the same subject, are restricted in application to commerce among the several States and Territories, the District of Columbia, and with foreign nations. Your committee can conceive of no good reason why the insular possessions or other places now under the jurisdiction of the United States should not be included within the provisions of our antitrust laws, and with this idea in view we have accordingly in this bill broadened the scope of these laws so as to make them applicable to all places under the jurisdiction of the United States.

II.

PRICE DISCRIMINATIONS.

Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption, or resale within the United States or any place within its jurisdiction, when such discrimination is made with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, either of such dealer or seller. It will be observed that the language used makes this section applicable only to domestic commerce, or, in other words, its application is restricted to commerce carried on in the United States, or in places under the jurisdiction thereof, and has no reference to commodities sold either

in this country or abroad which are intended solely for our export trade. The violation of any of the provisions of this section is made a misdemeanor, and is made punishable by fine or imprisonment, or both. There are two provisos in this section which are important. The first proviso permits discrimination in prices of commodities on account of differences in grade, quality, and quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation. The second proviso permits persons selling goods, wares, and merchandise in commerce to select their own customers, except as provided in section 3, which will be considered later. The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce.

The necessity for such legislation is shown by the fact that 19 States have enacted laws forbidding this particular form of discrimination within their borders. These State statutes have practically all been enacted in the last few years, and most of them in the years 1911, 1912, and 1913. It is important that these State statutes be supplemented by additional legislation by Congress, for it is now possible for one of these great corporations doing business in not only the 48 States but throughout the world to lower the prices of its commodities in a particular State and sell within that State at a uniform price in compliance with State laws, and thereby destroy the business of all independent concerns and competitors operating within the State. The loss incurred by such gigantic effort in destroying competition can be more than regained by general increase in the prices of their commodities in other sections. In fact, complaint has been made to your committee that efforts have been made by certain great corporations engaged in commerce in some of the States which have enacted statutes forbidding such discrimination to circumvent the State laws by the methods above described. In seeking to enact section 2 into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as

it is within the power of Congress to deal with the subject. This we think is accomplished by section 2 of this bill. As further showing the necessity for such legislation, we call attention to the States which have heretofore adopted statutes varying in form but for the purpose of preventing unfair discriminations in price, as follows:

1. Arkansas, act 1905, as amended March 12, 1913.
2. Idaho, antitrust act of 1911.
3. Iowa, Revised Statutes.
4. Louisiana, act of 1908.
5. Missouri, Revised Statutes.
6. Nebraska, act of 1913.
7. New Jersey, act 1913.
8. North Carolina, act 1913.
9. Oklahoma, act 1913.
10. South Carolina, act 1902.
11. Utah, act 1913.
12. Wisconsin, act 1913.
13. Wyoming, Revised Statutes, 1911.
14. Kansas, act 1905.
15. Michigan, act 1913.
16. Massachusetts, act 1912.
17. Montana, act 1913.
18. North Dakota, act of 1913.
19. California, act 1913.

III.

MINE PRODUCTS.

Section 3 of the bill makes it unlawful for the owner or operator of a mine, or the person controlling the sale of the product thereof in commerce, to arbitrarily refuse to sell such product to a responsible person who applies to purchase the same. This section, like section 2, is limited in its application to the United States and to places under the jurisdiction thereof, and has no reference to persons desiring to purchase such a product for export sale. In that case the seller is permitted to arbitrarily refuse to sell to a responsible bidder, for otherwise a foreign dealer being responsible might purchase the entire output of a mine, to the detriment of manufacturers and dealers in the United States and the owner be powerless to prevent it. The section is based on the broad conservation idea that natural products, such as iron, coal, and other minerals stored in the earth as the result of nature's laws, should not be monopolized by the mere acquisition of the title to the lands which contain such resources. The design is to prevent those who have acquired or may acquire a monopoly or partial monopoly of mines from discriminating against certain manufacturers, railroads, or other persons who need the products of the mines in carrying on their industries where the commodity is used in its crude state, as coal, and, further, to prevent arbitrary discrimination against responsible purchasers who desire to obtain such products for use or consumption or for resale to persons who desire to purchase same for use or consumption.

This provision is new, but in view of the fact that many railroad corporations, the United States Steel Corporation, and other cor-

porations have acquired and own, either directly or indirectly, through the medium of subsidiary corporations, vast areas of land containing coal, iron, and copper and other minerals in common use, we feel that this legislation is needed and fully justified. By its enactment into law we make it impossible for mere ownership of mines to enable the owners or those disposing of the products thereof to direct the disposal of such products into monopolistic channels of trade. It will liberate from the power of the trust every small manufacturer who is compelled to go into the open market for his raw material and every person who desires to purchase coal for use or for resale to those who desire to purchase for use or consumption, and will afford to every such manufacturer an opportunity to purchase same for cash wherever offered for sale in commerce. The section expressly forbids the mine owner or person controlling the sale of the product of the mine to arbitrarily refuse to sell such product to any responsible purchaser, and thereby prevents the mine owner or operator from giving the preference to another and rival dealer in the disposal of such product.

IV.

EXCLUSIVE AND "TYING" CONTRACTS.

Section 4 of this bill has apparently been much misunderstood, and great confusion seems to have arisen in regard to its provisions. Whether designedly or from a misunderstanding of its purport, we know not, but it has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatever relates to agencies properly so termed. Let us therefore consider what this section really accomplishes. It prohibits the exclusive or "tying" contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects. The section provides that any person engaged in commerce who either leases or makes a sale of goods, wares, and merchandise in the United States or in any places under its jurisdiction on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor of either the lessor or seller shall be deemed guilty of a misdemeanor and punished as provided in the section. The words "or fix a price charged therefor or discount therefrom or rebate upon such price" are merely descriptive of the different methods used by the manufacturers to induce the dealer or local merchant to enter into this exclusive or "tying" contract, which obligates him to surrender a right which every dealer should enjoy, namely, to handle any manufacturer's goods, wares, or merchandise he sees fit to handle. Of course, the manufacturer must offer some very flattering

and extraordinary iducements on his part, for otherwise no dealer would be foolish enough to enter into any such contract. The first inducement in every case must of necessity relate to price.

By fixing the price so high that the retail dealer will make an extraordinary or unusual profit on the commodities actually sold, the manufacturer is enabled to induce him to enter into an arrangement whereby the local dealer can actually increase his profits for the time being at least by giving up his entire trade in competitive commodities which he is compelled to handle on a small margin. But, rest assured that when the local dealer enters into such a contract and gives up a portion of his trade to rivals, he at once attempts by the aid of the manufacturer to establish a monopoly in the trade of the commodity handled under the exclusive contract and sold at a higher profit. If the transaction results in completely driving out competitive articles from the community as the contract by its terms takes them out of the business of the local dealer, there can be little room to question the contention of the advocates of this system that both the manufacturer and the dealer are benefited by the transaction. If on the contrary the local merchant who has tied his hands by an exclusive contract can not drive out of the community competitive articles and thereby secure a monopoly of the trade in his immediate locality, it is manifest that he has been seriously hampered and injured in his business by the restrictions placed upon him by his contract. But, the advocates of this system and practice of monopoly, in dealing with this question never look beyond the manufacturer or the local dealer to the millions of American consumers who are compelled to purchase daily the necessary food, raiment, and all the necessities of life through the ordinary channels of trade in their respective communities. What about the interest of consumers—the general public—the American people, as a whole? How do they fare under this unnatural arbitrary system and trade practice devised by American manufacturers and put in operation by great and powerful combinations in trade for their own enrichment and with the ultimate view of obtaining a complete monopoly in their special line of industry? Undoubtedly, the system results in higher prices to consumers. Great department stores, and mail-order houses flourish under it. Local customers can not purchase or obtain at their local stores particular commodities desired and often necessary and hence are compelled to send their money abroad in order to secure the desired commodity which ought under any fair system to be procurable in their local community through their local dealer. On account of this very condition, the temptation to the local merchant is very strong to break away from his contract and to deal in the commodities of others. The needs of his customers demand constantly that he should do so.

The customer having once gone to another dealer or procured the desired commodity through a mail-order house may not return to his local dealer and the goods purchased under an exclusive or "tying" contract may remain on the shelves of the local merchant unsold. The local dealer has invested his money in them; he has paid for them; they belong to him. But the manufacturer has a contract that binds him not to deal in other like commodities. So every such contract provides for a discount from or rebate upon such price as a

further inducement for the local merchant or retailer to enter into a discriminating contract which ties his hands. What is the result? Let us see. What is the motive and purpose of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular community or locality. His contract by its express terms completely shuts out competition in the business of the local dealer with whom he makes it. The dealer, bound by this exclusive contract not to handle the goods, wares, and merchandise of another, becomes the ally of the manufacturer in his effort and purpose to drive out competition in the locality or community in which such commodities are sold. This is done by means of extensive advertising, and let it be borne in mind also that this advertising is added in the price of the commodities and paid for by the consumer. If by the combined efforts of the manufacturer and the local dealer and the glowing and overdrawn and oftentimes false advertisements competitors are compelled to retire from the field, a monopoly in the particular community or locality is the invariable result. In this connection it is important to state that to-day in every village and locality where there is only a single store and this exclusive or "tying" contract is entered into between the manufacturer and the local dealer concerning any commodity, the exclusive or "tying" contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. That the effect of such a system is detrimental to the consumers and to the general public can not be questioned for a moment.

The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in other communities or through mail-order houses that can not be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or "tying" contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who is using machines of the Shoe Machinery Co. were to purchase and place a machine manufactured by any independent company in his establishment, the Shoe Machinery Co. could under its contracts withdraw all their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer. The General Film Co., by the same method practiced by the Shoe Machinery Co. under the lease system, has practically destroyed all competition and

acquired a virtual monoply of all films manufactured and sold in the United States. When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system.

The local dealer is required under the contract system to purchase and pay for each article secured for his business. He is required to contract for purchase on condition that he will not deal in like articles manufactured by competitors. If he can not sell the commodities so purchased, he must go out of business. It was shown in testimony before the committee during the recent hearings that a certain automobile manufacturing company, with a capital of only $2,000,000, had made a profit of $25,000,000 net on their investment in a single year. Was that a profit on the $2,000,000 actually invested by the manufacturing company? Not at all. It was the profit on that $2,000,000 supplemented by many times that many millions actually invested by local dealers in the machines of that company by so-called selling agencies throughout the country. The selling agencies are not in reality agencies at all, but are purchasers and owners of machines who have paid the full price therefor under contracts conditioned that these same dealers will not deal in the machines of any competitor or rival company. These extraordinary profits have been made largely on money actually invested in machines by customers, hundreds of which remain unsold in the possession of the local dealer. This illustration alone is sufficient to show the absolute unfairness of any such practice or system. The system is wholly bad for consumers and the general public, and in its last analysis detrimental to the interests of local dealers generally. We have penalized this practice under the provisions of section 4 and made it a misdemeanor punishable as prescribed in the section.

V.

SUPPLEMENT SECTION 7 OF SHERMAN ACT.

Section 5 is supplementary to the existing laws, and extends the remedy under section 7 of the Sherman Act to persons injured in their business or property by the wrongful acts of persons or combinations violating any of the antitrust laws, and allows the recovery of threefold damages therefor.

VI.

DECREE ADMISSIBLE IN OTHER SUIT.

Section 6 provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the

statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit or proceeding instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.

It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies.

VII.

FRATERNAL, LABOR, AND OTHER ORGANIZATIONS.

The object of section 7 is to make clear certain questions about which doubt has arisen as to whether or not fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations organized for mutual help, not having capital stock or conducted for profit, come within the scope and purview of the Sherman antitrust law in such way as to warrant the courts under interpretations heretofore given to that law to enter a decree for the dissolution of such organizations, orders, or associations upon a proper showing, as may be done in regard to industrial corporations and combinations which have been found to be guilty of violation of its provisions.

A second paragraph is inserted in this section to remove a question of doubt as to whether associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conferring among themselves or of making any lawful agreement as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission, come within the prohibitions of the antitrust laws.

It was contended before your committee by Mr. Gompers, president of the American Federation of Labor, that under the interpretations of the Sherman law as construed by the courts, the labor organizations as they exist to-day might, under certain conditions, be deemed and held illegal combinations in restraint of trade and be dissolved by a decree of the court under section 4 of the act of July 2, 1890, and that the American Federation of Labor and all organizations affiliated with it exist and operate to-day at the sufferance of the administration in power. Mr. Gompers, among other things in his address before the committee, said:

> Gentlemen, under the interpretation placed upon the Sherman antitrust law by the courts, it is within the province and within the power of any administration at any time to begin proceedings to dissolve any organization of labor in the United States and to take charge of and receive whatever funds any worker or organization may have wanted to contribute or felt that it is his duty to contribute to the organization.
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> Mr. WEBB. Are there any suits pending in the courts now looking to this end, Mr. Gompers?
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> Mr. GOMPERS. There are no suits now pending, but an organization of workingmen, the window-glass workers, was dissolved by order of the court under the provisions of the Sherman antitrust law, charged with conspiracy as an illegal combination in restraint of trade. And while that organization was dissolved by action of the court, yet it created no furor, for this reason: I have no

desire to reflect upon the men who are in charge of that organization as its officers and representatives, but it was, in my judgment, supine cowardness for them not to resist an attempt of the dissolution of their associated effort as a voluntary organization of men to protect the only thing they possessed—the power to labor.

Mr. WEBB. Have you any case where a labor organization has been dissolved simply because they themselves united in asking or fixing a certain wage and went no further in uniting with the manufacturers?

Mr. GOMPERS. I can not tell you, sir, about that. But that is the very essence of the life of the organization. What I want to convey is this, that there are probably, of these 30,000 or more local associations of workingmen, what we call local unions of working men and working women, probably more than two-thirds of whom have agreements with employers. As a matter of fact, I think that every observer and every humane man who knows greeted with the greatest satisfaction the creation of the protocol in the sweated industries of New York City and vicinity which abolished sweatshops and long hours of labor, and the burdensome, miserable toil prevailing, and established the combination of employers and of workmen and work-women by which certain standards are to be enforced, and no employer can become a member of the manufacturers' association in that trade unless he is willing to undersign an agreement by which the conditions prevailing in the protocol will be inaugurated by him. Yet, under the provisions of the Sherman antitrust law that association of manufacturers has been sued, I think, for something like $250,000, because it is a conspiracy in restraint of trade.

What I mean to say is this: I am perfectly satisfied in my own mind that the Attorney General of this administration, the Attorney General of the United States under the present administration, is not going to dissolve or make any attempt to dissolve the organizations of the working people of this country. I firmly believe that if there should be any of them, any individual or an aggregation of individuals, guilty of any crime, that the present administration would proceed against them just as readily, and perhaps more so, as any other; I am speaking of the procedure against the organizations themselves and the dissolution of them. But who can tell whether this administration is going to continue very long, or whether the same policy is going to be pushed; that is, the policy of permitting these associations to exist without interference or attempts to isolate them? Who can tell? What may come; what may not the future hold in store for us working people who are engaged in an effort for the protection of men and women who toil to make life better worth living? We do not want to exist as a matter of sufferance, subject to the whims or to the chances or to the vindictiveness of any administration or of an administration officer. Our existence is justified not only by our history, but our existence is legally the best concept of what constitutes law. It is an outrage; it is an outrage of not only the conscience; it is not only an outrage upon justice; it is an outrage upon our language to attempt to place in the same category a combination of men engaged in the speculation and the control of the products of labor and the products of the soil on the one hand and the associations of men and women who own nothing but themselves and undertake to control nothing but themselves and their power to work.

Mr. FLOYD. I want to see if I understand your position. If I understand your position under the existing status of the law as determined by the Federal courts, if the Attorney General should proceed to dissolve any of your labor organizations they could be dissolved. Is that your proposition?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. And that your existence, therefore, depends upon the sufferance of the administration which happens to be in power for the time being?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. What you desire is for us to give you a legal status under the law?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. So you can carry on this cooperative work on behalf of the laborers of the country and of the different organizations without being under the ban of the existing law?

Mr. GOMPERS. Yes, sir.

In the light of previous decisions of the courts and in view of possible interpretation of the law which would empower the courts

to order the dissolution of such organizations and associations, your committee feels that all doubt should be removed as to the legality of the existence and operations of these organizations and associations and that the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws or to forbid the individual members of such associations from carrying out the legitimate and lawful objects of their associations. This will be accomplished by the provisions of section 7 of this bill, which recognize as legal the existence and operations of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations organized for purposes of mutual help, and not having capital stock or conducted for profit, and forbids the danger and possibility of the dissolution of such organizations, orders, or associations by a decree of the courts as unlawful combinations in restraint of trade or commerce under the provisions of the antitrust laws. It also guarantees to individual members of such organizations, orders, or associations, the right to pursue without molestation or legal restraint the legitimate objects of such association. This section should be construed in connection with sections 15 to 2, inclusive, which regulate the issuance of injunctions and provide for jury trials in certain cases of contempts in Federal courts. The sections relating to injunctions and contempts constitute for labor a complete bill of rights in equitable proceedings in United States courts.

This section further provides that nothing contained in the antitrust laws shall be construed to forbid associations of traffic, operating, accounting, or other officers of common carriers for the purpose of conferring among themselves or of making any lawful agreement as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission. In actual practice the officers of common carriers in the interest of the public and to avoid complications must necessarily confer with the officers of other railroad companies, but as all agreements or arrangements made between them are subject to the jurisdiction of the Interstate Commerce Commission, your committee consider it but just to make clear that such associations are not in violation of the Sherman Act. When the desirability of this provision was brought to the attention of the committee, the question was referred to the Interstate Commerce Commission by the chairman of the committee for its opinion in regard to the proposed legislation, and this provision as drawn is in keeping with the views of the Interstate Commerce Commission.

VIII.

HOLDING COMPANIES.

Section 8 deals with what is commonly known as the "holding company," which is a common and favorite method of promoting monopoly. "Holding company" is a term generally understood to mean a company that holds the stock of another company or companies, but as we understand the terms a "holding company" is a company whose *primary* purpose is to hold the stocks of other companies. It has usually issued its own shares in exchange for these

stocks, and is a means of holding under one control the competing companies whose stocks it has thus acquired. As thus defined a "holding company" is an abomination and, in our judgment, is a mere incorporated form of the old-fashioned trust. Most of the corporations engaged in interstate commerce are organized under the laws of one or the other of the States. It is right that this should be so, and it is right that the various States, each of which has the right to exclude corporations of any other State from its borders, should exhibit comity to these other States, and that the Federal Government, which perhaps has the right to exclude corporations of any State from interstate commerce, should exhibit comity to all the States.

At common law a corporation had no right to own stock in another corporation, but from time to time the various States have, by special statutes, permitted it, until now certainly more than a majority of all the States permit corporate stockholding, either generally or of certain kinds and under certain conditions. This legislation in its early operation may have served a useful, economic purpose. Trade and commerce could do as well without steam and electricity as without the idea of the commercial unit which is embodied in the word "corporation." Hence there are certain corporations which may properly be interested with individuals other than its own stockholders, but experience has taught us that the "holding company" as above described no longer serves any purpose that is helpful to either business or the community at large when it is operated purely as a "holding company." Section 8 is intended to eliminate this evil so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been found necessary by business experience and conditions, and the exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade.

IX.

INTERLOCKING DIRECTORATES.

Section 9 of the bill deals with the general subject of interlocking directorates. The President, in his message delivered before Congress on January 20, 1914, on the subject of trusts and monopolies, among other things, said:

> We are all agreed that "private monopoly is indefensible and intolerable," and our program is founded upon that conviction. It will be a comprehensive but not a radical or unacceptable program, and these are its items, the changes which opinion deliberately sanctions and for which business waits:
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> It waits with acquiescence, in the first place, for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business. Sufficient time should be allowed, of course, in which to effect these changes of organization without inconvenience or confusion.
>
> Such a prohibition will work much more than a mere negative good by correcting the serious evils which have arisen because, for example, the men who have been the directing spirits of the great investment banks have usurped the place which belongs to independent industrial management working in its own

behoof. It will bring new men, new energies, a new spirit of initiative, new blood, into the management of our great business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.

In drafting the provisions of section 9 your committee has endeavored to carry out the recommendations of the President. In order that the corporations affected may have ample time in which to readjust their boards of directors in keeping with the requirements of this act, it is expressly provided that the provisions of this section shall not become effective until two years after the date of the approval of the act. This section is divided into three paragraphs, each of which relates to the particular class of corporations described, and the provisions of each paragraph are limited in their application to the corporations belonging to the class named herein.

The first paragraph deals with the eligibility of directors in interstate-railroad corporations, and provides that no person who is engaged as an individual or who is a member of a partnership or is a director or other officer of a corporation engaged in the business of producing or selling equipment, materials, or supplies, or in the construction or maintenance of railroads or other common carriers engaged in commerce, shall act as a director or other officer or employee of any other corporation or common carrier engaged in commerce to which he or such partnership or corporation sells or leases, directly or indirectly, equipment, material, or supplies, or for which he or such partnership or corporation, directly or indirectly, engages in the work of construction or maintenance. It is further provided in this paragraph that no person who is engaged as an individual or who is a member of a partnership, or is a director or other officer of a corporation which is engaged in the conduct of a bank or trust company, shall act as a director or other officer or employee of any common carrier for which he or such partnership or bank or trust company acts, either separately or in connection with others, as agent for or underwriter of the sale or disposal by such common carrier of issues or parts of issues of its securities, or from which he or such partnership or bank or trust company purchases, either separately or in connection with others, issues or parts of issues of securities of such common carriers. The provisions of this paragraph prevent absolutely common directors or interlocking directors between corporations occupying relations to each other described therein, without any reference to the capital, surplus, and undivided profits of the corporations dealing with each other.

The second paragraph of the bill deals with the eligibility of directors, officers, and employees of banks, banking associations, and trust companies organized or operating under the laws of the United States, either of which has deposits, capital, surplus, or undivided profits aggregating more than $2,500,000, and provides that no private banker or person who is a director in any bank or trust company organized and operating under the laws of a State having such aggregate amount of deposits, capital, surplus, and undivided profits shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The purpose

of this provision, which relates exclusively to banks and banking associations, is to prevent as far as possible control of great aggregations of money and capital through the medium of common directors between banks and banking associations, the object being to prevent the concentration of money or its distribution through a system of interlocking directorates. Your committee have not deemed it necessary or wise, therefore, to include within the provisions of this paragraph the smaller banks throughout the country, except where located in cities and towns of more than 100,000 inhabitants. There are three provisos relating to this paragraph. The first proviso excepts from its provisions mutual savings banks not having capital stock represented by shares. The second proviso permits a director, officer, or employee of a bank or banking association or trust company to be a director, officer, or employee in another bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other. And the third proviso allows a director of class A of a Federal reserve bank, as defined in the Federal reserve act, to be a director or officer, or both a director and officer, in one member bank. This is permitted by the provisions of the Federal reserve act, and this proviso is inserted to avoid repealing that provision.

The third paragraph of section 9 deals with the eligibility of directors in industrial corporations engaged in commerce, and provides that no person at the same time shall be a director in any two or more corporations, either of which shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, other than common carriers which are subject to the act to regulate commerce, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws. In this, as in the preceding paragraph relating to banks, it was not deemed necessary or advisable that interlocking directorates should be prohibited between the smaller industrial corporations. The importance of the legislation embodied in section 9 of this bill can not be overestimated. The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. From an economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he

dominates by reason of his prestige as a director and to the detriment of the public generally.

As the President has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.

X.

VENUE.

Section 10 relates to procedure and provides that any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant but also in any district wherein it may be found. Under the law as it now exists, a suit against a corporation must be brought in the district whereof it is an inhabitant.

XI.

SUBPŒNAS RUN INTO OTHER DISTRICTS.

Section 11 provides that in any suit, action, or proceeding brought by or on behalf of the United States, subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws, may run into any other district. Under the existing law, subpœnas for witnesses in such suits may run only in the district in which they are issued.

XII.

PERSONAL GUILT.

Section 12 is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation, and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished as prescribed in the section.

XIII.

SAME AS SECTION 4 OF SHERMAN ACT.

Section 13 is a reenactment of section 4 of the act of July 2, 1890, so as to enable the United States to proceed against corporations for the violation of any of the provisions of this act as it is now authorized by law to proceed against corporations for violations of the Sherman Act.

XIV.

INJUNCTIVE RELIEF AUTHORIZED.

Section 14 authorizes a person, firm, or corporation or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies.

INJUNCTIONS AND CONTEMPTS.

The remaining sections of the bill, 15 to 23, inclusive, are substantially the same as the provisions of the two separate bills (H. R. 23635 and H. R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. They deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court. The reports upon these bills made to the House in the last Congress are comprehensive and explain in detail their purpose, and for convenience are adopted as a part of this report. They follow in order:

House Report No. 612, Sixty-second Congress, second session.

REGULATION OF INJUNCTIONS.

APRIL 26, 1912.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 23635.]

The Committee on the Judiciary, having had under consideration H. R. 23635, to amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, report the same back with the recommendation that the bill do pass.

The too ready issuance of injunctions or the issuance without proper precautions or safeguards has been called to the attention of the Congress session after session for many years. The bill now reported seeks to remedy the evils complained of by legislation directed to those specific matters which have given rise to most criticism. These matters are so segregated in various sections of the bill that they may be separately discussed.

I.

The first section of the bill amends section 263 of the judicial code which relates to two distinct steps in the procedure, namely, notice and security. But the amended section relates only to the notice, leaving the matter of security to be dealt with by a new section 266a.

FORMER STATUTES.

In order to fully understand the subject of notice in injunction cases it is necessary to give an historical résumé of the subject. In

the judiciary act of 1789 which was passed during the first session of that year, Congress having created the different courts according to the scheme outlined by Chief Justice Ellsworth, conferred upon the courts power to issue all writs, including writs of ne exeat (a form of injunction), according to legal usages and practice. In 1793, however, there was a revision of that statute, and among other things the same powers, substantially, were conferred upon the judges as before; but at the end of the section authorizing the issuance of injunctions, was this language: "No injunction shall be issued in any case without reasonable previous notice to the adverse party or his attorney."

The law stood thus until the general revision of 1873, during which period the law expressly required reasonable notice to be given in all cases. But the will of Congress as thus expressed was completely thwarted and the statute nullified by the peculiar construction placed upon it by the courts. The question frequently arose. The courts got around it in various ways, but usually by holding that it did not apply to a case of threatened irreparable injury, notwithstanding that its language was broad and sweeping, plainly covering all cases. Another form of expression often used is found in Ex parte Poultney (4 Peters C. C. C., 472):

> Every court of equity possesses the power to mold its rules in relation to the time of appearing and answering so as to prevent the rule from working injustice, and it is not only in the power of the court, but it is its duty to exercise a sound discretion upon this subject.

The court found a similar method of evading the sweeping prohibition of the revision of 1793, with respect to notice in Lawrence *v.* Bowman (1 U. S. C. C., Alester, 230).

But the earliest provision requiring notice came before the Supreme Court in 1799, in New York *v.* Connecticut (4 Dall., 1). Its constitutionality was not questioned. The only issue was as to the sufficiency of the notice, Chief Justice Ellsworth, for the court, saying: "The prohibition contained in the statute that writs of injunction shall not be granted without reasonable notice to the adverse party or his attorney, extends to injunctions granted by the Supreme Court or the circuit court as well as to those that may be granted by a single judge. The design and effect, however, of injunctions must render a shorter notice, reasonable notice, in the case of an application to a court than would be so construed in most cases of an application to a single judge, and until a general rule shall be settled the particular circumstances of each case must also be regarded."

Here was a case in which, although no point was made by counsel on any question of constitutionality, the Supreme Court accepted the comprehensive requirement of the act of 1793 as binding on all the Federal courts.

Now we come to the present law, found in section 263 of the Judicial Code, and reading thus:

> Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

This was the law as contained in section 718 of the Revised Statutes, said section having been enacted in 1872. It simply em-

bodies the practice of the courts with respect to notice, a practice established notwithstanding the nonconformity of the practice to the positive requirement of the act of 1793.

PROPOSED CHANGES.

But it will be seen that the giving of notice and requiring security, left by the present law to the discretion of the court, is by this bill a positive duty, except where irreparable and immediate injury might result from the giving of a notice or the delay incident thereto, in which case the court or judge may issue a temporary restraining order pending the giving of the notice. The concluding part of the amended section has an effect to safeguard parties from the reckless and inconsiderate issuance of restraining orders. Injuries compensable in damages recoverable in an action at law are not treated or considered by the courts as irreparable in any proper legal sense, and parties attempting to show why the injury sought to be restrained is irreparable would often disclose an adequate legal remedy. This provision requires the reason to appear in the order, but it should be read in connection with the new section 266b, requiring the order to be made by the court or judge to be likewise specific in other essentials, and section 266c, requiring that every complaint filed for the purpose of obtaining the order in the cases there specified shall contain a particular description of the property or property right for which the prohibitive power of the court is sought, and that such complaint shall be verified.

A valuable provision of the amendment is one that a restraining order issued without notice "shall by its terms expire within such time after entry, not to exceed seven days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record."

A legislative precedent for such legislation is found in the act of 1807, wherein it was provided that injunctions granted by the district courts "shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing, nor shall an injunction be issued by a district judge in any case where a party has had a reasonable time to apply to the circuit court for the writ." (U. S. Stat. L., vol. 2, p. 418.)

If the views of President Taft on this subject have not changed, he will welcome an opportunity to approve a bill containing such provisions as those in the amendment governing notice, because in his message of December 7, 1909, to the regular session of the Sixty-first Congress, after a quotation from the Republican platform of 1908, he said:

> I recommend that in compliance with the promise thus made appropriate legislation be adopted. The ends of justice will best be met and the chief cause of complaint against ill-considered injunctions without notice will be removed by the enactment of a statute forbidding hereafter the issuing of any injunction or restraining order, whether temporary or permanent, by any Federal court without previous notice and a reasonable opportunity to be heard on behalf of the parties to be enjoined; unless it shall appear to the satisfaction of the court that the delay necessary to give such notice and hearing would result in irreparable injury to the complainant, and unless, also, the court shall from

the evidence make a written finding, which shall be spread upon the court minutes, that immediate and irreparable injury is likely to ensue to the complainant, and shall define the injury, state why it is irreparable, and shall also indorse on the order issued the date and the hour of the issuance of the order. Moreover, every such injunction or restraining order issued without previous notice and opportunity by the defendant to be heard should by force of the statute expire and be of no effect after seven days from the issuance thereof or within any time less than that period which the court may fix, unless within such seven days or such less period the injunction or order is extended or renewed after previous notice and opportunity to be heard.

My judgment is that the passage of such an act, which really embodies the best practice in equity and is very likely the rule now in force in some courts, will prevent the issuing of ill-advised orders of injunction without notice and will render such orders, when issued, much less objectionable by the short time in which they may remain effective.

II.

Section 266a simply requires security for costs and damages in all cases, leaving it no longer within the discretion of the courts whether any such security or none shall be given.

Prior to the said act of 1872 (contained in the revision of 1873) there appears to have been no legislation on the matter of security in injunction cases; but that security was usually required is a fact well known to the legal profession. It seems clearly just and salutary that the extraordinary writ of injunction should not issue in any case until the party seeking it and for whose benefit it issues has provided the other party with all the protection which security for damages affords.

It appears by the authorities, both English and American, to have been always within the range of judicial discretion, in the absence of a statute, to waive security, though better practice has been to require security as a condition to issuing restraining orders and injunctions.

The new section, 266a, takes the matter of requiring security out of the category of discretionary matters, where it was found by the Committee on Revision and permitted to remain.

For a discussion of the existing law on the question of security, we refer to Russell *v.* Farley (105 U. S., 433).

III.

Section 266b is of general application. Defendants should never be left to guess at what they are forbidden to do, but the order "shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained." It also contains a safeguard against what have been heretofore known as dragnet or blanket injunctions, by which large numbers may be accused, and eventually punished, for violating injunctions in cases in which they were not made parties in the legal sense and of which they had only constructive notice, equivalent in most cases to none at all. Moreover, no person shall be bound by any such order without actual personal notice.

EXISTING LAW AND PRACTICE.

There was heretofore no Federal statute to govern either the matter of making or form and contents of orders for injunctions. Of

course, where a restraining order is granted, that performs the functions of order, process, and notice. But the writ of injunction, where temporary, is preceded by the entry of an order, and where permanent by the entry of a decree.

The whole matter appears to have bene left, both by the States and the Federal Government, to the courts, which have mostly conformed to established principles.

The most important of these was that the order should be sufficiently clear and certain in its terms that the defendants could by an inspection of it readily know what they were forbidden to do.

See Arthur *v.* Oakes, 63 Fed. Rep., 310, 25 L. R. An., 414; St. Louis Min., etc., Co. *v.* Co. c. Montana, Min. Co., 58 Fed. Rep., 129; Sweet *v.* Mangham, 4 Jur., 479; 9 L. J. Ch., 323, 34 Eng. Ch., 51; Cother *v.* Midland R. Co., 22 Eng. Ch., 469.

It should also be in accordance with the terms of the prayer of the bill. (State *v.* Rush County, 35 Kan., 150; McEldowney *v.* Lowther, 49 W. Va., 348.) It should not impose a greater restraint than is asked or is necessary (Shubert *v.* Angeles, 80 N. Y. App. Div., 625; New York Fire Dept. *v.* Baudet, 4 N. Y. Supp., 206), and should be specific and certain. (Orris *v.* National Commercial Bank, 81 N. Y. App. Div., 631; St. Rege's Paper Co. *v.* Santa Clara Lumber Co., 55 N. Y. App. Div., 225; Norris *v.* Cable, 8 Rich (S. C.), 58; Parker *v.* First Ave. Hotel Co., 24 Ch. Div., 282; Hackett *v.* Baiss, L. R., 20 Eq., 494; Dover Harbour *v.* London, etc., R. Co., 3 De. G. F. & J., 559; Low *v.* Innes, 4 De G. J. & S., 286.)

So it appears that section 266b really does not change the best practice with respect to orders, but imposes the duty upon the courts, in mandatory form, to conform to correct rules, as already established by judicial precedent.

That such provision is necessary and timely will appear upon an inspection of some orders which have issued.

For instance, take the case of Kansas & Texas Coal Co. *v.* Denney, decided in the district court for Arkansas in 1899. And here, as in most of such cases, no full official report of the case can be obtained, but a mere memorandum. In this case the defendants (strikers) were ordered to be and were enjoined from "congregating at or near or on the premises of the property of the Kansas & Texas Coal Co. in, about, or near the town of Huntington, Ark., or elsewhere, for the purpose of intimidating its employees or preventing said employees from rendering service to the Kansas & Texas Coal Co. from inducing or coercing by threats, intimidation, force, or violence any of said employees to leave the employment of the said Kansas & Texas Coal Co., or from in any manner interfering with or molesting any person or persons who may be employed or seek employment by and of the Kansas & Texas Coal Co., in the operation of its coal mines at or near said town of Huntington, or elsewhere."

It will be observed that a defendant in that suit would render himself liable to punishment for contempt if he met a man seeking employment by the company in a foreign country and persuaded him not to enter its service.

The bill further provides that it shall be "binding only upon parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall by personal serv-

ice or otherwise have received actual notice of the same." Unquestionably this is the true rule, but unfortunately the courts have not uniformly observed it. Much of the criticism which arose from the Debs case (64 Fed. Rep. 724) was due to the fact that the court undertook to make the order effective not only upon the parties to the suit and those in concert with them, but upon all other persons whomsoever. In Scott *v.* Donald (165 U. S., 117), the court rebuked a violation by the lower court in the following language:

> The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious and do not grow out of any common action or agreement between constables and sheriffs of the State of South Carolina. We have indeed a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented or to subject them to penalties for contempt in disregarding such an injunction. (Fellows *v.* Fellows, 4 John. Chan., 25, citing Iveson *v.* Harris, 7 Ves., 257.)
>
> The decree of the court below should therefore be amended by being restricted to the parties named as plaintiff and defendants in the bill, and this is directed to be done, and it is otherwise.

IV.

Section 266c is concerned with cases between "employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment."

The first clause of the new section 266c relates to the contents and form of the complaint. It must disclose a threatened irreparable injury to property or to a property right of the party making the application for which there is no adequate remedy at law. And the property or property right must be described "with particularity."

These requirements are merely those of good pleading and correct practice in such cases established by a long line of precedents, well understood by the profession and which should be, but perhaps have not been, uniformly applied. To show this it is only necessary to briefly state the applicable rules, citing some of the numerous authorities.

As the granting of an injunction rests in some degree in the discretion of the chancellor, allegations in the complaint should show candor and frankness. (Moffatt *v.* Calvert County Comm'rs, 97 Md., 266; Johnson *v.* Glenn, 40 Md., 200; Edison Storage Battery Co. *v.* Edison Automobile Co., 67 N. J. Eq., 44; Sharp *v.* Ashton, 3 Ves. & B., 144.)

The omission of material facts which, in the nature of the case, must be known to the plaintiff will preclude the granting of the relief. (Sprigg *v.* Western Tel. Co., 46 Md., 67; Walker *v.* Burks, 48 Tex., 206.)

An injunction may be refused if the allegations are argumentative and inferential. (Battle *v.* Stevens, 32 Ga., 25; Warsop *v.* Hastings, 22 Minn., 437.)

The allegations of the complaint must be definite and certain. (St. Louis *v.* Knapp Co., 104 U. S., 658.)

The complaint must set forth the facts with particularity and minuteness (Minor *v.* Terry, Code Rep. N. S. (N. S.), 384), and no material fact should be left to inference. (Warsop *v.* Hastings, 22 Minn., 437; Philphower *v.* Todd, 11 N. J. Eq., 54; Perkins *v.* Collins, 3 N. J. Eq., 482.)

Facts, and not the conclusions or opinions of the pleader, must be stated. (McBride *v.* Ross (D. C.), 13 App. Cas., 576.)

An injunction should not ordinarily be granted when the material allegations are made upon information and belief. (Brooks *v.* O'Hara, 8 Fed. Rep., 529; In re Holmes, 3 Fed. Rep. Cases No. 1, 562.)

The complaint must clearly show the threats or acts of defendant which cause him to apprehend future injury. (Mendelson *v.* McCabe, 144 Cal., 230; Ryan *v.* Fulghurn, 96 Ga., 234.) And it is not sufficient to allege that the defendant claims the right to do an act which plaintiff believes illegal and injurious to him, since the intention to exercise the right must be alleged. (Lutman *v.* Lake Shore, etc., R. Co., 56 Ohio St., 433; Attorney General *v.* Eau Claire, 37 Wis., 400.)

The bill must allege facts which clearly show that the plaintiff will sustain substantial injury because of the acts complained of. (Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 146 Ind., 673; Boston, etc., Ry. Co. *v.* Sullivan, 177 Mass., 230; McGovern *v.* Loder (N. J. Ch., 1890), 20 Atl. Rep., 209; Smith *v.* Lockwood, 13 Barb., 209; Jones *v.* Stewart (Tenn. Ch. App., 1900), 61 Sev., 105; Spokane St. R. Co. *v.* Spokane, 5 Wash., 634; State *v.* Eau Claire, 40 Wis., 533. And it is not sufficient to merely allege injury without stating the facts. Giffing *v.* Gibb, 2 Black, 519; Spooner *v.* McConnell, 22 Fed. Cases No. 13245; Bowling *v.* Crook, 104 Ala., 130; Grant *v.* Cooke, 7 D. C., 165; Coast Line R. Co., *v.* Caben, 50 Ga., 451; Dinwiddie *v.* Roberts, 1 Greene, 363; Wabaska Electric Co. *v.* Wymore Co., Nebr., 199; Lubrs *v.* Sturtevant, 10 Or., 170; Farland *v.* Wood, 35 W. Va., 458.)

Since the jurisdiction in equity depends on the lack of an adequate remedy at law, a bill for an injunction must state facts from which the court can determine that the remedy at law is inadequate. (Pollock *v.* Farmers' Loan & Tr. Co., 157 U. S., 429; Safe-Deposit, etc., Co. *v.* Anniston, 96 Fed. Rep., 661.)

If the inadequacy of the legal remedy depends upon the defendant's insolvency the fact of insolvency must be positively alleged. (Fullington *v.* Kyle Lumber Co., 139 Ala., 242; Graham *v.* Tankersley, 15 Ala., 634.)

An injunction will not be granted unless the complaint shows that a refusal to grant the writ will work irreparable injury. (California Nav. Co. *v.* Union Transp. Co., 122 Cal., 641; Cook County Brick Co., 92 Ill. App., 526; Manufacturers' Gas Co. *v.* Indiana Nat. Gas, etc., Co., 156 Ind., 679.) And it is not sufficient simply to allege that the injury will be irreparable, but the facts must be stated so that the court may see that the apprehension of irreparable injury is well founded. (California Nav. Co. *v.* Union Transp. Co., 122 Cal., 641; Empire Transp. Co. *v.* Johnson, 76 Conn., 79; Orange City *v.* Thayer, 45 Fla., 502.)

The plaintiff must allege that he has done or is willing to do everything which is necessary to entitle him to the relief sought. (Stanley *v.* Gadsley, 10 Pet (U. S.), 521; Elliott *v.* Sihley, 101 Ala., 344; Burham *v.* San Francisco Fuse Mfg. Co., 76 Cal., 26; Sloan *v.* Coolbaugh, 10 Iowa, 31; Lewis *v.* Wilson, 17 N. Y. Supp., 128; Spann *v.* Sterns, 18 Tex., 556.)

The second paragraph of section 266c is concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules. It may be proper to notice, in passing, that the State courts furnish precedents frequently for action by the Federal courts, and vice versa, so that a pernicious rule or an error in one jurisdiction is quickly adopted by the other. It is not contended that either the Federal or State courts have stood alone in any of the precedents which are disapproved. The provisions of this section of the bill are self-explanatory, and in justification of the language used we content ourselves with submitting quotations from recognized authorities. We classify these authorities by quoting first the clauses of the bill to which they have particular reference.

The first clause:

> And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so.

In Allis Chalmers Co. *v.* Iron Molders' Union (C. C. 150 Fed. R., 155), Judge Sanborn said:

> The conclusion to be drawn from the cases, as applicable to this controversy, is, I think, that the combination of the defendant unions, their members, and the defendant O'Leary, to strike, and to further enforce he strike, and if possible to bring the employers to terms by preventing them from obtaining other workmen to replace the strikers, was not unlawful, because grounded on just cause or excuse, being the economic advancement of the union molders, and the competition of labor against capital.

In Arthur *v.* Oakes (63 Fed. R., 310, 317) Justice Harlan, for the court, said:

> If an employee quits without cause, and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and perhaps, in some states of case, to criminal prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had under taken to perform. And it may be assumed for the purposes of this discussion that he would be liable in like manner where the contract of service, by necessary implication arising out of the nature or the circumstances of the employment, required him not to quit the service of his employer suddenly, and without reasonable notice of his intention to do so. But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Courts of equity have

sometimes sought to sustain a contract for services requiring special knowledge or skill by enjoining acts or conduct that would constitute a breach of such contract.

* * * * * * *

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employee engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable.

Sitting with Justice Harlan at circuit in that case were other learned jurists, but there was no dissent from these views.

In this connection we cite from the luminous opinion by Judge Loring delivering the opinion in Pickett *v.* Walsh (192 Mass., 572), a clear exposition of our views here expressed. We regret the necessity of limiting the quotation, because the whole opinion could be studied with profit.

The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case, therefore, is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like Mogul Steamship Co. *v.* McGregor (23 Q. B. D., 598; S. C., on appeal (1892); A. C., 25).

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, can not get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately. To be sure, the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals can not do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid. (See in this connection Plant *v.* Woods, 176 Mass., 492, 502; Berry *v.* Donovan, 188 Mass., 353, 357.)

The result to which that conclusion brings us in the case at bar ought not to be passed without consideration.

The result is harsh on the contractors, who prefer to give the work to the pointers, because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employee); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and, finally, (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who can not lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done

is to say you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in Carew *v.* Rutherford (106 Mass., 1). They have not undertaken to forbid the contractors employing pointers, as they did in Plant *v.* Woods (176 Mass., 492). So far as the labor unions are concerned, the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers' and masons' unions on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get nonunion men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J., in Martell *v.* White (185 Mass., 255, 260) in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

* * * * * * *

The application of the right of the defendant unions, who are composed of bricklayers and stonemasons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said), is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community.

To the same effect is Allis-Chalmers Co. *v.* Iron Molders' Union (C. C.) (150 Fed. Rep., 155), per Sanborn, J.

The consensus of judicial view, as expressed in these cases and others which might be cited, is that workingmen may lawfully combine to further their material interests without limit or constraint, and may for that purpose adopt any means or methods which are lawful. It is the enjoyment and exercise of that right and none other that this bill forbids the courts to interfere with.

The second clause:

Or for attending at or near a house or place where any person resides or works or carries on business or happens to be for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or to abstain from working.

This language is taken from the British trades-dispute act of 1906, the second section of which is as follows:

It shall be lawful for one or more persons acting on their own behalf or on behalf of an individual, corporation, or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from work.

This it has been said "might well be termed a codification of the law relating to peaceful picketing as laid down by a majority of the

American courts." (Martin's Law of Labor Unions, sec. 173.) Upon the general subject the same author says:

There are some decisions which hold that all picketing is unlawful, and it has been said that from the very nature of things peaceful picketing is of rare occurrence and "very much of an illusion," yet the view taken by the majority of decisions and which is best supported by reason is that picketing, if not conducted in such numbers as will of itself amount to intimidation, and when confined to the seeking of information such as the number and names and places of residence of those at work or seeking work on the premises against which the strike is in operation, and to the use of peaceful argument and entreaty for the purpose of procuring such workmen to support the strike by quitting work or by not accepting work, is not unlawful, and will furnish no ground for injunction or an action at law for damages. * * * That the views set forth in this section are correct does not admit of doubt. Indeed, it may readily be seen that the right almost universally conceded to striking workmen to use peaceable argument and persuasion to induce other workmen to aid them in their strike might, and very probably would be, most seriously hampered if the right of picketing were denied. "The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment." While it is true that in the guise of picketing strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault, yet it can always be determined from the evidence whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgment. (Martin's Modern Law of Labor Unions, sec. 169, pp. 233, 234, and 235.)

The third clause:

Or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do

The best opinion to be gathered from the conflicting opinions on this matter have been well summarized in the most recent textbook on the subject as follows:

It is lawful for members of a union, acting by agreement among themselves, to cease to patronize a person against whom the concert of action is directed when they regard it for their interest to do so. This is the so-called primary boycott, and in furtherance thereof it is lawful to circulate notices among the members of the union to cease patronizing one with whom they have a trade dispute and to announce their intention to carry their agreement into effect. For instance, if an employer of labor refuses to employ union men the union has a right to say that its members will not patronize him. A combination between persons merely to regulate their own conduct and affairs is allowable and a lawful combination, though others may be indirectly affected thereby. And the fact that the execution of the agreement may tend to diminish the profits of the party against whom such act is aimed does not render the participants liable to a prosecution for a criminal conspiracy or to a suit for injunction. Even though he sustain financial loss, he will be without remedy, either in a court of law or a court of equity. So long as the primary object of the combination is to advance its own interests and not to inflict harm on the person against whom it is directed, it is not possible to see how any claim of illegality could be sustained. (Martin's Modern Law of Labor Unions, pp. 107, 108, and 109.)

It is not unlawful for members of a union or their sympathizers to use, in aid of a justifiable strike, peaceable argument and persuasion to induce customers of the person against whom the strike is in operation to withhold their patronage from him, although their purpose in so doing is to injure the business of their former employer and constrain him to yield to their demands, and the same rule applies where the employer has locked out his employees. These acts may be consummated by direct communication or through the medium of the press, and it is only when the combination becomes a conspiracy to injure, by threats and coercion, the property rights of another that the power of the courts can be invoked. The vital distinction between combinations of this character and boycotts is that here no coercion is present, while, as was

heretofore shown, coercion is a necessary element of a boycott. In applying the principles stated it has been held that the issuance of circulars by members of a labor union notifying persons engaged in the trade of controversies existing between such members and their employer and requesting such persons not to deal with the employer is not unlawful and will not be enjoined where no intimidation or violence is used. (Martin's Modern Law of Labor Unions, pp. 109 and 110.)

Said Mr. Justice Van Orsdel in his concurring opinion in Court of Appeals of the District of Columbia (the American Federation of Labor et al., appellants, *v.* the Buck's Stove & Range Co., No. 1916, Decided Mar. 11, 1909):

* * * * * * *

Applying the same principle, I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion or a threat.

As long as the actions of this combination of individuals are lawful, to this point it is not clear how they can become unlawful because of their subsequent acts directed against the same person or corporation. To this point there is no conspiracy—no boycott. The word "boycott" is here used as referring to what is usually understood as "the secondary boycott," and when used in this opinion it is intended to be applied exclusively in that sense. It is, therefore, only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another that the power of the courts can be invoked. This point must be passed before the unlawful and unwarranted acts which the courts will punish and restrain are committed.

The definition of a boycott given by Judge Taft in Toledo Co. *v.* Penna. Co. (54 Fed., 730) is as follows: "As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse through threats that, unless those others do so, the many will cause similar loss to them." In Gray *v.* Building Trades Council (91 Minn., 171) the word "boycott" is defined as follows: "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that unless a compliance with their demands be made the persons forming the combination will cause loss or injury to him, or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy and may be restrained by injunction." In Brace Brothers *v.* Evans (3 R. & Corp. L. J., 501) it is said: "The word itself implies a threat. In popular acceptation it is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and they coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."

It will be observed that the above definitions are in direct conflict with the earlier English decisions and indicate a distinct departure by our courts. This undoubtedly is in recognition of the right of a number of individuals to combine for the purpose of improving their condition. The rule of the English common law, from which we have so far departed, is expressed in Bowen *v.* Hall (6 Q. B. Div., 333) as follows: "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it."

From this clear distinction it will be observed that there is no boycott until the members of the organization have passed the point of refusing to patronize the person or corporation themselves and have entered the field where, by coercion or threats, they prevent others from dealing with such persons or corporation. I fully agree with this distinction.

So long, then, as the American Federation of Labor and those acting under its advice refuse to patronize complainant, the combination had not arisen to the dignity of an unlawful conspiracy or a boycott.

In Hopkins *v.* Oxley Stave Co. (83 Fed. R., 912), Judge Caldwell, in a dissenting opinion, said:

While laborers, by the application to them of the doctrine we are considering, are reduced to individual action, it is not so with the forces arrayed against them. A corporation is an association of individuals for combined action; trusts are corporations combined together for the very purpose of collective action and boycotting; and capital, which is the product of labor, is in itself a powerful collective force. Indeed, according to this supposed rule, every corporation and trust in the country is an unlawful combination, for while its business may be of a kind that its individual members, each acting for himself, might lawfully conduct, the moment they enter into a combination to do that same thing by their combined effort the combination becomes an unlawful conspiracy. But the rule is never so applied.

Corporations and trusts and other combinations of individuals and aggregations of capital extend themselves right and left through the entire community, boycotting and inflicting irreparable damage upon and crushing out all small dealers and producers, stifling competition, establishing monopolies, reducing the wages of the laborer, raising the price of food on every man's table, and of the clothes on his back, and of the house that shelters him, and inflicting on the wage earners the pains and penalties of the lockout and the black list, and denying to them the right of association and combined action by refusing employment to those who are members of labor organizations; and all these things are justified as a legitimate result of the evolution of industries resulting from new social and economic conditions, and of the right of every man to carry on his business as he sees fit, and of lawful competition. On the other hand, when laborers combine to maintain or raise their wages or otherwise to better their condition or to protect themselves from oppression or to attempt to overcome competition with their labor or the products of their labor in order that they may continue to have employment and live, their action, however open, peaceful, and orderly, is branded as a "conspiracy." What is "competition" when done by capital is "conspiracy" when done by laborers. No amount of verbal dexterity can conceal or justify this glaring discrimination. If the vast aggregation and collective action of capital is not accompanied by a corresponding organization and collective action of labor capital will speedily become proprietor of the wage earners as well as the recipient of the profits of their labor. This result can only be averted by some sort of organization that will secure the collective action of wage earners. This is demanded, not in the interest of wage earners alone, but by the highest considerations of public policy.

In Vegelahn *v.* Gunter (167 Mass., 92) Justice Holmes, now of the Supreme Court of the United States, delivering the opinion, said:

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it is, or detrimental, it is inevitable, unless the fundamental axioms of society and even the fundamental conditions of life are to be changed. One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is potent and powerful. Combination on the other is a fair and equal way. * * * If it be true that the workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has, to support their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.

The logic of Justice Sherwood, of the Supreme Court of Missouri, in Marx & Haas Co. *v.* Watson (56 L. R. A., 951), appears unanswerable. He discussed the question from a constitutional stand-

point, taking for his text the Missouri bill of rights, substantially the same as the first amendment to the Federal Constitution, saying (p. 956):

> The evident idea of that section is penalty or punishment, and not prevention, because if prevention exists, then no opportunity can possibly arise for one becoming responsible by saying, writing, or publishing "whatever he will on any subject." The two ideas—the one absolute freedom "to say, write, or publish whatever he will on any subject," coupled with responsibility therefor, and the other idea of preventing any such free speech, free writing, or free publication—can not coexist.

The opinion continues, after citing authorities, Federal and State, as follows:

> Section 14, supra, makes no distinction and authorizes no difference to be made by courts or legislatures between a proceeding set on foot to enjoin the publication of a libel and one to enjoin the publication of any other sort or nature, however injurious it may be, or to prohibit the use of free speech or free writing on any subject whatever, because wherever the authority of injunction begins there the right of free speech, free writing, or free publication ends. No halfway house stands on the highway between absolute prevention and absolute freedom.

The fourth clause:

> Or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value.

In at least two instances State courts (Reynolds *v.* Davis, 198 Mass., 294, and A. S. Barnes & Co. *v.* Chicago Typographical Union, 232 Ill., 424) have held that if the purpose of a strike was unlawful the officers and members of unions should be enjoined from giving financial aid in the form of strike benefits in furtherance thereof. But in the only case of the kind disposed of by a Federal court an entirely different conclusion was reached. In A. S. Barnes & Co. *v.* Berry (157 Fed. R., 883) it was held without exception or qualification that an employer against whom a strike was in operation could not have enjoined the officers of a union from giving its striking members strike benefits. The reason assigned was that—

> the strike benefit fund is created by moneys deposited by the men with the general officers for the support of themselves and families in times of strike, and the court has no more control of it than it would have over deposits made by them in the banks.

This decision is in harmony with two recent English decisions—Denabey, etc., Collieries *v.* Yorkshire Miners' Assn. (75 L. J. K. B., 384); Lyons *v.* Wilkins (67 L. J., ch. 383).

The fifth and sixth clauses:

> Or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

After all that can be asserted against the provisions of section 266c, or any provision of the bill elsewhere found has been said, we can truly say that it does not transcend or contravene the clear and conclusive statement of the law as stated in National Fireproofing Co. *v.* Mason Builders Assn. (169 Fed. Rep., 260). Delivering the opinion of the court in that case, Judge Noyes said (p. 265):

> As a general rule it may be stated, that when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination, entered

into for the real malicious purpose of injuring a third person in his business or property, may amount to a conspiracy and furnish a ground of action for damages sustained or call for an injunction, even though formed for the ostensible purpose of benefiting its members, and actually operating to some extent to their advantage. But a combination without such ulterior oppressive object entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and so long as the motive is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, is a damnum absque injuria. The damage is present, but the unlawful object is absent. And so the essential question must always be, whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit.

Any attack upon the policy of this section of the bill must be directed at its specific prohibitions; nor will any mere general criticism or any attack which does not particularize herein be worthy of serious attention. The ready and perfect defense to all such is at hand, and imposes no difficult task. Is there any reason why the complainant, seeking an injunction against workingmen, should not describe with particularity in his cause of complaint the nature of the threatened injury and the property or property right involved as in other cases? Is there any reason why an injunction should issue at all involving or growing out of the relation created between employer and employee to prevent the termination of the relation, or advising and persuading others to do so, or to prevent the unrestricted communication and exchange of information between persons, or the giving of aid by financial contributions in any labor affair or dispute? Is there any reason, after a labor dispute has arisen and a socially hostile attitude has been created, for an injunction to prevent abstinence in patronizing or service by one party for the other's benefit, or the exercise of the right of free speech in advising or inducing such abstinence on the part of others? Is there, in short, any good reason why, after a dispute has arisen and the parties are "at arms length," a court of equity should interpose its strong arm merely because such dispute has arisen?

At its hearings the committee had the benefit of learned and illuminating arguments against the several bills. Counsel in opposition were patiently and respectfully heard, and the committee profited largely by having heard them, as is shown by the results of its labors. The bill does not interfere with the Sherman Antitrust Act at all; it leaves the law of conspiracy untouched, and is not open to effective criticism on any constitutional ground. The subject of the constitutionality of such legislation was exhausted at the hearings on the contempt bill (H. R. 22591), returned to the House with a separate report, in which all constitutional objections are fully met.

NO QUESTION OF CONSTITUTIONALITY INVOLVED.

This bill does not, any more than does the contempt bill, invade the jurisdiction of the courts or attempt legislatively to exercise a judicial function. It merely limits and circumscribes the remedy and procedure. While we here enter into no elaborate discussion

of the authorities on this topic, yet, for convenience of reference, we insert a synopsis. On point of inconsistency between our theory of government and exercise of arbitrary power see Yick Wo *v.* Hopkins (118 U. S. Rep., 369). For a case in which Congress was held to have constitutionally exercised power to take away all remedy see Finck *v.* O'Neill (106 U. S., 272); and for a case where a statute taking away the power to issue an injunction in a certain case wherein the jurisdiction had been previously held and exercised was recognized without question as of binding force see Sharon *v.* Terry (36 Fed. Rep., 365). For a general statement of the proposition that the inferior courts of the United States are all limited in their nature and constitutions and have not the powers inherent in courts existing by prescription or by the common law see Cary *v.* Curtiss (3 How. (U. S.), 236, 254). The same principle still more elaborately stated and applied, Ex parte Robinson (19 Wall. (U. S.), 505).

Many decisions on the question of injunctive process and jurisdiction in labor cases are greatly influenced by, and, indeed, sometimes founded upon, precedents established when to be a wage earner was to be a servant whose social and legal status was little above that of slavery. But even England has preceded us in new views and policies herein. The English act of 1906, set forth at length in the hearings, goes farther than it has yet been deemed possible to go in this country in relieving labor, and especially organized labor, of legal burdens and discriminations. The Supreme Court has more than once protested against attempts by any branch of the Government to exercise arbitrary power, and the courts should, and probably will, welcome the definite limitations contained in this bill if it should be enacted.

The idea has been advanced, and ably supported in argument, by one of the proponents of this legislation that liberty, and more of it, is safe in the hands of the workingmen of the country. We are convinced of the merit and truth of that contention. The tendency toward freedom and liberation from legal trammels and impediments to progress and to a great social advance is seen in nearly all civilized nations. It is an unpropitious time to oppose a reform like that embodied in this bill, in view of the fact that the abuses of power which it seeks to terminate have been, admittedly, numerous and flagrant.

(H. R. 23635, Sixty-second Congress, second session.)

IN THE HOUSE OF REPRESENTATIVES, APRIL 22, 1912.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 263 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows, and that said act be further amended by inserting after section 266 thereof three new sections, to be numbered, respectively, 266a, 266b, 266c, reading as follows:

"SEC. 263. That no injunction, whether interlocutory or permanent, in cases other than those described in section 266 of this title, shall be issued without previous notice and an opportunity to be heard on behalf of the parties to be

enjoined, which notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction will be based, shall be served upon the parties sought to be enjoined a reasonable time in advance of such application. But if it shall appear to be satisfaction of the court or judge that immediate and irreparable injury is likely to ensure to the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon, the court or judge may, in his discretion, issue a temporary restraining order without notice. Every such order shall be indorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed seven days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record.

"SEC. 266a. That no restraining order or interlocutory order of injunction shall issue except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

"SEC. 266b. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall by personal service or otherwise have received actual notice of the same.

"SEC. 266c. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

House Report No. 613, Sixty-second Congress, second session.

PROCEDURE IN CONTEMPT CASES.

APRIL 26 (calendar day, APRIL 27), 1912.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 22501.]

The Committee on the Judiciary, having had under consideration H. R. 22591, to amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, report the same back with the recommendation that the bill do pass.

The bill leaves section 268 of the Judicial Code, formerly section 725 of the Revised Statutes, in full force and inserts five new sections, none of whose provisions conflict with said section 268.

ANALYSIS OF BILL.

By section 268a, in such cases of contempt specified in section 268 as constitute a criminal offense under any statute of the United States or at common law, the proceedings against the accused party shall be "as hereinafter provided"; that is, in the subsequent section of the bill.

Most of the important provisions of the bill are contained in section 268b. Before action by the court, except in the cases excepted from the operation of the bill, there must be presented a formal charge showing reasonable ground; and before the party is put upon trial he must be afforded an opportunity to purge himself of any actual or technical contempt which he may have committed. He can not be arrested until he has opportunity to either purge himself or make answer and has refused to do either. If arrested, or in case the matter can not be disposed of on the return day, he may be required to give bail.

The trial is by the court (1) in case no jury be demanded by the accused, (2) if the contempt be in the presence of the court or so near thereto as to obstruct the administration of justice, or (3) if the contempt be charged to be in disobedience of any lawful writ,

process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name or on behalf of the United States. In other cases the trial is to be by jury.

Section 268c provides for the preservation of bills of exception, for review upon writ of error, for stay of execution pending proceeding, for review, and for bail in case the accused shall have been sentenced to imprisonment.

Section 268d excepts from the operation of the act contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.

Section 268e bars proceedings for contempt unless begun within one year from the date of the act complained of, and preserves the right of criminal prosecution, notwithstanding any proceeding and punishment for the contempts covered by the bill. It also excepts from the provisions of the bill any proceedings for contempt pending at the time of its passage.

Thus it is seen that the bill applies and gives a jury trial, with the exception noted, in all proceedings for contempt wherein the acts alleged to have been committed constitute a criminal offense, either under any Federal statute or at common law. The trial where a jury is had, is governed (sec. 268b), as near as is practicable, by the practice in criminal cases prosecuted by indictment or upon information.

Before calling further attention to the provisions of the bill now reported it is appropriate to review some of the contentions of those who have opposed every form of legislation whatever on this subject.

OBJECTIONS ANSWERED.

All the grounds of objection are reducible to two heads:

First. That any legislation whatever materially limiting or curtailing the power of the courts in the trial of contempts is unconstitutional.

Second. That any interference with the full and complete dominion or discretion of the judge in contempt cases tends to disorganization and a weakening of judicial efficiency.

Let us consider first the constitutional objections.

It is said that although the courts inferior to the Supreme Court owe their existence and jurisdiction to congressional action, yet a distinction should be made between the jurisdiction and judicial power, for instance, in the citation, trial, and puishment of a party charged with contempt of court.

The controversy goes back over 60 years. In 1831 Congress passed an act limiting the power of the courts subjectively; that is to say, it lopped off some of the jurisdiction which the court had assumed and exercised—a jurisdiction, or power, if the latter term be preferred, which Congress believed, and by its legislation asserted, was a usurpation. Never, until within a very recent period, was the authority of Congress to do that questioned, either by the courts or

by any respectable authority. The particular circumstance or event, instigating the act of 1831, was the punishment by Judge Peck in Missouri, as for a contempt of court, of a party who had criticized one of his decisions in the columns of a newspaper.

The law before the act of 1831 read thus:

> The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority.

The act of 1831 consisted in addition of a proviso, reading as follows:

> *Provided*, That such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said court.

The extensive scope of this amendatory statute has been generally overlooked. The Federal courts were assuming and exercising the unlimited and unchecked powers resorted to by common-law courts, of deciding for themselves, not only the mode of procedure and degree and amount of punishment, but of selecting for themselves particular acts of alleged misconduct which should be placed in the category of contempts. Congress treated the term "power" as synonymous with "jurisdiction," circumscribed the field of jurisdiction, specified the acts which should constitute contempts, and said that such power or jurisdiction shall not extend beyond these specified acts.

It has been suggested that Congress might have refused to create the inferior courts, or even the Supreme Court, and have thus caused the failure of the Government.

But it is said that when Congress has acted and established a Federal court the common-law and equity powers of the courts immediately flow into these judicial receptacles out of the Constitution. It is only necessary to examine this new doctrine to know to what absurdities it would lead. The common-law courts of England, with the King's bench at their head, in addition to administering statutory law and the common law proper, exercised certain parliamentary powers. In the English system the legislative and judicial departments were, and are, entirely independent of each other. It is true that the courts were bound by acts of Parliament as construed by them, but outside the statutes their powers were as free from limitation as those of Parliament itself. They were the exponents and final arbiters of public policy for the Kingdom.

Though it is often said that the three departments of our Government are separate and independent, which is true in the sense that they must not invade each other's constitutional domain, and thus destroy each other, yet it is also true that arbitrary unchecked power does not abide with either of them. As the Supreme Court has well expressed it, in Yick Wo *v.* Hopkins (118 U. S. Rep., 369):

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

To concede that the courts might, even with the limits fixed in the act of 1831, exclusively decide when a contempt has been committed, and the amount or degree of punishment, with no power in Congress to set a limit thereto, would be to concede to the courts the power to annul every act of Congress, to paralyze the Executive arm, to confiscate all property, and destroy all liberty. Of course, few, if any, believe that the courts would ever proceed to such extremes, but it is sufficient to say that, according to our interpretation, the framers of the Constitution took care to safeguard the people against the possibilities of all such calamitous tendencies.

Referring to this bill, and comparing its provisions with the proviso added in 1831, it is seen that the bill only changes the procedure in contempt cases, while, as before stated, that proviso limited the jurisdiction subjectively.

The opposition was represented before the committee by able counsel and many authorities were cited, few of which, however, in our opinion, had any direct bearing on the question from a constitutional point of view. In fact, the power of Congress, as exhibited in the act of 1831, was so generally and uniformly conceded that not a single case has been found which ever questioned or doubted it. A few cases which, though not directly bearing upon the point of constitutionality, yet shed more or less light upon it, will now be noticed.

It is argued that Congress can not require a court of equity to try issues of fact by jury. That is unquestionably sound doctrine, and the case of Brown *v.* Kalamazoo, Circuit Judge (87 Mich., 274), is sound law. But it is wholly inapplicable here. No one has thus far ever insisted that contempt is of equitable cognizance, or other than what the textbooks designated, namely, a special proceeding, criminal in its nature, not necessarily connected with any particular suit or action pending in the court.

Numerous State cases were cited in argument. They may all be answered as a class. The relation between Congress and Federal courts is not the same as that between State legislatures and the State courts. The constitutions of the various States themselves provide for and establish the court, partition the powers of government between the legislative, executive, and judicial departments, prescribing safeguards, and defining their powers in detail; whereas the Federal Constitution has delegated full and complete control of the matter to Congress. Nor should the fact be overlooked that the State decisions on the subject are often based upon precedents of the common law, which is no part of the Federal system. Thus, in Ex parte McCowan (139 N. Car., 95), that being typical of many such cases relied upon, it was said:

> We are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeal the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void for reasons which we will now state.

In Finck *v.* O'Neill (106 U. S. Rep., 272) it appeared that Congress has taken from the court all power to enforce its judgment, and the act of Congress was upheld by the Supreme Court of the United States. In that case (p. 280) the court said:

> The United States can not enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judg-

ment. To reap the fruit of that judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction except as the law confers and limits it.

And in Cary *v.* Curtiss (3 How., 236, 254) the same court said:

The courts of the United States are all limited in their nature and constitutions, and have not the powers inherent in courts existing by prescription, or by the common law.

But in section 720 of the Revised Statutes we have a statute of Congress prohibiting the Federal courts from issuing injunctions in certain cases, and the constitutional validity of that statute was declared in Sharon *v.* Terry (36 Fed. R., 365). Now, the writ of injunction is the arm of the Federal courts in the exercise of their equitable powers, which it has been urged enjoy complete immunity from congressional action. And here a Federal circuit court sustained an act of Congress which substracted an important part of equitable jurisdiction. Anyone taking the trouble to examine the judiciary act of 1789, with or without subsequent additions and amendments, will observe that it consists, in large part, of regulations of and limitations upon jurisdiction.

We close this head with the quotation from Ex parte Robinson (19 Wall., 505), cited with approval in the case of Bessette *v.* Conkey (194 U. S., 327), which is so clearly and obviously applicable and conclusive that no comment appears to be necessary:

The power to punish for contempts is inherent in all courts. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power, but the power has been limited and defined by the act of Congress of March 3, 1831. The act, in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and power from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases.

(1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice.

(2) Where there has been misbehavior of any officer of the courts in his official transaction.

(3) Where there has been disobedience or resistance by an officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. The law happily prescribes the punishment which the courts can impose for contempts. The seventeenth section of the judiciary act of 1789 (1 Stat. L., 73), declares that the court shall have power to punish of their authority in any cause or hearing before them by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court debarring the petitioner, treated as a punishment for contempt, was therefore unauthorized and void.

As to the other ground of objection urged—that is, that any interference with the full and complete dominion and discretion of the courts tends to disorganization and to the weakening of judicial authority—judging by the course of previous discussion on this measure, it is not anticipated that the policy of the provision placing

a limitation upon the punishment which can be inflicted will be strenuously criticised, and, therefore, we will make no further comment on that.

TRIAL BY JURY.

The feature of the bill against which the most strenuous argument has been directed is that providing for jury trials. But no one has shown that such provision amounts to anything more than a change of procedure. So that the question comes down to this, Has Congress or not the power to prescribe precedure? The courts will still, if this bill passes, have all the substantive power left in their hands by the act of 1831. Not one of the acts there catalogued will have been eliminated. The method of ascertaining the facts in certain cases is changed, but their ascertainment is still under supervision of the court, and ample safeguards are provided against evasions and miscarriages of justice.

A contemnor, from the moment the facts are judicially ascertained, is, by uniform practice, either placed in durance or required to give bail. The result of an adverse judgment is always penal, both in form and effect, though the fine be sometimes turned over to a private litigant.

The manner of disposing of the fine does not alter, in any respect, the form and effect of the procedure, or change it from criminal to civil.

SUCH LEGISLATION LONG DEMANDED.

The bill is an evolution from prolonged and varied discussion, by no means limited to a recent date or to the present Congress. Every feature and provision of it has been subjected to attack and defense, but the whole controversy appears to have at length converged upon the issue of whether or not the policy and practice of jury trial in contempt cases shall be admitted in the Federal jurisprudence at all.

That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt have really convicted persons of substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury. It has been the purpose of your committee in this bill to meet this complaint, believing it to be a sound public policy so to adjust the processes of the courts as to disarm any legitimate criticism; and your committee confidently believes that, so far from weakening the power and effectiveness of Federal courts, this bill will remove a cause of just complaint and promote that popular affection and respect which is in the last resolve the true support of every form of governmental activity.

ACTS OF CONGRESS RELATING TO CONTEMPTS.

Statutes at Large, vol. 1, First Congress, first session, chapter 20:

AN ACT To establish the Judicial Courts of the United States, approved September 24, 1789.

SEC. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; (*a*) and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; (*b*) and to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States. (This section at page 83; letters in parentheses refer to notes at the bottom of the page.)

Act of March 2, 1831, upon which sections 725, 5399, 5404, 5405, and 5406, Revised Statutes, above quoted, is based, was as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense.

Approved, March 2, 1831.

Section 725, Revised Statutes United States (1878):

SEC. 725. The said courts shall have power to impose and administer all necessary oaths and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of said courts. (Stat. L., vol. 4, p. 487, 21st Cong., 2d sess., chap. 99, "An act declaratory of the law concerning contempts of court," approved Mar. 2, 1831.)

NOTE.—Section 725 of the Revised Statutes is reenacted by section 268 of the Judicial Code, effective January 1, 1912, and section 725 is repealed by section 297 of the same code.

Section 268 of the Judicial Code (1912):

SEC. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts, in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (Rev. Stats., sec. 725, 1878.)

Section 5399, Revised Statutes United States (1878):

SEC. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer, in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both. (Stat. L., vol. 4, p. 488; act approved Mar. 2, 1831.)

Section 5404, Revised Statutes United States (1878):

SEC. 5404. Every person who corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavors to influence, intimidate, or impede any grand or petit juror of any court of the United States in the discharge of his duty, or who corruptly, or by threats or force, or by threatening letters, or any threatening communications, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice therein, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. (Stat. L., chap. 420, vol. 17, p. 378; act of June 10, 1872.)

Section 5405, Revised Statutes United States (1878):

SEC. 5405. Every person who attempts to influence the action or decision of any grand or petit juror upon any issue or matter pending before such juror or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication in print or writing in relation to such issue or matter, without the order previously obtained of the court before which the juror is summoned, shall be punishable by a fine of not more than one thousand dollars or by imprisonment not more than six months, or by both such fine and imprisonment. (Stat. L., vol. 17, p. 378, chap. 420; act of June 10, 1872.)

Section 5406, Revised Statutes United States (1878):

SEC. 5406. If two or more persons in any State or Territory conspire to deter by force, intimidation, or threat any party or witness in any court of the United States from attending such court or from testifying to any matter pending therein freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, each of such persons shall be punished by a fine of not less than five hundred, nor more than five thousand dollars, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both such fine and imprisonment. (Stat. L., vol. 17, p. 13, Apr. 20, 1871.)

NOTE.—Sections 5399, 5404, 5405, and 5406 of the Revised Statutes are repealed by section 341 and reenacted by sections 135, 136, and 137 of the Criminal Code, effective January 1, 1910.

Section 135, Criminal Code (1910):

SEC. 135. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness in any court of the United States, or before any United States com-

missioner or officer acting as such commissioner, or any grand or petit juror or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or threatening communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both. (Rev. Stats., secs. 5399, 5404.)

Section 136, Criminal Code (1910):

SEC. 136. If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States, or in any examination before a United States commissioner or officer acting as such commissioner, from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully, or injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, each of such persons shall be fined not more than five thousand dollars or imprisoned not more than six years, or both. (Rev. Stats., sec. 5406.)

Section 137, Criminal Code (1910):

SEC. 137. Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States, upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both. (Rev. Stats., sec. 5405.)

THE BILL.

[H. R. 22591, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES, MARCH 29, 1912.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section 268 thereof five new sections, to be numbered, respectively, 268a, 268b, 268c, 268d, and 268e, reading as follows:

"SEC. 268a. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing any act or thing therein or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or at common law shall be proceeded against for his said contempt as hereinafter provided.

"SEC. 268b. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an

answer; and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused person is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

"In all cases within the purview of this act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them, as the court may direct; but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of one thousand dollars, nor shall such imprisonment exceed the term of six months.

"SEC. 268 c. That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon a writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court or by any justice or judge of any district court of the United States.

"SEC. 268 d. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, but the same and all other cases of contempt not specifically embraced within section 268 a of this act may be punished in conformity to the usages at law and in equity now prevailing.

"SEC. 268 e. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this act."

House Report 627, part 2, Sixty-third Congress, second session.

ANTITRUST LEGISLATION.

MAY 12, 1914.—Referred to the House Calendar and ordered to be printed.

Mr. GRAHAM of Pennsylvania, from the Committee on the Judiciary, submitted the following

MINORITY VIEWS.

[To accompany H. R. 15657.]

We, the undersigned members of the Committee on the Judiciary, do not agree with the action of the committee on the bill (H. R. 15657) entitled "A bill to supplement existing laws against unlawful restraint and monopolies, and for other purposes."

The antitrust laws on the statute book at this time have been carefully considered by the Supreme Court and judicially interpreted through a period of 24 years, and if properly enforced are believed by us to strip corporations and trusts of any power to injure or oppress.

No possible good can come from constant interference with business. It is our belief that business should have a rest from further legislation and be given an opportunity to adjust itself to the environment created by the existing antitrust laws as the same have been interpreted and are now being administered.

The proposed legislation contains many new phrases and sets up new standards, all of which would require a period of years of interpretation by the courts before their full meaning can be definitely known by the business world.

It is very undesirable to bring about such a period of uncertainty and doubt to woryy and harass the business of the country.

DISCRIMINATION IN PRICES.

The bill provides that any concern engaging in interstate commerce which shall discriminate in price between different persons or different localities (except on account of differences in grade, quality, or quantity of goods sold or differences in cost of transportation), with "the purpose or intent to thereby destroy or wrongfully injure the business of a competitor," shall be liable to a fine of $5,000 and to imprisonment for one year.

The phrase "with intent" to thereby destroy or wrongfully injure business is evidently relied upon to limit this prohibition to all such discriminations in price as would transgress the ethics of business competition.

Two things, however, make this view doubtful.

First. This section is intended to add something to the Sherman law; and an examination of the cases and decisions upon that law clearly shows that it already forbids all price discriminations that injure the business of a competitor in such a degree as to restrain trade.

It will probably be contended that this section forbids all price discriminations that wrongfully injure the business of a competitor, even though they fall short of "restraint of trade." This would introduce a new element and a new standard, and the meaning of the section would require judicial interpretation.

The ambiguous and uncertain language of this provision presents a difficult problem in judicial interpretation, and this would seem to us to be wholly unnecessary, in view of the fact that the law as it stands has already accomplished the object or purpose of this provision.

Second. The words "intent to wrongfully injure" present a modification of the bill as it was originally introduced, and relieves the section to some extent of the objections which could have been urged against it in its original form.

Nevertheless, it substitutes a new standard. In place of "monopoly" or "restraint of trade," the present standard, we will have to consider the "intent to wrongfully injure or destroy" the business of a competitor. This new standard must be construed in conjunction with the well-recognized presumption of law that a man always "intends" the natural consequences of his act. It would follow, therefore, that "intent to wrongfully injure" might be interpreted to cover every act by which one man obtains business from another in competition with him.

The word "wrongfully" has been introduced, evidently with the view of endeavoring to avoid this consequence; but it would seem to be inadequate for that purpose, because a jury might infer that any act which resulted in taking business from a competitor would necessarily be wrongful.

Price discriminations between different purchasers or different localities, adopted simply to avert business disaster by raising money to meet an exigency or to move unsalable goods, or adopted by a newcomer to get a foothold in a new territory—all of which might result in taking trade away from a competitor and thus "injure" his business—might be held to fall within the prohibition of this section.

It seems to us to be unwise to expose our business men to the peril of the interpretation of these new phrases when the law as it stands is definite and covers the subject matter of this section.

This section would seem to expose a manufacturer or jobber whose business extended over a wide area to a new and unjust risk. If confronted with competition at one point, and he lowers his price at such point merely and does so to meet the competitor's price in an endeavor (entirely within his legal rights) to keep the customers he

has won in a successful business career, it would seem to require him to lower his price all over the vaster area in which he sells his product. Otherwise he would be open to the accusation that his "intent" in lowering his price in the competitive territory was wrongful and might be made liable to fine and imprisonment.

A competitor who attacks at a single point and is in business only at that point might sell a small quantity of goods at lower prices, and to him this would be a negligible quantity, while the man whose business is assailed must, in order to avoid the appearance of evil and avoid the risk of litigation or prosecution, reduce his prices all over the country and thereby suffer a great loss.

If the section is intended to produce this result, then it is one that penalizes success in business. Mere size, although entirely lawful and not constituting a monopoly, would become a handicap. The business of such a manufacturer or jobber would be exposed to attacks savoring of blackmail; and yet, under the requirements of this section, he would have to sit supinely by and see his trade taken away; or, if he attempts to meet the attack—which would be his legal right—he must run the risk of appearing to wrongfully injure the business of the competitor or else, by reducing his price everywhere, meet with a great and destructive loss.

The policy of the antitrust laws is to foster competition, and is built upon the basis that that is the normal and desirable thing; but this law would tend to prevent competition, and put it in the power of an individual manufacture prices instead of manufacturing products.

On the other hand, a concern trying to enter a new territory and seek new business would be equally cruelly dealt with. It could not make any reductions in the new territory without at the same time reducing its prices everywhere else.

An independent trying to acquire additional business would thus be dangerously handicapped; he would, in fact, be denied the right of competition.

Competition is a struggle for business between competitors. The law fosters it; the courts enforce the law; and yet this section would seriously interfere with, if not deny, competition, and take away from the general public the benefits which such competition might bring.

This section carefully recognizes the right to make different prices based upon grade, quality, and quantity of goods sold, and permits the taking into account of the cost of transportation; but it makes no provision whatever for the differences in local cost of distribution; nor does it make any provision covering differences in price due to differences in cost of production in different localities.

It is not a sound argument to say that within a few years 19 States have passed similar regulations. The answer to such an argument is that conditions in a locality might permit of such regulations, while in a great country like ours they would not.

Why should the conditions of cost of distribution and the cost of production be ignored?

The controlling fact, however, still remains that cutting prices, which transgresses business fair dealing, can now be adequately met and punished.

DUTIES OF MINE OWNERS.

This is a new and important invasion of business liberty. By this section a mine owner is deprived of a natural right to sell his product where and to whom he may. The mine owner is put upon the same basis as a public-service corporation.

The majority report says this is intended to meet cases where great corporations get control of mines and keep the raw materials to themselves. If such a thing were done by a great corporation, or by any corporation, so as to thereby create a monopoly or attempt to create one, or restrain trade, it can readily be dissolved and, if necessary, punished under the terms of the Sherman law. But if none of these things follow, the control of the raw material should not be condemned, for it would be a means of cheapening the cost of the product to the consumer.

The basis upon which public-service corporations are regulated does not exist with reference to mines. A great majority of mines are owned by small corporations and are entirely independent of all combinations. Upon each of these corporations this bill would impose all the conditions of a public-service corporation; yet how widely different are the circumstances and conditions affecting these two classes! The mine has a limited output; its capacity is limited; the demand for its product may extend to many places and localities; more customers may apply for its product than can be supplied. On the other hand, the public-service corporation will have no demands beyond the locality it serves. The product of a mine must decrease; the product of a public-service company would naturally increase to meet every possible demand of the growth of its business. Being limited in market and product, the mine operator can deal with only a few customers, and must pick and choose. Those who offer the best terms and the best prices and assure him steadfast and continued absorption of the product of the mine would naturally be chosen as customers. And why should they not be selected? Why should the freedom of the mine owner be invaded and destroyed? Why should he be subjected to a demand from a stranger for part of his product?

To extend to mine owners the duties of a public-service company is to subject the most hazardous, most competitive, and least attractive business to duties which the law now imposes upon the least hazardous, most monopolistic, and probably the most attractive business under the new conditions.

Under this law, a mine owner is forbidden to select his own customers, although this right is carefully preserved with regard to every other business by the language of the proposed law.

EXCLUSIVE TRADE ARRANGEMENTS.

The bill provides that anyone engaged in interstate commerce who shall lease or sell "goods, wares, merchandise, machinery, supplies, or other commodities, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a

competitor" shall be liable to a fine of $5,000, and to imprisonment for one year.

The Sherman Act already forbids anyone to do any of these things in such a degree as to restrain trade. This bill goes further and restrains them in every degree.

This forbids the owner of a machine to lease or sell it under any arrangement by which the licensee shall buy all his spare parts and supplies from the manufacturer.

It would forbid the manufacturer to sell to a dealer under any arrangement by which the dealer would take a year's supply exclusively from the manufacturer.

It would forbid a manufacturer who has given a dealer exclusive territory for the sale of his line to require that dealer for a specified period not to carry any competitive line.

It wipes out the long-established agency system of doing business, and brands as criminal the time-honored practice of rewarding loyal dealers.

It would seem to be contrary to the principles of sound, fair, and legitimate business to forbid a manufacturer who desires to introduce his line of goods into a particular territory to make an arrangement with the retailer to concentrate his efforts upon the manufacturer's goods and push the introduction of them to the exclusion of all rival brands, yet this section would forbid any such arrangement.

Unless a manufacturer can give some assurance of reward to a retailer who undertakes the introduction of his goods, he can not hope to find a market for them in territory already occupied by his rivals. The bill, however, forbids the manufacturer to make any such arrangement.

A manufacturer selling a delicate machine, the successful operation of which depends upon perfectly adapted substitute parts, supplies, and supplementary appliances, agrees to furnish purchasers with perfectly adapted parts, supplies, and appliances at a special price, upon the understanding that they shall not use parts, supplies, or appliances of other manufacturers. This is done in the interest of maintaining the high standing and character of his machine. Yet this is forbidden by the bill.

Again, the manufacturer, instead of agreeing to sell these perfectly adapted parts, supplies, or appliances at a special price, agrees to sell the original machine at a special price, with the understanding that the purchaser shall not use imperfectly adapted parts, supplies, or appliances of any other manufacturer. This also is forbidden by the bill.

Again, the manufacturer sells no machines at all, but only leases them, and because they are delicate and any injury to them is his own loss he leases them only to lessees who agree not to use imperfectly adapted parts, supplies, or appliances of other manufacture. Or he leases them at a special rental, upon the understanding that the lessees shall not use imperfectly adapted parts, supplies, or appliances of any other manufacture. Or he agrees to sell to the lessee perfectly adapted parts, supplies, or appliances upon the understanding that the lessee shall not use imperfectly adapted ones of other manufacture. Each of these transactions—which good morals

and honorable business conduct from time immemorial have always sanctioned—is forbidden by the bill. For doing any of these things the manufacturer may suffer a fine of $5,000 and a year's imprisonment.

HOLDING COMPANIES.

The bill provides that no corporation shall acquire stock of another corporation where the effect of such acquisition is to "eliminate or lessen competition" between the corporation whose stock is so acquired and the corporation making the acquisition, or to make a monopoly of any line of trade in any section or community.

It also provides that no corporation shall acquire stock of two or more corporations engaged in commerce where the effect of such acquisition, by the voting or granting of proxies or otherwise, would eliminate or substantially lessen competition between such corporations, or any of them, whose stock of share capital is so acquired, or to create a monopoly of any line of trade in any section or community.

There are various exceptions mentioned in the bill, such as the acquisition of stock solely for investment; the holding of stock of subsidiaries formed for carrying out the lawful business of the corporation or legitimate branches thereof; excepting also the acquisition by railroads of stock in an independent railroad where there is no substantial competition.

This provision goes further than the Sherman Act of 1890 with relation to holding companies. Under that act the doing of any of these things with intent to create or actually creating a monopoly or restraint of trade is forbidden; and the law in this respect is fully ample and competent to take care of all such offenses and the offenders. This act, however, goes beyond and leads us into a most dangerous realm, for it makes "elimination or lessening of competition" the test of illegality; while the Sherman Act makes "monopoly" or "restraint of trade" the test of illegality.

The only possible excuse and justification for legislation against holding companies lies in the fact that the holding company intended to be reached by the law creates a monopoly, or attempts to do so, or restrains interstate trade.

This proposed law, however, would make the acquisition of stock by one corporation in another in the same line of business, and although the two corporations taken together would form in their united business an infinitesimal fragment of the business of the locality in that particular line, a crime punishable by fine and imprisonment.

The existing law is sufficient to reach all malefactors who would monopolize or restrain trade. The new law introduces new phrases which would necessarily be the subject of judicial interpretation for years to come. It introduces new and uncalled-for risks and penalties. It exposes every business man who would by a holding company unite his control of two or more small corporations, so as to be able to manage them under one management, to the risk and peril of indictment and imprisonment, although his act in effect neither creates a monopoly nor restrains trade.

The courts have expressly held that "restraint of interstate trade" and "restraint of competition in interstate trade" are not interchangeable terms.

There may be, under the antitrust act, restraint of competition that does not amount to restrain of interstate trade. (U. S. v. E. I. Du Pont de Nemours & Co., 188 Fed., 127, 151, and the Supreme Court cases cited.)

Why new, untried, and indefinite phraseology which has been judicially declared to be inconsistent with the language of the Sherman law should now be substituted for phraseology which has obtained definite meaning in the Sherman Act through 24 years of judicial interpretation, and which has been held to be so "comprehensive and thorough" as "to prevent evasion of its policy by resort to any disguise or subterfuge in form," or "the escape of its prohibitions by any indirection" (Standard Sanitary Mfg. Co. *v.* United States, 226 U. S., 20, 49), and to embrace "every conceivable act which could possibly come within the spirit or purpose of the prohibition of the law, without regard to the garb in which such acts were clothed," is hard to understand (U. S. *v.* American Tobacco Co., 221 U. S., 106, 181).

This section is not calculated to affect larger corporations so much as it will harass and annoy smaller ones. Where a few people are interested in two or three corporations of minor importance which they desire—not being able to merge or unite them in one, for legal reasons—to control under a single management, they are denied this right by the terms of this section, although if they could merge and unite them they would be guilty of no violation of the law. If such persons were to attempt to exercise this natural business privilege and method of managing their own property, they would render themselves liable to fine and imprisonment.

INTERLOCKING DIRECTORATES.

The bill provides against interlocking directorates—(1) To exclude from directorates of every interstate common carrier everyone who, directly or indirectly, has any individual interest in any transaction with such common carrier; (2) to prevent, so far as possible, with certain exceptions as to size and location, everybody engaged in any capacity in any branch of the banking business from engaging at the same time in any capacity in any other branch of the banking business; (3) to exclude from the directorates of every industrial corporation engaged in interstate commerce everyone who is a director in any competitive corporation.

With the principle underlying the first, no one can quarrel. The only question is, whether the existing laws punishing directors who directly or indirectly profit individually by transactions with their corporations need any reenforcement, and whether this need is so extreme as to justify eliminating as directors industrial and financial leaders whose advice within the wide field of their experience is almost invaluable, and whose reputation for judgment and integrity, fortified by the strict duties which the law already lays upon them, insures the confidence of the entire business community in the corporations which they serve.

As to the provisions relating to banks, or the second purpose above named, it is hard to find an adequate reason for the language of the bill. The law arbitrarily dissects the whole field of banking into innumerable small compartments, and creates uncrossable boundaries for each of these, determined, not upon the basis of a monopoly or a trust in monetary affairs, or the attempt to create either, but according to the character of the institution, whether national bank, State bank, trust company, or private bank, and according to the size of the institution, whether having more or less than $2,500,000 resources, and according to the population of the place in which the institution or bank is located, whether more or less than 100,000 inhabitants. Peculation or mismanagement in a community of more than 100,000 population would seem to be just as criminal as peculation or mismanagement in a community of less than 100,000 population. Mismanagement of or larcency from an institution of less than $2,500,000 resources would seem to be just as wicked, and perhaps more so, than larcency from or mismanagement of an institution of more than $2,500,000 resources. Why should legality or illegality depend upon such figures?

The arbitrariness of these figures emphasizes the unscientific character of the proposed legislation and the lack of principle in the entire proposal.

The third, or the provision relating to corporations engaged in interstate commerce (excepting common carriers), comes measurably closer to the principle of the Sherman Act than any of the preceding provisions relating to interlocking directorates. This provision, however, makes the bear possibility of "elimination of competition" the test of illegality, instead of the actuality of "eliminating or lessening of competition," which is the test adopted in the provision relating to holding companies; and instead of "restraint of trade," which is the test of illegality in the Sherman Act, this new standard of the "eliminating or lessening of competition" is substituted.

The phrase "so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws" affords no protection, but exposes all directors in more than one corporation engaged in interstate commerce to the peril of violating the law, because the proposed bill will be a part of the antitrust laws of the United States, and in it the "elimination of competition," or the liability to eliminate or lessen competition, instead of the creation of a monopoly or a restraint of trade, would become the governing test by which the directors would be judged.

Under existing laws, wherever interlocking directorates exist this fact can be shown, and if the interlocking tends to establish a monopoly or creates a monopoly or a restraint of trade, it can readily be reached and corrected and the evil removed. Neither the possibilities nor the actualities of "elimination of competition" ought to be substituted for "monopoly" or "restraint of trade" as the test of illegality.

This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will larger ones, against which the legislation is presumed to be aimed.

The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden.

It is provided that this provision shall not relate to corporations whose capital, surplus, and undivided profits do not exceed $1,000,000. There is no occasion for any such limitation or provision, but if one is to be made it ought to be much higher than this. The unscientific character of the proposed legislation rests upon the fact that an effort is made to take the detail by which monopoly or restraint of trade is effected, and erect these into separate and distinct crimes, whereas the law should aim ouly at the monopoly or restraint of trade, and leave the detail or incident by which either is effected to the court and jury under the circumstances of each particular case.

This view brings us back to the original question whether the Sherman Act, which already forbids such interlocking directorates in its general prohibition of monopoly and restraints of trade, needs any reenforcement, and whether this need is so extreme as to justify eliminating as diretcors industrial and financial leaders whose advice within the wide field of their experience is most valuable, and whose reputation for judgment and integrity insures the confidence of the business community in the corporations which they serve.

PRIVATE SUITS UNDER ANTITRUST LAW.

The bill provides that the final judgment or decree in any suit brought by the United States under the antitrust laws shall "constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same issues of law in favor of or against any other party" in any suit under the antitrust laws; that, while the United States is prosecuting any suit under the antitrust laws, the time within which any individual may sue on account of the same matter shall be suspended; that suits for treble damages and for costs of suit and for a reasonable attorney's fee may be brought by anyone injured by reason of any discriminations in prices or exclusive trade arrangements forbidden by the bill; that subpœnas for the attendance of witnesses may run into any other district; and that, subject to the rules covering injunction proceedings, any individual may sue any concern (except a common carrier subject to the interstate-commerce act) for an injunction against threatened loss or damage by reason of any violation of the antitrust laws.

These are all extraordinary remedies added to the existing remedy which every individual has of suing for treble damages and costs of suit and a reasonable attorney's fee for any violation of the Sherman Act. The only justification for these additional remedies must lie in the supposition that the existing remedy is insufficient.

Recovery of treble damages and costs of suit and an attorney's fee would seem, in themselves, sufficient inducements to any aggrieved party or his counsel to sue under the existing law.

The number of suits officially reported which have been brought to enforce this remedy show that in a large number the plaintiffs have obtained substantial verdicts. In all the other cases the courts show a strong disposition in favor of the plaintiffs upon the questions

raised by the pleadings, and the history of this litigation shows the effectiveness of the remedy now afforded by the existing law.

From the standpoint of the Government, the proposal to make Government decrees conclusive in private suits is open to serious objection. In various proceedings taken by the Government under the Sherman Act parties have been persuaded to consent to decrees granting all the relief which the Government demanded. Such consent decrees have accomplished, without the consumption of the time and expense involved in conducting prosecutions, all the relief which could be obtained by successful litigation. No hindrance should be put in the way of the Department of Justice in respect of these negotiations.

If this proposal were enacted, it would deter any company from ever consenting to the entry of a decree in a Government suit under the antitrust laws, for such a decree would simply invite a flood of litigation that might bankrupt any company.

The enactment of this provision into law would create an unfair discrimination unless, instead of restricting its operation to any suit or proceedings in equity hereafter brought, it were restricted to any suit or proceeding in equity hereafter brought for or by reason of any act, matter, or thing hereafter committed or omitted in violation of the antitrust laws. In other words, all past offenders should be put upon the same basis. Those against whom suits have been brought and determined are placed outside of the effect of this provision. So ought also those who might hereafter be sued because of things heretofore done or committed. In other words, if the section were confined to future offenders, this discrimination would not exist.

The extension of time in which individual suits may be brought until after the Government's suit is terminated is perhaps too broad an enlargement of the time and should be limited by some definite period; otherwise a protracted litigation might last for such a number of years as would end in the loss of evidence, the inability to find or produce witnesses; in other words, it tends to an indefinite extension of the statutory period. It ought, in our judgment, to be fixed so that there would be a time when, notwithstanding the suspension of the suit during the pendency of the litigation, no suit could be begun.

Under the proposed bill a peculiar hardship is threatened to witnesses in Government suits. Subpœnas are permitted to run into every district in the United States, and witnesses may be summoned to New York or Washington from San Francisco or Seattle or vice versa. This would tend to expose witnesses to loss and suffering and perhaps the attendant ruin of their business. It is our opinion that the present law, which provides for the taking of the testimony in the district where the witness resides or where he may be found, is amply sufficient.

The provision giving to any individual the right to enjoin any threatened loss or damage by reason of any violation of the antitrust law is a very serious one. Suits at law for damages such as may now be brought under the Sherman Act relate to past instead of to present or future conduct and do not have the same evil effects as a proceeding for an injunction. The beginning of an investigation by the Government on any complaint that a concern has violated the antitrust

law almost immediately to some extent affects his credit but not as seriously as an application for an injunction and perhaps a receivership, which might be brought by any individual. There should be a different policy in respect to the two classes of remedy, which should be analogous to that which has been recognized in respect of railroads under the interstate-commerce act.

If Congress should see fit to enact the law providing an interstate trade commission, it should have the power and authority of considering all requests of individuals to begin suits for an injunction under the antitrust laws and to provide that the commission should begin such suits in its own name whenever such requests seem warranted by the facts as the commission, upon its own investigation, shall discover them to be.

The Interstate Commerce Commission has substantially this power and duty now in respect of requests by individuals for equitable relief against railroads for violations or threatened violations of the interstate-commerce act. A similar practice, therefore, would seem to be logical in the matter of procedure under the antitrust laws.

The advantages of such a course would seem to be considerable: (1) In every worthy case, the individual would be saved an enormous expense, and the proceeding would be begun with all the weight and authority of a branch of the Government; (2) in every unworthy case, or case of mistake or misapprehension on the part of the complaining individual, the determination by the commission not to begin suit would save both the complaining individual and the accused concern enormous expense, and would prevent anything like blackmail or willful harassing of legitimate business; (3) in those few and almost never-occurring cases of a really worthy case, which neither the Department of Justice nor the interstate trade commission would find deserving of prosecution, the complaining individual would still be able to begin an action at law for treble damages under the antitrust act.

INJUNCTIONS AND CONTEMPTS.

Following the method pursued in the majority report, we would submit that it is true that the other sections of the bill are substantially the same as the provisions of the two separate bills (H. R. 23635 and H. R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. They deal entirely with questions of Federal procedure relating to injuctions and contempts committed without the presence of the court.

The minority reports made upon these bills in the last Congress explain their purpose and present the criticisms against them which might be made, and are comprehensive and should be read in conjunction with what has been set forth in the majority report. For convenience, we would present them as addenda to this report. They follow in order and are entitled "Appendix A" and "Appendix B."

All of which is respectfully submitted.

GEORGE S. GRAHAM.
HENRY G. DANFORTH.
L. C. DYER.

APPENDIX A.

RELATING TO INJUNCTIONS.

House Report 612, part 2, Sixty-second Congress, second session.

REGULATION OF INJUNCTIONS.

MAY 3, 1912.—Ordered to be printed.

Mr. MOON of Pennsylvania, from the Committee on the Judiciary, submitted the following as the

VIEWS OF THE MINORITY.

[To accompany H. R. 23635.]

The undersigned members of the Judiciary Committee, to whom was referred the bill (H. R. 23635) to amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," etc., which bill has been reported favorably, beg leave to submit herewith their views in opposition to the enactment of said measure.

The first section of the bill is intended as a substitute for the existing law on the subject of injunctions as found in section 263 of the Judicial Code, and the subsequent sections are intended to be supplementary to section 266 of the code.

According to the report of the majority of this committee, this bill intends to correct "the too ready issuance of injunctions, or the issuance without proper precautions or safeguards." If the report is predicated upon the "too ready issuance of injunctions," it is singular that it does not disclose a single case upon which the opinion of the majority could be founded. We are well aware of the charges iterated and reiterated before congressional committees alleging abuses in the issuance of injunctions. We have not found any more evidence to support them in the past than we now find in the report of the committee. We thoroughly believe, with the Supreme Court of the United States, "that no injunction ought to be granted except in a case reasonably free from doubt. We think such rule is and will be followed by all the judges of the Federal courts."

The minority members have at all times been willing to assent to a rational proposal to further safeguard the issuance of injunctions against even the possibility of abuse, and have introduced a bill for that purpose; but we can not consent to proposals which would operate to deprive the writ of half its efficiency in all cases and to

determine its application in many instances by the character of the parties to the controversy rather than the nature of the wrong which is to be remedied. We think, furthermore, that the majority report is founded upon a misconception of the course of judicial decision respecting statutes regulating the issuance of injunctions, and that the legislation proposed is impracticable, invalid, in the interests of a class rather than of the community, and proposes standards of legality without parallel or precedent in our legislation.

To make our position clearer, we consider the bill in the order pursued in Report No. 612:

I.

Preliminary to a discussion of the bill, the majority gives an historical résumé of legislation respecting notice in injunction cases. We believe essential elements of that history have not received the consideration deserved from the majority, and we must disagree with them respecting conclusions drawn from both the legislation and judicial decisions of the past respecting that legislation.

On the 2d of March, 1793, was enacted legislation of which the following was a part:

> Nor shall any writ of injunction issue in any case without reasonable previous notice to the adverse party or his attorney of the time and place of moving the same. (Ch. 22, vol. 1, U. S. Stat. L., p. 334.)

The majority concludes:

> The will of Congress as thus expressed was completely thwarted and the statute nullified by the peculiar construction placed upon it by the courts.

It appears to us the majority and not the courts, have misconstrued the will of Congress. They overlook, as the court did not, the distinction described in all authoritative textbooks, familiar to every lawyer and pointed out with striking distinctness by the courts, between restraining orders intended to preserve the status quo to protect the subject matter of litigation and the preliminary and final injunctions which are issued, if at all, after hearing upon the application for the equitable remedy. That the statute in question should not be construed to prevent the issuance of restraining orders was natural and inevitable. It was a practice recognized by the English chancery from time immemorial. The early English textbooks speak of it as well understood and essential, as, for instance, Eden on Injunctions, 1821; Adams Equity, 1845.

Had the court construed the act of Congress to forbid the preservation of the subject matter of litigation until the respective rights of the litigants could be adjudicated, it would have obviously given a construction against the very essentials of justice. Indeed, the majority recognizes and admits this by its own proposal, for while it criticizes the construction which permits the issuance of restraining orders without notice under special circumstances it provides in section 263 of its own bill for the doing of the very thing which it criticizes the courts for having done.

We call attention to the English practice, because it was early held respecting the judicial power of the courts of the Union in equity that:

> The usages of the high court of chancery in England whenever the jurisdiction is exercised govern the proceedings. This may be said to be the common

law of chancery, and since the organization of the Government it has been observed. (Penn. *v.* Wheeling, etc., Bridge Co., 13 How., 563; Meade *v.* Beale, 1 Campbell's Reports, 339, C. C. M. D. Tawney. 1850; Loring et al. *v.* Marsh, 2 Clifford's Reports, 469.)

Thus the courts did not "get around" the statute, as is suggested by the majority, but construed it in accordance with an immemorial practice of English jurisprudence which recognized the necessity of issuing restraining orders under special circumstances that the court might preserve the status quo, protect the subject matter of litigation, and preserve from destruction that upon which it was to pass judgment.

The report implies that the case of New York *v.* Connecticut (4 Dall., 1) upheld a construction which forbade the issuance of even restraining orders without notice. That issue is not presented in that case decided in 1799. The practice was first recognized four years before in the case of Schermerhorn *v.* L'Espenasse (2 Dall., 360). In this case the defendants, merchants of Amsterdam, had executed to the complainant power of attorney to receive for his own use the interest due on $180,000 of certificates of the United States, bearing interest at 6 per cent from the 1st of January, 1788, to the 31st of December, 1790, amounting to $32,400. Notwithstanding this assignment, the defendants, on the 16th of June, 1792, received certificates for the interest and funded the amount at 3 per cent in their own names. The bill prayed relief according to the equity of the case and a restraining order to prevent the defendants from transferring the stock or receiving the principal or interest. On the bill exhibited of the power of attorney and affidavits to the effect that the stock was registered in the name of the defendants on the books of the treasurer the restraining order was granted. No subpœna was served until Mr. Lewis, on behalf of the defendants, moved for a rule to show cause why the injunction should not be dissolved. The motion was refused. An examination of the record discloses that Mr. Lewis, counsel for the defendants, supported his motion for dissolution on two grounds:

That the injunction was issued irregularly, as there was no affidavit made of the truth of the allegations contained in the bill.

In supporting this he said:

He did not object because the injunction was issued before a subpœna was served, as there were various cases in which justice could not otherwise be obtained.

This proceeding was had two years after the passage of the statute of 1793 before a justice of the Supreme Court who had been a member of the Congress which had enacted the statute; the hearing was held in a building adjoining that in which the act was passed and in the same district where the Congress was sitting. It demonstrates as no other case can the well-recognized equity practice in relation to temporary restraining orders, and shows the construction placed upon the statute by the profession and the court. In the meantime the practice of issuing restraining orders without notice under special circumstances of necessity was approved through the exercise of the power by the highest authority, including various justices of the circuit and district courts and Chief Justice Marshall (who is observed to issue an ex parte restraining order to prevent moneys alleged to

have been improperly allowed by an administrator from being taken out of the country). (Green et al. *v.* Hanberry's Executors, 2 Brockenbrough's reports, 405, Nov., 1830; Love *v.* Fendall's Trustees, 1 Cranch C. C., 34; Marsh et al. *v.* Bennett, 5 McLean, 117; Crane *v.* McCoy, 1 Bond's Reports, 422; Mowrey *v.* Indianapolis & C. R. Co., 17 Fed. Cas., 930.)

Too much space would be taken by the enumeration of cases of this character, and those cited are merely offered as examples.

Finally, during the debate upon the act of 1872, now section 263 of the Judicial Code, we find two of the most distinguished lawyers of the Senate expressing the recognized practice as follows:

> Mr. CARPENTER. I understand if any judge having the jurisdiction by law to grant an injunction has presented to him a bill in equity, fortified with proofs which entitle the party by the acknowledged and usual practice of a court of equity to have an injunction, the judge has no discretion to deny it.
>
> Mr. FRELINGHUYSEN. I think that elementary provision of the law even I may have been presumed to have heard and known of.
>
> Mr. CARPENTER. Therefore I was astonished to hear the Senator deny it.
>
> Mr. FRELINGHUYSEN. I did not deny it. (46 Congressional Globe, p. 2492.)

Thus we find the practice respecting restraining orders recognized by Congress, by the courts, and the profession throughout the history of our Government and its necessity appreciated by the majority from its incorporation in this bill. Indeed, we believe the right to issue a restraining order upon a proper showing of its necessity to protect a right of a pecuniary nature against irreparable damage is an essential part of the judicial power in equity. If a suitor over whom a court has jurisdiction by a bill in that court discloses a state of facts where irreparable harm is threatened and where, if notice were given, irreparable damage would be done before hearing could be had or decree entered, were deprived by the legislature of the right to such a remedy, we believe it would be equivalent to a legislative determination in advance that under no circumstances can a plaintiff disclose a threatened irreparable injury without adequate remedy at law demanding immediate equitable intervention. If the Congress undertakes arbitrarily to determine in advance what a suitor would otherwise be entitled to as due process of law in a court of equity, we believe he would be deprived of a guaranteed constitutional right.

The first section of the bill, with one material exception, is almost an exact copy of a bill introduced in the Sixty-first Congress, known as the Moon bill. This bill was reintroduced in the present Congress, and was supported by the entire Republican membership of the Judiciary Committee.

The exception referred to has reference to the provision for the expiration of a restraining order granted by the court without notice. The Moon bill provided that the order should expire "within such time after service is made or notice given, which shall be made or given as speedily as possible, not to exceed seven days, as the judge or court shall fix." The proposed bill provides that "it shall expire at such time after entry as the court or judge shall fix, not to exceed seven days," etc.

A restraining order is of no effect until served, and under such a provision it would be only necessary for those having knowledge of the application to avoid service for seven days after the issuance of

the order to defeat its purpose. We can conceive circumstances in which a few who might be served would notify other defendants to avoid it and on failure to make the order effective by service within seven days it would be necessary to give notice to all previously served before an extension of further time could be had. We can conceive of no more certain method of depriving a suitor of essential equitable protection. Many judicial districts of our country administer justice over vast areas in which the material circumstances of life must be taken into consideration. The proposal of this section is general. It applies to all forms of litigation, and in view of the physical as well as the personal difficulties attending the service of restraining orders under some circumstances we can not but believe that not only would many individual suitors suffer grievous injury, but we can from our public service and professional experience conceive many circumstances in which the public interest would be seriously jeopardized. All of these difficulties would be overcome if the restraining order should date from the time of service instead of the time of its entry.

II.

Section 266A provides that no restraining or interlocutory order shall issue except upon the giving of security against cost or damage. Under the present practice this is within the discretion of the court, and while we should not be disposed to disagree with such a suggestion, we must again note that no reason is given for the suggested change which implies a failure upon the part of the courts to properly exercise this discretion. No evidence to this effect has been at any time submitted to the committee, nor do the majority offer any evidence to that effect as a reason for their action.

III.

Section 266B requires every restraining order or every injunctive order "to set forth the reasons for the issuance of the same to be specific in terms and describe in reasonable detail, and not by reference to the bill of complaint or other document the act or acts sought to be restrained;" it binds only the parties to the suit, "their agents, servants, employees, and attorneys or those in active concert with them, and who shall by personal services or otherwise have received actual notice of the same." This section is of general application. In support of this provision the majority point out that it is to be a safeguard against "dragnet or blanket injunctions," by which parties may be punished for contempt after "only constructive notice, equivalent in most cases to none at all."

Again, the majority asserts conditions as a basis for proposed legislation which are both unproven and unprovable. Nothing is clearer in the field of jurisprudence than the requirement that a respondent on a contempt charge must have actual notice of the existence of an order which he is accused of violating and that the order must have been unmistakably brought to his attention. (Bessette *v.* Conkey, 194 U. S.) All the Debbs cases, both in the circuit and district courts and on appeal, actually confirm this statement. The majority offer in proof of the necessity of their proposal merely an implica-

tion unwarrantedly reflecting upon the judiciary and without supporting proof of any character.

They have, moreover, properly provided in section 266 that every restraining order issued shall be accompanied by an entry stating the reasons for its issuance. It would be a useless waste of time to again set forth the reasons for the issuance of the order in the order itself, as is required by section 266B. Complaints are heard on every side against cumbersome and delaying procedure. This proposal multiplies the delays, difficulties, and inconveniences of procedure indefinitely. It requires every order to be a history, to repeat in irrelevant and cumbersome detail all the preliminary pleadings, and instead of enlightening the parties against whom it was issued the form suggested and the procedure prescribed would increase his confusion and doubt.

The majority point out that there is "no Federal statute to govern either the matter of making or form and contents of orders in injunctions," thereby inferring that this entire matter is left to the discretion or judgment of the judge granting the injunction. In this statement they entirely overlook the rules in equity of the Supreme Court of the United States binding upon all inferior Federal courts, prescribing with great minuteness and changed from time to time in accordance with the teaching of experience the forms of injunctive orders and forbidding the ceaseless repetition in decrees and orders of the contents of bills of complaint.

The effect of section 266B is to abolish the many rules in equity of the Supreme Court in conflict with it, representing the professional experience of a century, and amended from time to time to shorten procedure, increase the convenience, and protect the rights of litigants in the courts of the United States. The majority says section 266 does not change the best practice with respect to orders, but imposes the duty upon the courts in mandatory form to conform to correct rules as already established by judicial precedent. We respectfully submit that the equity rules of the Supreme Court express correct judicial precedents and that the majority have apparently overlooked this important fact.

The bill as reported would withdraw the application of the restraining order from parties not named in it and not in agreement with the parties named who may on their own initiative undertake its violation. Such cases are not uncommon. If the majority intend to exempt such violations of the order, they have created an unusual and remarkably privileged class of lawbreakers; if not, we are unable to discern the intention expressed in the limitation "in active concert with them."

IV.

The two paragraphs of section 266C must be read in connection with each other or their purpose and meaning are lost. The first paragraph provides that no judge or court of the United States shall issue any restraining order or injunction "in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning the terms or conditions

of employment, unless necessary to prevent irreparable injury to property or to a property right," etc. If this section is intended to withdraw civil rights from equitable protection in this class of cases, we must disapprove it as an evident effort to deny such protection as is given to civil rights in all other classes of cases, since it is axiomatic that it is the office of equity to protect by injunction, under proper circumstances, civil and even personal as well as property rights. We object to the implication contained in emphasizing controversies between employers and employees, or between employees or persons employed and seeking employment, and if the majority intends by this to indicate that such rights are to have less or different protection from the same rights when involving controversies of another kind we must emphatically disagree with the principle implied, for in this country remedies are to be predicated at all times upon the character of the rights which are threatened, and not upon the class or nature of the persons involved in the controversy.

We do not comment upon the many cases cited by the learned members of the majority in support of their views upon equity pleadings in this connection. We quite agree with the correctness of such decisions, but we draw from them quite a different conclusion from that implied by the majority. We think they prove what the majority evidently adduces them to disprove. To us they are evidence that the pleadings required with such particularity in the special class of cases involved in section 266C are required generally in all applications for equitable intervention. The majority are thus seen to be offering as proof of the need of special legislation for pleadings in a particular class of cases the fact that the courts have substantially required such conditions and pleadings in all classes of cases of which the kind enumerated are a part.

The second paragraph of section 266C contains to our mind the most vicious proposal of the whole bill. It enumerates certain specific acts and provides that no restraining order or injunction shall prohibit the doing of them. Most of the acts thus recited are in themselves not amenable to the injunction process under existing law and practice. No court does or would enjoin them, but to declare by law that these acts should under no circumstances be restrained, we do not hesitate to say, is a proposal without precedent in the legislative history of this country. No legislature has ever proposed that any act however innocent itself should be sanctified irrespective of the motive or purpose of the actor. "No conduct," says Mr. Justice Holmes in Aiken *v.* Wisconsin (195 U. S., 194), "has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

The majority have quoted various decisions in which particular acts under the pleadings presented to the court were held lawful and their prohibition denied. The same acts under other circumstances have been held unlawful and enjoined by the very courts, and in the course of the very decisions which the majority cites. Thus, in Arthur *v.* Oakes (63 Fed. Rep., 310), Mr. Justice Harlan is quoted to sustain the proposition that no man can by injunction be required to perform personal service for another, and in that decision Justice

Harlan eliminated from the injunction the words "and from so quitting the service of the said receivers with or without notice as to cripple the property or prevent or hinder the operation of said railroad." The majority must observe, however, that Mr. Justice Harlan likewise held, "But different considerations must control in respect to the words in the same paragraph of the writs of injunction, and from combining and conspiring to quit with or without notice the service of said receivers with the object and intention of crippling the property in their custody or embarrassing the operation of said railroad." Thus, the same act of quitting is lawful under one set of circumstances and unlawful under another, because the concerted action in the first instance, in the opinion of Mr. Justice Harlan, "is a very different matter from a combination and conspiracy among employees with the object and intent, not simply of quitting the service of the receivers because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad."

The majority undertakes to prescribe a set rule forbidding under any circumstances the enjoining of certain acts which may or may not be actuated by a malicious motive or be done for the purpose of working an unlawful injury or interfering with constitutional rights of employer or employee. In the same opinion Mr. Justice Harlan points out the impossibility of prescribing a set rule of this character and says, "The authorities all agree that a court of equity should not hesitate to use its power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is as Justice Story said, 'because of the varying circumstances of cases that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunction shall be granted or withheld,'" and the authority proceeds, "there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases and therefore should be fostered and upheld by a steady confidence." (Story, Equity Jurisprudence, sec. 959B; Arthur *v.* Oakes, 63 Fed., 328.)

Among the acts which the second paragraph of section 266C declares shall not be restrained is to prohibit any person or persons to terminate any relation of employment, or from ceasing to perform any work or labor or from recommending or persuading others by peaceful means to do so; of peacefully persuading any person to work or to abstain from working, or from ceasing to patronize or employ any party to such dispute or from recommending, advising, or persuading others by peaceful means so to do," etc.

While many of these acts are in themselves entirely harmless and would never be enjoined by any court, yet under certain circumstances the same acts might become a weapon of lawless and destructive industrial warfare demanding the protection of the courts, this section would prevent the issuance of the injunction in the Debs case (In re Debs, 158 U. S., 564); it would prevent the issuance of the injunction in Toledo & Ann Arbor *v.* Pennsylvania Co. (54 Fed.,

730); it would prevent the issuance of any injunction to restrain either workmen or employers who were the objects of the most vicious form of boycott that has been passed upon by the courts, or can be devised by the ingenuity of boycotters. It changes the remedies by which the Sherman Act may be enforced, inasmuch as if any of these acts enumerated in section 20OC were the means employed to enforce the restraint of trade or to damage the interstate business of any individual or corporation no injunction could be obtained either by a private individual or by the Government against such acts.

In the Debs case, a combination sought to paralyze the railroads of the United States and prevent the carrying of the mail until the railroad companies would agree not to haul Pullman cars because of a controversy between the Pullman Co. and certain of its employees who were not in the employ nor in any way related to the railroad companies. It is true there were acts of violence, but the general scheme was one of persuading all employees of the railroad companies to quit until the demands of the boycotters and strikers had been complied with. In the Toledo & Ann Arbor case the famous rule 12 of the brotherhood provided that none of its members should handle the cars of any carrier with which members of the brotherhood were in a dispute. In that case the brotherhood employees of the Pennsylvania refused to handle cars of the Toledo & Ann Arbor because of a dispute between that road and some of the brotherhood, and they threatened to quit the service of the Pennsylvania road unless it agreed to violate the provisions of the interstate-commerce act by not affording equal facilities to the cars of another road. No violence was threatened. The brotherhood merely undertook to "peacefully persuade" the Pennsylvania Co. not to handle the cars of the other road under a threat of leaving their service—a thing which they had a perfect right to do to better their own condition, but not for the purpose of compelling the Pennsylvania Railroad Co. to violate the law.

The majority report quotes at length from the case of Pickett *v.* Walsh (192 Mass., 572), "and regret the necessity of limiting the quotations, because the whole opinion could be studied with profit." We agree with the majority that the whole opinion could have been studied with profit, since it condemns forms of "peaceful persuasion" from which the majority would withdraw equitable intervention. Speaking of the case before it, it says: "It is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. * * * It is a combination by the union to obtain a decision in their favor by forcing other persons who have no interest in the dispute to force the employer to decide the dispute in their favor. Such a strike is an interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right to coercion or compulsion is limited to strikes against the persons with whom the person has a trade dispute; or, to put it in another way, we are of the opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to the strikers' demands is unjustifiable interference with the right of A to carry on his calling as he thinks best. Only two cases to the contrary have come to our attention,

namely, Bohn Manufacturing Co. *v.* Hollis (54 Minn., 223) and Jeans Clothing Co. *v.* Watson (168 Mo., 133)."

This case which the majority believe could be "studied with profit" is squarely against the proposal of their bill, and the two cases alluded to as being the only ones known to the court contrary to such view, for both have been overruled. Bohn Manufacturing Co. (54 Minn., 223) was overruled in Gray *v.* Building Trades Council (91 Minn., 171). The second case is alluded to by the majority of the committee in support of its contentions and the majority declare the logic of the court in that case "appears unanswerable." This "unanswerable" logic was overruled by the Supreme Court of Missouri in Lohse Patent Door Co. *v.* Fuel (215 Mo., 421).

The majority report also quotes in support of their contention from Vagelahn *v.* Gunter (167 Mass., 92), saying, "Justice Holmes, now of the Supreme Court of the United States, delivered the opinion." The opinion was delivered by Mr. Justice Allen and is squarely against the contention of the majority, Mr. Justice Holmes having delivered a dissenting opinion in which he stood alone. The majority have been driven to the necessity of quoting from other dissenting opinions in support of their opposition, and to these we do not deem it necessary to give attention.

It is said by the majority that no question of constitutionality is involved. We submit that if the measure is to be construed, as it evidently is, to prevent the application of injunctive relief to certain acts in disputes between employer and employee which may be part of a scheme or plan to work irreparable injury, which acts could be enjoined in any other department of litigation, it is obvious that the parties affected would be denied the equal protection of the law and due process of law, coming well within the rule laid down in Connelly *v.* The Union Sewer Pipe Co. (184 U. S., 540); Goldberg *v.* Stablemen's Union (149 Cal., 429); Pierce *v.* Stablemen's Union (156 Cal., 70); and Niagara Fire Insurance Co. *v.* Cornell (110 Fed., 816).

We do not consider the English act of 1906, which is quoted by the majority, as a precedent for some of its proposals. There is no parallel whatever between the conditions at which the English act is aimed and the fundamental restrictions of the organic law of this country, having no similitude in the constitution of the British Empire. The peculiar privileges conferred upon trades-unions by the English act of 1906 are accompanied by disabilities and criminal provisions of so drastic a nature that if they were offered as any part of the legislation of this country we should deem it our duty to oppose them in the interest of all workingmen.

We agree with the majority that "liberty, and more of it, is safe in the hands of the workingmen of the country." We are convinced of the merit and truth of that contention. We do not, however, believe that liberty is advanced in the person of any citizen by stripping him of remedial protection through processes which have received the deliberate and mature approval of the English-speaking race during all the centuries of its history. We can not believe that the due protection of person and property under constitutional guaranties and by remedies tested by time is "an impediment to progress," or that the destruction of the essential remedies by which person and property receive protection is "a great social advance." We believe with the President of the United States, in a famous statement

made by him many years since to the American Bar Association, "It will not be surprising if the storm of abuse heaped upon the Federal courts and the political strength of Federal groups, whose plans of social reforms have met obstructions in these tribunals, shall lead to serious efforts, through legislation, to cut down their jurisdiction and cripple their efficiency. If this comes, then the responsibility for its effects, whether good or bad, must be not only with those who urge the change, but also with those who do not strive to resist its coming." (Address to American Bar Association at Detroit, 1895.)

JOHN A. STERLING.
R. O. MOON.
EDWIN W. HIGGINS.
PAUL HOWLAND.
FRANK M. NYE.
FRANCIS H. DODDS.

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APPENDIX B.

RELATING TO CONTEMPTS.

House Report 613, part 2, Sixty-second Congress, second session.

PROCEDURE IN CONTEMPT CASES.

APRIL 20, 1912.—Referred to the House Calendar and ordered to be printed.

Mr. STERLING, from the Committee on the Judiciary, submitted the following as the

VIEWS OF THE MINORITY.

[To accompany H. R. 22591.]

We, the undersigned, members of the Committee on the Judiciary, do not agree with the action of the committee on the bill (H. R. 21100) entitled "An act to amend an act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911.

The effect of the bill is to take from the courts the right to determine the guilt or innocence of one charged with contempt in certain cases and submit that question to a jury. If its provisions were put into actual practice it would greatly impair and might in some instances, we fear, totally destroy the power of the court to enforce its orders and decrees and maintain the peace of society.

We know of no necessity for the erratic and radical legislation provided for in this bill. He who would depart from long-established principles and usages should be able to give some reason therefor. He should be able to offer something better or show wherein abuses would be corrected or evils avoided by the departure. The proponents of this bill have failed to do either.

The committee has had extended hearings on this bill. Nowhere has it been made to appear to the committee that there has been any general abuse of the power of the courts to punish for contempt, nor has specific instances been shown where persons were wronged by the exercise of that power which this bill seeks to take from the court and lodge in another tribunal.

We desire to view this bill in three aspects: First, as to some of its provisions in detail; second, as to its constitutionality; and, third, as to whether it is desirable legislation on the ground of public policy.

Even though it were desirable to try any questions of contempt by a jury there can be no possible reason why those cases set apart by this bill to be dealt with in that way should be so distinguished from

all others. It is important that all contempts should be punished with certainty and as summarily as possible consistent with justice. This is necessary in order to maintain the authority of the court and to secure to it that respect to which it is entitled. This is especially true where the acts constituting the contempts are acts of violence or where they constitute a crime. It is this class of contempts which this bill precludes from certain and summary punishment and no others. It provides that any act of disobedience to the law constituting contempt shall be tried by the jury if the act of disobedience also amounts to a crime, but it leaves the lesser offense of contempt not constituting crime to be punished summarily by the court. Punishment for violence in any form should be as certain and swift as is possible consistent with justice, and particularly so when that violence resists the execution of the processes and orders of the courts and the due course of justice. What reason can one assign for giving to the man who commits a crime in resistance to an order or process of court the right of trial by jury and denying it to the man who resists it by peaceful methods? The proponents of this bill have never here or elsewhere assigned any reason for the unjust and unfair distinction. As a concrete illustration of the working of such a law let us suppose a case. An officer of the law in the performance of his sworn duty seeks to serve one with a summons to attend court as a witness or juror, but is prevented from doing so by being assaulted and beaten. That offender is guilty of contempt by the commission of violence on an officer amounting to a crime, and under the provisions of this bill he is entitled to have his case of contempt taken away from the court whose authority he has violated and submitted to a jury, with all the delays and uncertainties incident to such practice.

In another case the officer serves one with a summons to attend as a witness or juror without molestation and makes due return to the court. But this man simply disobeys the order of the court by failure or refusal to attend, and he is denied the right of trial by jury and must submit to the summary determination of his contempt by the court whose order he disobeys. Thus, the graver offender, the one who defies the court and resists its authority by violence and crime, is given the right of trial by jury, if he demands it, while the lesser offender who simply fails or refuses to obey the order of the court is denied that right.

But even a graver injustice must inevitably flow from this invidious classification of contempts than that. The bill provides that trial by jury for contempt shall conform as nearly as may be to the practice in criminal cases prosecuted by indictment or upon information. Under that clause the court must apply the rules of evidence in criminal cases to that class of contempt cases which are submitted to a jury by this bill. It requires the court to instruct the jury that unless they believe from the evidence beyond all reasonable doubt that the accused is guilty of contempt he must be acquitted; and that if the acts of the accused can be explained on any other reasonable hypothesis than that of guilt he must be found not guilty. But this favorable rule of evidence will only apply in the case of the graver offender, who has defied the court by violence and intimidation and resisted its authority by the commission of crime. He of all persons charged with contempt, is selected out to receive the

benefit of any doubt, while the lesser offender, he who has passively disobeyed the order of the court, shall be convicted on a mere preponderance of the evidence. We believe in those rules of evidence which require strict proof, when liberty is at stake; but if they are made to apply to grave offenses in contempt cases, they should also be made to apply to slight offenses. We insist that if any distinction is to be made in this class of cases and in the degree of proof required, then the slight offender and not the grave offender should be favored in that distinction. This bill does the reverse.

Under this bill, prosecution for contempt would be subject to the delays and uncertainties incident to jury trials. This would be true in a measure even in law courts, of which the jury is a component part. Much of the time even these courts have no jury at hand. Under such conditions a jury must be drawn from the whole body of the people of the district, which would result in delay. The bill takes no account of a disagreement of the jury, or a failure to reach a verdict, and this would require the impaneling of another jury; and thus it will be seen that the authority of the court will be greatly weakened by delay and uncertainty, and the administration of justice greatly impeded by reason thereof.

It is very clear, however, that this bill is not intended, in its application, for contempt cases in the law courts. It aims at the courts of equity and seeks to impair their judicial power, by the intervention of a jury, to enforce their orders and decrees. This intervention of a jury in courts of equity, to determine questions of law and fact, is an innovation in practice unknown in the whole history of equity jurisprudence, and he who espouses it assumes the burden of showing it is a real reform and not a mere political exigency. Courts of equity have no jury nor the means of securing one. These courts grew up by reason of the very fact that they apply principles of justice and equity to the affairs of men which may be better administered by the chancellor than by a jury. They came as a necessity, to do justice in those cases where the rigid rules of law either wrought or permitted a hardship. This bill proposes to strip these courts of their true character as courts of equity and thus tie the hands of the chancellor in the administration of justice by the introduction of rules of practice which belong only to the courts of law.

It does violence to the experience of the centuries, that equity principles are best administered through the conscience of the chancellor. It is inconsistent, indeed it is folly, to confer upon courts of equity the judicial power to try and determine causes in equity and to then intervene between that court and the enforcement of its decrees another tribunal unknown to equity practice.

This bill contains one very remarkable exception. It makes a distinction between actions brought by or in the name of the United States and actions brought by persons. No reason has been assigned for this distinction, and we know of none. Section 268*d* provides:

> That nothing herein contained shall be construed to relate to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States.

It leaves contempts arising in this class of cases to be dealt with as they are now. If this bill provides good practice in contempts arising in suits between persons, why is it not good practice in suits to which

the Government is a party? If it would be bad practice in cases where the Government is a party, it would be bad in cases between persons. There is no escape from this conclusion. There is no rational or sensible reason for eliminating Government suits from the operation of the law, except that it would interfere with the proper administration of justice by hampering the courts in the enforcement of their orders and decrees and maintaining their authority and their complete integrity as courts. We fully agree that this is a conclusive reason for not applying the bill to such cases. It is just as conclusive a reason why it should not apply to other cases. It condemns the whole bill. The exception suggests the thought that it is desired to do as little harm as possible to the proper administration of justice, but to do only such harm as the political exigencies of the situation require. We respectfully submit that this is not the true and proper basis on which legislation should be predicated.

We are of the opinion that the proposed law is in violation of the Constitution. Congress can not take from the courts those inherent powers necessary to their existence or so regulate the exercise of them as to seriously impair them.

The judicial power of the United States is conferred upon the Supreme Court and such inferior courts as Congress may ordain and establish, by the Constitution, and not by any act of Congress. The language of the Constitution is as follows:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish.

The Constitution made it the duty of Congress to create such courts as it deemed necessary, and the instant Congress had acted in the performance of its duty the judicial power vested in the courts thus created, by virtue of the Constitution.

Judicial power is the power to hear and determine causes in law and equity and to enforce the processes, orders, judgments, and decrees of the court. The power, too, to enforce its judgments and decrees are equally important as the power to hear and decide cases. A court without the power to enforce its orders would be a nullity and utterly powerless to administer justice. In the case of Kansas *v.* Colorado (206 U. S., p. 31), Mr. Justice Brewer discussed the constitutional grant of power to Congress and the courts as follows:

> In the Constitution are provisions in separate articles for the three great departments of Government—legislative, executive, and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads:
>
> "All legislative powers herein granted shall be vested in a Congress," etc.
>
> And then, in Article VIII, it mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power, it has become an accepted constitutional rule that this is a government of enumerated powers.
>
> In McCulloch *v.* Maryland (4 Wheat., 405, 4 L. ed., 601) Chief Justice Marshall said:
>
> "This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seems too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."
>
> On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads

that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the Nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but, if there are any, they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. Construing this article in the early case of Chisholm *v.* Georgia (2 Dall., 419, 1 L. ed., 440) the court held that the judicial power of the Supreme Court extended to a suit brought against a State by a citizen of another State. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453; L. ed., p. 454):

"This question, important in itself, will depend on others more important still, and may, perhaps, be ultimately resolved into one no less radical than this: Do the people of the United States form a nation?"

In reference to this question attention may, however, properly be called to Hans *v.* Louisiana (134 U. S., 1, 33 L. ed., 842, 10 Sup. Ct. Rep., 504).

The decision in Chisholm *v.* Georgia led to the adoption of the eleventh amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or citizens or subjects of a foreign State. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in Cohen *v.* Virginia (6 Wheat., 264, 407; 5 L. ed., 257, 291): "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." See also South Dakota *v.* North Carolina (192 U. S., 286; 48 L. ed., 448; 24 Sup. Ct. Rep., 269).

Speaking generally, it may be observed that the judicial powers of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the Nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the Nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not, without its consent, subject to the controlling action of any of the instrumentalities or agencies. The creature can not rule the creator. (Kawananakoa *v.* Polyblank, 205 U. S., 349, ante, 834; 27 Sup. Ct. Rep., 520.) Nor is it inconsistent with the ruling in Wisconsin *v.* Pelican Insurance Co. (127 U. S., 265; 32 L. ed., 239; 8 Sup. Ct. Rep., 1370), that an original action can not be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.

These considerations lead to the proposition that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We believe that all the courts, where the question has arisen, have held that the power to punish for disobedience of the court's orders and decrees and for resistance to its authority is an inherent power which may not be taken away or impaired by legislative enactment. In the case of Middlebrook *v.* State (43 Conn., p. 257), the court said:

The statute is not to be regarded as conferring the power to punish for contempts, but merely as regulating an existing power. The power is inherent in all courts.

But independently of the statute, we think the power is inherent in all courts. The court of justice must of necessity have the power to preserve its own dignity and to protect itself.

The Legislature of Virginia passed an act very similar to the one proposed here, giving one accused of contempt of court a right of trial by jury. The courts of that State refused to recognize the power of the legislature to so regulate the powers of the court in contempt cases. In the Carter case in the 96 Virginia reports the court say:

Being of opinion that the defendant was guilty of contempt, we shall not attempt any classification of it as a direct or indirect contempt. If it were a direct contempt, then its punishment was without doubt to be ascertained and fixed by the court without the intervention of a jury by the terms of the law.

It is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

In the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power can be regulated but can not be destroyed or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury.

The Supreme Court of Michigan held the same doctrine in the case of Nichols *v.* Judge of Superior Court (130 Mich., 192), decided in 1902. The constitution confers judicial power on the courts of that State in much the same language as that used in the Federal Constitution. In that case the court used this language:

The question, therefore, is again presented to this court, Have the circuit courts of this State the inherent power to punish for contempts, or are they subject to the control of the legislature? The question is an important one in the administration of the law. If the legislature can determine what acts shall constitute contempts in the circuit courts, it can abolish the power of such courts to punish for the contempts. There is no middle ground; either the courts have the absolute control, under the constitution, over contempt proceedings, or they have only such as the legislature may see fit to confer.

In Hale *v.* The State (55 Ohio St. Rep.. 210) is another case in point:

In this case the inherent power to punish contempts and enforce orders of court by summary proceedings is fully sustained, and it is said of sections 6906 and 6907 of the Revised Statutes, which make certain acts formerly punishable as contempts now punishable by indictment as offenses against public justice, that if it is to be interpreted to take away from a constitutional court its inherent right to punish offenses of this character when they are contempts of court, the statute will be invalidated.

In Ex parte McCown (139 N. C.), decided in 1905, sections 648 to 657 of legislative act of 1871 were pleaded to prevent punishment for contempt. The court said:

We are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeals the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void for reasons which we will now state.

The case of Callahan *v.* Judd (23 Wis., 343) has been cited often on the question as to whether the legislature has the power under the constitution to require courts of equity to employ a jury in their ad-

ministration of the law. It is a well-considered case, and we quote from the opinion:

I think the act invalid, and my reasons are, briefly, as follows: The power to decide questions of fact in equity cases belonged to the chancellor just as much as the power to decide questions of law. It was an inherent part and one of the constituent elements of equitable jurisdiction. If, therefore, it shall appear that by the constitution the equitable jurisdiction existing in this State is vested in the courts, I think it will necessarily follow that it would not be competent for the legislature to divest him of any part of it and confer it upon juries. If they can do so as to a part, I do not see why they may not as to the whole. If they can say that in an equity case no court shall render any judgment except upon the verdict of a jury upon questions of fact, I can see no reason why they may not say that a jury shall also be allowed to decide questions of law.

But the constitution (sec. 2, art. 7) provides that "the judicial power of this State, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts. * * *"

In order to determine the meaning of the phrase "judicial power as to matters of law and equity," it is only necessary to refer to the system of jurisprudence established in this country and derived from England, in which the court had certain well-defined powers in those two classes of cases. In actions of law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the constitution, therefore, vested in certain courts judicial power in matters at law, this would be construed as vesting such power as the court, under the English and American systems of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood. But, to remove all doubt in actions at law, the right of a trial by jury is expressly preserved by another provision.

But, as already stated, the power of a court of chancery to determine questions of fact as well as of law was equally well established and understood. And when the constitution vested in certain courts judicial power as to matters in equity, it clothed them with this power as one of the established elements of judicial power in equity, so that the legislature can not withdraw it and confer it upon juries. * * *

The plain object of this provision was to enable the legislature to distribute the jurisdiction in both matters at law and in equity as between the circuit courts and the other courts in the State, giving the circuit courts such original jurisdiction and such appellate jurisdiction as it might see fit. But the jurisdiction there intended was jurisdiction of the suit.

It may well be that the legislature may deprive the circuit courts of original jurisdiction in actions for the foreclosure of mortgages. It is unnecessary to determine whether it could or not. But it is quite certain that this clause contains no authority for it, while leaving those courts jurisdiction of this class of action, to attempt to withdraw from them an acknowledged part of the judicial power and vest it in the jury.

The Supreme Court of Oklahoma held an act of the legislature unconstitutional which required the courts to submit indirect contempts to a trial by jury. The following is the opinion of that court in the case of Smith *v.* Speed (11 Okla., 95):

If it now should be found that the judge had no power to enforce his order at all or to punish for contempt, and that the court had no power to punish beyond a fine of $50 and imprisonment not exceeding a longer period than 10 days in the county jail, and that a change of judge may be had and a change of venue from the county, and that a trial by jury may be had to determine whether the recalcitrant party is in contempt at all or not, it will be admitted by the bar, acquainted with the law's delays, that the power to punish for contempt, either direct or indirect, being destroyed in the judge, will be to a great extent destroyed also in the court and rendered valueless.

If the contention now sought for by the plaintiff in error should be sustained, it would go to the extent that the court, in equitable proceedings, after a full hearing and a final determination and judgment upon the merits, is without the power to enforce its judgments by the imposition of a pecuniary penalty or imprisonment, and that in the endeavor to enforce its judgment by proceedings in contempt it would be subject to have its final judgment brought into review in the contempt proceedings upon a change of judge, or of venue, to a completely new jurisdiction and to a trial by jury, in which the merits of the final order, which has been made by the court, in the proceeding, should again be reviewed, including the question whether there was any merit, right, or authority of the court in the equitable proceedings in which the judgment had been rendered or the order made, and the equitable jurisdiction of the district court upon matters finally determined would thus be subject to be again brought in question by another judge in another venture and by a jury, a thing unheard of in the chancery jurisdiction. If such a state of things could be, it could but result in the degradation of courts and to make them truly the subjects of contempt.

If the power to punish for contempt is inherent in the court, it can not be taken away or impaired by Congress or the State legislatures. If it is inherent, then the courts can not exist without it. As to whether such power is inherent is well stated by the Supreme Court of Mississippi in the case of Watson *v.* Williams (36 Miss., 331), as follows:

The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it.

In Kalamazoo *v.* Superior Court Judge, in 75 Michigan, 274, the court argues the question in this way:

It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights. * * * The function of judges in equity cases in dealing with them is as well settled a part of the judicial power and as necessary to its administration as the functions of juries in common-law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how the facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they can not foreclose him in his conclusions unless they convince his judgment.

In all ages and in all countries this distinction by nature, which was never called "equitable" except in English jurisprudence, where it was first so called from an idea that the rights were imperfect because unknown in the rude ages, when property was scanty and business almost unheard of in the regions outside of great cities, has been recognized and provided for by suitable methods substantially similar in character. * * * The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore.

The following cases and many others lay down the same doctrine: Ex parte Terry (128 U. S.); Eilenbecker *v.* Plymouth Court (134 U. S.); Ex parte Debs (158 U. S.).

In conclusion, we call attention to the most recent utterance of the United States Supreme Court on this point in the case of Gompers *v.* Bucks Stove & Range Co. (221 U. S., 492) and the cases therein cited.

Judge Lamar says:

For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens." (Bessette *v.* W. B. Conkey Co., 194 U. S., 333, 48 L. ed., 1004; 24 Sup. Ct. Rep., 665.)

There has been a general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For, if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants. (Bessette *v.* W. B. Conkey Co., 194 U. S., 337, 48 L. ed., 1005; 24 Sup. Ct. Rep., 665.)

What good can come from this legislation? What evils will be remedied and what rights will be more secure? If you can point to nothing it will accomplish in the way of enlightened progress then this bill should be defeated. If our present system of punishing contempts has worked well, is it the part of wisdom for Congress, even if it has the power, to change it? Is it wise public policy to do so?

In this day of carping critics we hear much of criticism of our American institutions and especially of our courts. Criticism of some of the courts may be just, but that does not justify a radical change in the method of procedure that will hinder and embarrass our whole judiciary in the administration of justice. If in some instances, yet none have been cited, the judges have abused the power to punish for contempt, is it a wise policy to take from or seriously impair the power of all the judges to administer justice and maintain the dignity and authority of the courts of the land?

It has been urged that this legislation is needed to relieve the courts of the criticism that the judges are biased in their decisions as to whether their own orders have been violated and their authority defied.

They say that whether this criticism be just or not, they should be removed from the possibility of this charge. Even if this amounts to an argument it is not necessary to impair the power of the courts in the performance of their judicial functions to reach that end. If one accused of contempt feels that he can not have a fair trial before the judge "whose authority he has defied," it is not necessary to resort to the slow, uncertain, and cumbersome plan provided by this bill to remedy that evil if it were possible under the Constitution

to do so. The possibility of prejudice on the part of the judge may be eliminated by another plan much surer and more expeditious than this, and a plan that does no violence to the Constitution. Let the accused have the right to have another judge designated to try and determine whether he is guilty of the charge. A judge is qualified to know and understand the force and purpose of a decree and the importance to the litigants and to the people of having it duly observed. This would avoid all the uncertainties and delays incident to the jury system. It would wholly remove the possibility of the accused being the victim of bias or prejudice and fully answers the charge that judges should be protected from the criticism that prejudice influences their decisions in such cases.

President Taft very ably discusses these two plans in his letter of acceptance:

DANGEROUS ATTACK ON POWER OF COURTS.

This provision in the [Democratic] platform of 1896 was regarded then as a most dangerous attack upon the power of the courts to enforce their orders and decrees, and it was one of the chief reasons for the defeat of the Democratic Party in that contest, as it ought to have been. The extended operation of such a provision to weaken the power of the courts in the enforcement of their lawful orders can hardly be overstated.

EFFECT OF JURY TRIAL.

Under such a provision a recalcitrant witness who refuses to obey a subpœna may insist on a jury trial before the court can determine that he received the subpœna. A citizen summoned as a juror and refusing to obey the writ when brought into court must be tried by another jury to determine whether he got the summons. Such a provision applies not alone to injunctions, but to every order which the court issues against persons. A suit may be tried in the court of first instance and carried to the court of appeals and thence to the Supreme Court, and a judgment and decree entered and an order issued, and then if the decree involves the defendant's doing anything or not doing anything, and he disobeys it, the plaintiff, who has pursued his remedies in lawful course for years, must, to secure his rights, undergo the uncertainties and delays of a jury trial before he can enjoy that which is his right by the decision of the highest court in the land. I say without hesitation that such a change would greatly impair the indispensable power and authority of the courts. In securing to the public the benefits of the new statutes enacted in the present administration the ultimate instrumentality to be resorted to is the courts of the United States. If now their authority is to be weakened in a manner never known in the history of the jurisprudence of England or America, except in the constitution of Oklahoma, how can we expect that such statutes will have efficient enforcement? Those who advocate this intervention of a jury in such cases seem to suppose that this change in some way will inure only to the benefit of the poor working man. As a matter of fact, the person who will secure chief advantage from it is the wealthy and unscrupulous defendant, able to employ astute and cunning counsel and anxious to avoid justice.

I have been willing, in order to avoid a popular but unfounded impression that a judge, in punishing for contempt of his own order, may be affected by personal feeling, to approve a law which should enable the contemnor upon his application to have another judge sit to hear the charge of contempt; but this, with so many judges as there are available in the Federal courts, would not constitute a delay in the enforcement of the process. The character and efficiency of the trial would be the same. It is the nature and the delay of a jury trial in such cases that those who would wish to defy the order of the court would rely upon a reason for doing so.

MAINTENANCE OF FULL POWER OF COURTS NECESSARY TO AVOID ANARCHY.

The administration of justice lies at the foundation of government. The maintenance of the authority of the courts is essential unless we are prepared to embrace anarchy. Never in the history of the country has there been such an

insidious attack upon the judicial system as the proposal to interject a jury trial between all orders of the court made after full hearing and the enforcement of such orders.

We present a bill (H. R. 21722) introduced by Mr. Sterling, which provides a plan of procedure in contempt cases, and which gives to one accused of indirect contempt the right to have another judge designated to try and determine the charge of contempt against him, and recommend that it do pass.

It is as follows:

[H. R. 21722, Sixty-second Congress, second session.]

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and sixty-eight thereof seven new sections, to be numbered, respectively, 268 a, 268 b, 268 c, 268 d, 268 e, 268 f, and 268 g, reading as follows:

"SEC. 268 a. That contempts of court are divided into two classes, direct contempts and indirect contempts, as hereinafter defined.

"SEC. 268 b. That contempts committed in the presence of the court or of a judge at chambers are direct contempts. All other contempts are indirect contempts.

"SEC. 268 c. A person charged with direct contempt of court, if found guilty, shall be punished summarily and judgment thereon shall be entered of record accordingly, which judgment shall contain a statement of the acts constituting the contempt and a statement, if any, of the accused relied on as a defense or made in extenuation of the offense and the sentence of the court in the case.

"SEC. 268 d. Any person charged with indirect contempt of court shall be given a written statement of the charge or charges against him specifically setting forth the acts on which the charge of contempt is predicated. Thereupon the accused shall be arraigned and his plea entered of record. If the accused should plead guilty to the charge, the court shall enter judgment thereon and impose sentence in the case. If he pleads not guilty, the court shall set the case for trial and admit the accused to bail until final determination of the case. The trial shall be by the court, and witnesses called and examined for and against the accused as in criminal cases. If the accused shall be found guilty, judgment shall be entered accordingly and the punishment prescribed. Said punishment may be by fine or imprisonment, or both, in the discretion of the court: *Provided*, That in cases where the fine is payable to the United States the same shall not exceed the sum of one thousand dollars in any case; and in no case shall the term of imprisonment exceed six months.

"SEC. 268 e. If any person who has entered a plea of not guilty to a charge of indirect contempt shall make affidavit that the judge before whom the case is set for trial in the first instance is prejudiced against him and that on account of such prejudice he believes he can not have a fair and impartial trial such judge shall designate forthwith some other judge to hear and determine the case.

"SEC. 268 f. That the evidence taken on the trial of any person accused of indirect contempt shall be preserved by bill of exceptions and any judgment entered in such case may be reviewed on appeal or by writ of error as now provided by law in criminal cases and such judgment may be reversed or modified as justice may require. When an appeal is taken or a writ of error granted, execution of the judgment shall be stayed and the accused shall be admitted to bail in such sum as is fixed by the court.

"SEC. 268 g. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court: *Provided*, That this act shall not affect any contempt proceedings pending at the time of the passage of this act."

The fundamental distinction between this bill and H. R. 21100 is that the latter provides a trial by jury in cases where the acts constituting the contempt also constitute a criminal offense, while this

bill provides that in indirect contempts the accused may have another judge to try the contempt.

We believe that it meets every criticism, just or unjust, and avoids every evil that may be charged against the present practice.

It divides contempts into two classes, direct and indirect, and gives to each class the usual and natural definition.

It defines direct contempts as those committed in the presence of the court or of a judge at chambers. Under it these contempts shall be punished summarily by the court. No one would change the practice in that regard, and neither of the bills would deprive the court of the power to deal with such contempts in that way. It further provides that the judgment in such case shall be entered of record and that the judgment shall contain a statement of the acts and a statement, if any, of the accused, relied on as a defense or as an extenuation of the offense.

It provides a specific plan of procedure in all cases which charge an indirect contempt of court. The accused may in such case, upon his own affidavit that the judge is prejudiced against him and that on account thereof he believes that he can not have a fair trial, have another judge designated to hear and determine his case.

The bill also provides for a review by the higher courts on appeal or by writ of error.

We repeat that the only charge made against the present practice is that judges who have issued orders or rendered judgments and decrees should not be permitted to pass upon the question as to whether a person has violated such order or decree or has defied or assailed the authority of the court over which that judge presides. It is said that a judge under such circumstances is prone to bias and that his decision might be tainted with prejudice against the accused. This bill eliminates such a possibility and it does it more effectually than does the bill reported by the majority. Under that bill the judge conducts the trial of the case before the jury, he passes upon the admissibility of the evidence, and delivers the charge to the jury, so that under the system provided by that bill there is still a possibility of the same criticism against him as in the present practice. The accused might still feel that he was the victim of judicial bias.

Such is not the case in the bill offered by the minority. Under its provisions the judge whose decree has been violated or whose authority has been defied is eliminated from the case and it is submitted to another judge who could have no possible prejudice against the accused, because he has no connection with the case. This bill meets all objection to the present practice without doing violence to the long-established principles of equity which forbids the intervention of a jury in equity proceedings. It accomplishes the desired end without taking away or impairing the judicial power of the court conferred upon it by the Constitution.

Respectfully submitted.

JOHN A. STERLING.
R. O. MOON.
EDWIN W. HIGGINS.
PAUL HOWLAND.
FRANK M. NYE.
FRANCIS H. DODDS.

House Report 627, part 3, Sixty-third Congress, second session.

ANTITRUST LEGISLATION.

MAY 13, 1914.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. NELSON, from the Committee on the Judiciary, submitted the following

MINORITY VIEWS.

[To accompany H. R. 15657.]

The undersigned, a member of the Committee on the Judiciary, having had under consideration H. R. 15657 and similar bills, being unable to agree with the majority of the committee, submits the following minority views:

The so-called antitrust bill reported by the committee is a distinct disappointment to those who sincerely desire to destroy private monopoly. The question of the suppression of trusts receives only incidental consideration. Instead of directly dealing with the trust problem, which was the original program, the committee has turned to side issues, such as discrimination in price, exclusive contracts, and the use of injunctions in labor disputes. These subjects are treated irrespective of the question of restraint of trade or of monopoly; such vague phraseology is employed, and so many exceptions are made that it becomes doubtful whether it is harm or benefit that results. In so far as this bill touches the problem of private monopoly at all, it legislates in an arbitrary way against the form of the evil and not against the substance. This bill as a whole will afford little relief to the people from the oppressions of the trusts.

After months of hearings before the Judiciary Committee upon certain tentative bills prepared by a partisan subcommittee, in consultation with the President, the outcome has been this compromise measure, which is clearly intended as an assurance to big business and a sop to public opinion. During the hearings no big trusts appeared to oppose the tentative bills, nor has the introduction of this final draft created any uneasiness or flurry in Wall Street. On the other hand, the smaller business men of the country have been very much concerned because of the far-reaching interference with business affairs that may follow the enactment of this measure. Like a Don Quixote the committee sallied forth valiantly to overthrow

the giant monopoly, but under the pressure of political expediency it turned aside to assail the windmills of little business. The spirit of compromise which runs through every section of this bill is something quite apart from the spirit of the brave declaration that "A private monopoly is indefensible and intolerable," but rather in it we detect the "atmosphere of accommodation and mutual understanding" between the Government and big business which the President advocated in his trust message.

ANALYSIS OF THE BILL.

Sections 2–4 of this bill are designed to check methods of unfair competition. This matter is dealt with entirely apart from the question whether these business methods restrain interstate commerce or tend to monopoly. Nor is it treated comprehensively or in a satisfactory manner. Out of all the unfair business methods whereby the trusts have been able to crush the independents, two are selected—discrimination in price and the making of exclusive contracts. This bill apparently permits trusts arbitrarily to refuse to sell to persons whom they wish to crush, except in reference to the products of mines, and it does not deal at all with such familiar practices as selling below cost to destroy the business of a competitor, placing prohibitive prices upon raw materials which are needed in the production of other commodities, spying upon the business of competitors, the doing of business under a fictitious name, or with intimidating the customers of a competitor by unwarranted threats of suits for alleged infringement of patents. To single out two unfair business practices—discrimination in price and the making of exclusive contracts—may have the bad effect of creating the impression that the other methods used to crush the independents are not under the ban of the law. As to the two practices prohibited, such exceptions are made in this bill that it apparently permits the trusts to do the very acts it aims to prevent. On the other hand these ambiguous sections may prove harassing and burdensome to the small business man. These new provisions are as likely to weaken as to strengthen the Sherman Act.

PRICE DISCRIMINATION.

Section 2 prohibits discrimination "in price between different purchasers of commodities in the same or in different communities." It is directed against an undoubted evil. But does this bill afford adequate protection against the continuance of this evil?

It must be noted that only discrimination "in price" is prohibited. There certainly can be many discriminations of a most serious character which do not involve the price at which a commodity is sold. One customer may be favored as against another in the manner and time of delivery, in more lenient terms of credit, and in any number of other terms of sale. This section permits all discriminations between purchasers except those relating to price.

Again, it is doubtful whether this section has any application to discrimination in price in bids and offers for sale to proposing purchasers. It prohibits discrimination only as between "different purchasers of commodities."

Nor does this section apply when commodities are not "sold for use, consumption, or resale within the United States." This exception clearly sanctions the practice of trusts in selling their commodities cheaper abroad than at home. What discrimination in price could be more vicious? Yet this bill expressly permits such discriminations against our own people.

There is also the big loophole that the discrimination in price must be shown to have been made with the purpose or intent to destroy or wrongfully injure the business of a competitor. This is a very indefinite element, yet whenever such intent can not be proven prosecutions for discrimination must fail.

Then, too, what discriminations in price may not be covered up as due to the grade, quality, or quantity of the commodity sold permitted by the first proviso? To allow discriminations on account of the quantity sold is to favor the trusts against the independents, the big purchasers against the small fellows.

The second proviso similarly destroys the intent of this section. It provides that this section shall not be deemed to prevent persons engaged in interstate commerce "from selecting their own customers." If trusts are given the power to select their own customers, they may discriminate between proposing purchasers. They may impose any conditions which they choose before they will deal with any proposing customer. They may refuse to deal with more than one person in any community, or for that matter throughout the United States. As far at least as this section goes, this proviso would have sanctioned the arbitrary action of the Motion Picture Trust in refusing to lease films to anybody but the General Film Co. This will permit a trust which controls the supply of some raw material, other than the product of any mine, which is needed in the production of some other commodity to absolutely refuse to sell such raw material whenever it cares to branch out into the manufacture of such other commodity. This proviso, it is probable, will sanction the practice of manufacturers to refuse to sell to any middleman who will not agree to sell their commodities at a certain fixed price, although the Supreme Court has decided that such efforts to control the prices to consumers are illegal.

The merits of this section can best be understood when it is restated in such manner as to bring out the discriminations permitted:

"That any person engaged in commerce is permitted to discriminate in price and in any other terms of sale in bids or offers for sale made to proposing purchasers of commodities, and every such person engaged in commerce is permitted to discriminate between different purchasers of commodities in the same or different sections or communities in reference to any terms of sale other than the price of such commodities and is permitted to discriminate in price if he merely gives a lower price to purchasers in foreign countries or if such discrimination in price is made on account of differences in the grade, quality, or quantity of the commodity sold or because of differences in the cost of transportation or if such discrimination results from the selection of their own customers by persons engaged in selling goods, wares, or merchandise in commerce or if it can not be established that such discrimination in price is made with the

purpose and intent to thereby destroy or wrongfully injure the business of a competitor, either of such purchaser or seller."

MINE PRODUCTS.

In section 3 an exception from the permission granted in section 2 that all corporations engaged in interstate commerce may select their own customers is made in reference to the products of mines. The owners and operators of mines and the persons "controlling" the product of any mine are prohibited from "arbitrarily" refusing to sell such product of any mine to any "responsible person, firm, or corporation." The persons controlling the supply of any other commodity, even if it is some raw material required in the production of other commodities, may select their own customers and may arbitrarily refuse, at their pleasure, to deal with any person, firm, or corporation. Why should the products of mines be thus singled out? If this is a sound principle, why should it not be applied generally as to all commodities, or at least as to all raw materials which are required in the production of other commodities?

This section is open to the further criticism that the language employed is vague and indefinite. To convict an owner or operator of any mine, or any person controlling the product of any mine under this section, it is necessary to prove that he "arbitrarily" refused to sell such product "to a responsible person, firm, or corporation." The use of the words "arbitrarily" and "responsible" affords loopholes which may make it difficult to prosecute anyone successfully.

EXCLUSIVE RIGHTS.

Section 4 aims at another method of unfair competition. This is the practice of trusts to refuse to sell to anyone who will not agree to handle or use exclusively their products. Here, again, there is an undoubted evil. The only question is whether this section adequately deals with that evil. It applies only to the leasing and selling of commodities. Should it not include, also, the licensing of the use of commodities by others, and the furnishing of goods by bailors to bailees? The prohibitions of this section may be evaded if commodities are not sold outright or leased, but are handled through nominal agents or bailees.

Again, this section prohibits exclusive contracts only in reference to the commodities "of a competitor or competitors of the lessor or seller." It is not enough to prove that a trust has required exclusive contracts from its customers. It must also be proven that the person against whom the contracts were directed was a business competitor of the trust. If the trust made the exclusive contract for the benefit of some allied corporation, or for any reason other than that of business competition, it can escape prosecution under this section.

What will be the effect of this section upon the right of persons engaged in interstate commerce to select their own customers, which section 2 of this bill seems to be so solicitous to protect? When sections 2 and 4 are read together, it is clear that this bill intends to confer upon sellers the right to choose their own customers. This implies that the seller may impose any conditions upon the customer which he chooses to make. But in section 4 he is prohibited from

entering into any agreement or understanding with his customer to the effect that the latter will not use the commodities of some competitor of the seller. Yet the seller may select his own customers, and may refuse to sell for any reason that he sees fit, including the fact that the proposing customer handles the products of some competitor. As long as the seller does not enter into a definite agreement or understanding with the customer that he shall not handle or use the commodities of some competitor, he can not be prosecuted although he may refuse to sell to anyone who will not handle his goods exclusively. This bill affords opportunities for doing secretly and in a roundabout way what it prohibits to be done aboveboard.

MACHINERY FOR ENFORCEMENT OF ANTITRUST LAWS.

In seeking a solution of the trust problem no matter is more vitally important than that of providing means for the more vigorous enforcement of the antitrust laws. The Sherman Act has been upon the statute books for almost a quarter of a century; but the trusts have been constantly increasing both in number and in power. The fault has not been that the prohibitions of the Sherman law have not been broad enough, but that this act has not been vigorously enforced. A large number of most excellent proposals to strengthen the Sherman law so as to make it practically self-enforcing were presented to the Committee on the Judiciary. Most of these proposals have been ignored. This bill will not permit States or independents to intervene in dissolution suits against trusts to protect their rights. Nothing is done to hasten the disposition of antitrust cases in courts. Even the suggestion that the Federal courts should be prohibited from enforcing contracts involving violations of the antitrust laws was rejected.

Section 6 aims to afford means for parties injured by the unlawful conduct of trusts to recover threefold damages for the losses sustained as provided in the Sherman Act. Although the purpose of this section is good, it is open to severe criticism. It does not permit private parties to make use of the facts and finding in suits brought by the Government, in accordance with section 13 of this act, for violations of any of its provisions. The decrees which private parties may make use of in their suits for damages are described as being "to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws." In other words, the decrees which private parties may plead in damage suits which they may bring against trusts as res adjudicata are decrees secured in Government suits brought under the Sherman law. Where the decree secured by the Government is to the effect that a trust has discriminated in price between different communities or individuals or that it has entered into exclusive contracts, private parties are not allowed to plead such findings as res adjudicata in any damage suits which they may bring under this act.

Another defect in this section is to be found in the second paragraph. This provides that the statute of limitations in reference to any private right of action shall be suspended during the pendency

of the Government suit. This does not always permit independents adequate time to bring their suits for damages against trusts after the decree in the Government suit is entered. They have only such time to begin their suits as had not expired under the statute of limitations when the Government suit was instituted—whether this be one week or five years. Inasmuch as the right of action of private parties was very largely merely theoretical before the decree in the Government suit was available, a much better provision would be to allow private parties one or two years after the entry of the decree in the Government suit to begin their suits for damages.

The most vital defect in section 6 remains to be noticed. This is contained in the provision that decrees and judgments secured in Government suits may be pleaded as res adjudicata in suits between trusts and private parties either "in favor or against such defendant." To allow the decrees and judgments in Government suits to be pleaded "in favor of" the trusts against private parties who may sue them is violative of all sense of justice. Under this provision whenever the Government suit miscarries or an Attorney General allows a feeble compromise decree to be entered, a trust may plead the decree secured to prevent private parties injured by its unlawful conduct from securing relief therefrom or damages therefor.

These private parties have never had their day in court. Though they may be able conclusively to prove that they have been injured by a trust they are denied all chance for relief whenever the Government is unsuccessful in its suit, or when it enters into compromises with trusts. Though the Government mishandled the case, they had no chance to intervene in the suit to protect their rights; yet, when the Government suit fails, the trust may plead the decree therein as a bar against any suit which these private parties might bring. This provision is not only a measure in the interests of the trusts, but apparently violates the fifth amendment to the Constitution, inasmuch as it will operate to deprive private parties in many cases, without due process of law, of rights of action held to be property within the meaning of that amendment. The provision that the decrees in Government suits may be pleaded as res adjudicata against trusts in suits brought by private citizens is on an entirely different plane from the provision that the trusts may plead the decrees in Government suits in their favor. The trusts have had their day in court, and despite their pleadings the court has entered a final decree or judgment against them. The private parties who sue trusts after the decree in the Government suit has been entered have not had their day in court; and yet this section would deprive them absolutely of redress in a court of justice.

Section 12 is intended to secure the more vigorous enforcement of the criminal law against monopolists and trust magnates. What does it do to secure this end? The first part of this section provides that the guilt of the corporation shall be deemed to be also that of the individual directors, officers, and agents of such corporation; but the second part provides that only those directors, officers, or agents "who shall have authorized, ordered, or done any of such prohibited acts," shall be punished. Under the Sherman law as it stands those who authorize, order, or do any act in violation thereof may be criminally prosecuted. It is extremely doubtful whether this section will

make the penalties of the antitrust laws more personal than they now are.

Attention must be directed, also, to the fact that the maximum fine which is provided in this section and throughout this bill is $5,000. To fine a great trust a maximum of $5,000, when the loot it gained may have been many hundred times that sum, is most ridiculous. The maximum should be much greater in amount. Nor is there any provision in this measure to the effect that punishments for violations of the antitrust laws shall not be omitted by suspension or other judicial action. Any judge may still suspend sentence in the case of trust officials found guilty of having violated the Sherman law.

Section 14 deals with another method of providing better machinery for the enforcement of the antitrust laws. This section would permit private parties who are being injured by the unlawful actions of trusts to secure injunctive relief. This is a most desirable provision, but the language of this section is such as to make it as difficult as possible for injured parties to secure relief. To do so it is not enough that they establish that they have suffered loss because of the action of some trust, but they must also show that a continuance of these acts is "threatened." This makes rigid a principle that is wholly proper in most equity cases, but which will often operate to deny a remedy to independents. Nothing is more difficult to prove than that acts of discrimination and other unfair practices of trusts are likely to be repeated. Again, there is a provision that no injunction shall be granted for the relief of a party injured by a trust except upon "the execution of a proper bond against damages for an injunction improvidently granted." To require an independent to give a bond sufficiently large to compensate a trust against possible damages will often prevent him from securing relief from the unfair tactics of the trust. Without this provision the matter of the bond would be left at the discretion of the court, in accordance with the provisions of the judiciary act.

HOLDING COMPANIES.

This measure deals, also, with two manifestations of the trust evil—the holding company and interlocking directorates. Both of these means have been employed by trusts to secure a stranglehold upon the industries of the country; but they represent only two of many forms of the evil of private monopoly. The possibility that holding companies and interlocking directorates may be used as a means to subject industry to Wall Street's dominance should be guarded against in every manner possible; but it is not enough to deal with these two manifestations of the trust evil, while the real and fundamental source of the evil exists through common-stock ownership or other forms of interlocking control.

Section 8 deals with the evil of the holding company. It does so in a most unsatisfactory manner. Nothing in this section applies to holding companies already organized. As for the organization of future holding companies, Mr. Samuel Untermyer, the attorney of the Pujo money-trust committee, has stated that this section will probably impair "the existing threadbare remedies" of minority stockholders. It prohibits one corporation from holding the stock of another corporation where the "effect" of such acquistion is to

eliminate or substantially lessen competition. In the Northern Securities case, the criterion, when the holding by one corporation of the stock of another is unlawful under the Sherman antitrust law was laid down as being, not that the holding of the stock of such other corporation must be shown to have had the effect of lessening competition, but that it confers a potential power to lessen competition, whether that power has been exercised or not. Had this section of the bill been law, the Northern Securities case would have been decided against the Government. Under this bill a corporation may acquire stock in any competing corporation, even to the point where it controls such other corporation, if it can not be shown to have exercised that control with the effect of lessening competition. If this section were genuinely intended to strengthen the Sherman Act in dealing with the evil of the holding company, why did it not simply declare that no corporation shall acquire any of the stock of another corporation where the acquisition of the whole of the stock of such other corporation would constitute a violation of the Sherman Antitrust Act? Instead of thus strengthening the Sherman law by preventing one competing corporation from edging toward the control of another, it provides that the potential power to lessen competition shall no longer be the criterion to determine the legality of a holding company's operations, but whether it has exercised that power with the effect of lessening competition.

REGULATION OF INTERLOCKING DIRECTORATES.

Section 9 deals with the evil of interlocking directorates. Such interlocking directorates have been one of the means employed for the building up of a powerful money trust, dominating many great industries. But interlocking directorates are but one of many manifestations of the real evil—the interlocking control of corporations in the same or allied fields of business. The interlocking control of such corporations must be prevented or there will be no real competition between them. Interlocking control of competing corporations may be evidenced by identity of stock holdings, voting trusts, and dummy directors as well as by interlocking directorates. The interlocking control is the vice, and it should be prevented, no matter how it may be manifested. There may be some doubtful advantage in forcing big business to substitute dummy directors for interlocking directorates; but certainly this does not solve the great evil of the Money Trust. There may be interlocking control although there are no interlocking directorates, and while it continues there will be no real competition.

Every paragraph in this section has the vice of striking at a form of the evil and not at the root of the evil itself. The first paragraph prohibits any person who is a director, officer, or employee of a common carrier from being also at the same time a director, officer, or employee of a corporation which sells materials to that carrier, or which does construction work for it, or of a bank or trust company which acts as a fiscal agent of such carrier. This paragraph is directed against the vice of having a set of men who control one corporation deal with themselves through another corporation which they also control, at the expense of the minority stockholders. This is one of the evils which the interlocking control of corporations

makes possible. Dealings between two corporations in each of which the same set of men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured. This paragraph does not apply at all to industrial corporations; nor does it directly prohibit such transactions as related to common carriers. It says only that the directors, officers, and employees of a common carrier shall not at the same time be directors, officers, or employees of banks, supply and construction companies with which such carriers have business relations; but they may own all of the stock of such other companies. Dealings which rob the minority stockholders may continue, although interlocking directorates are prohibited.

The other provisions of this section similarly aim at a form of the evil of interlocking control and not at the evil itself. Persons are prohibited from acting at the same time as directors, officers, or employees of two corporations of certain classes. Yet it permits these corporations to be controlled by the same man or the same set of men, if they but exercise their control through some other manner than that of interlocking directors. They may exercise their control through voting trusts, through dummy directors, or in any other manner, save that they must not themselves act as interlocking directors. One man or one set of men may control every bank and trust company in a city of above 100,000 population, or all the great banks of the country, but they must not act as directors of any two of the banks. This section permits identity of stock holdings in the corporations in which it prohibits interlocking directorates. While identity in stock holdings is permitted to continue it is idle to speak about restoring competition between these corporations. There will be interlocking control even when interlocking directorates are prohibited. A form of the evil only is prohibited; but the evil itself may still prevail.

THE EXEMPTION OF CERTAIN ORGANIZATIONS FROM THE ANTITRUST LAWS.

The apparent object aimed at in section 7 is to relieve certain classes of organizations which are generally recognized to be beneficial from the penalties of the Sherman antitrust law in carrying on their normal and proper activities. This is a most laudable object. The antitrust laws should place no restrictions upon the activities which the organizations enumerated in the first paragraph of this section normally carry on. They are beneficial, should be encouraged, and not discouraged.

None of the classes of organizations enumerated in this first paragraph have ever been held subject to the Sherman Antitrust Act or asked for exemption other than labor and farmer organizations. Labor and farmer organizations should not be treated as trusts. If labor is a commodity, it is certainly entirely different from every other commodity, inasmuch as the commodity labor can never be divorced from the human being—the laborer. And organizations of farmers at most aim merely to control the product of their own labor and not, like the great trusts, to engross the products of other men's labor. These organizations serve to protect the people against the evils of monopoly, not to enhance those evils.

The weakness of this first paragraph of section 7 is that it leaves the status of labor organizations under the antitrust laws uncertain and forbids, in effect, the cooperative efforts of farmers in buying commodities or selling their products. It is provided that nothing in the antitrust laws shall be construed to forbid the "existence or operation" of labor organizations or to forbid individual members of such organizations from carrying out "the legitimate objects thereof." What is meant by the "operation" of labor organizations and by "the legitimate objects" of such organizations is most vague. The majority of the committee, in its report, explains the purpose of this paragraph to be to make certain that the Sherman Antitrust Act does not "warrant the courts under interpretations heretofore given to that law to enter a decree for the dissolution of such organizations." If this is the correct interpretation of this paragraph, it will merely prevent suits for the dissolution of labor organizations, but will permit the taking out of injunctions under the Sherman Antitrust Act against labor organizations to restrain them from carrying out their purposes, and the bringing of suits for triple damages against them under that act.

This paragraph applies only to organizations "instituted for the purposes of mutual help, and not having capital stock or conducted for profit." We can not be entirely certain that all labor unions will be held to be conducted "for the purposes of mutual help" and as being not "conducted for profit." There can be no doubt that as to "consumers, agricultural, or horticultural" organizations this limitation is a fatal defect. Every organization of farmers which aims to cooperatively bargain as to the products of its members is "conducted for profit," and many of them have "capital stock." The only sort of farmer organization which this section sanctions is one which does nothing more than to discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the antitrust laws. In fact, this section is likely to bring down upon them the Sherman Act with all its penalties. When legislation is enacted specifically exempting certain classes of organizations, district attorneys and courts are likely to construe the antitrust laws as rendering unlawful the activities of the classes of organizations not exempted. This paragraph may sound the death knell to cooperation among farmers to better their conditions of life. The Department of Agriculture is constantly issuing literature urging the farmers to cooperate. Only recently a special commission which we sent to Europe to get suggestions upon how to encourage cooperation among the farmers has made its report. Yet this bill will not legalize farmer organizations if they are "conducted for profit" or have "capital stock."

The second paragraph of section 7 was inserted at a very late stage in the preparation of this bill. In the hearings before the committee there was no claim made by anyone that such legislation was either needed or desired. Nor is it clear what sort of agreements among common carriers are sanctioned by this paragraph. Associations of common carriers are authorized to make "any lawful agreement as to any manner which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission," but this is not to authorize "joint agreements by common

carriers to maintain rates." Does this mean that carriers may agree to change rates but may not agree to "maintain" such rates? What sort of agreements among common carriers does this paragraph authorize, and what possible benefit do the people derive therefrom? Why insert an exemption from the antitrust laws which nobody asked for and which is of uncertain meaning?

THE INJUNCTION AND CONTEMPT PROVISIONS.

The last part of this measure deals with a matter which has no direct relation to the trust question—that of the use of injunctions in connection with labor disputes. In section 7 the exemption of labor unions from the operations of the antitrust law is dealt with; but sections 15–23 have no reference to this question. They relate generally to procedure in injunction cases and to trials for contempt. Only one of these sections—section 18—applies to injunctions in labor disputes alone. In the Sixty-second Congress these sections were presented as two separate bills—the Clayton injunction limitation bill and the Clayton contempt bill.

Whatever divergent views Members may hold as to the desirability of these sections, there can be no question that they have no proper place in an antitrust bill. To combine these propositions with an antitrust bill, which throughout represents a minimum of what might be done to strengthen the existing law, has no merit other than that of political expediency.

JOHN M. NELSON.

The foregoing views are concurred in.

A. J. VOLSTEAD.

House Report 627, part 4, Sixty-third Congress, second session.

ANTITRUST LEGISLATION.

MAY 13, 1914.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. MORGAN of Oklahoma, from the Committee on the Judiciary, submitted the following

MINORITY VIEWS.

[To accompany H. R. 15657.]

I am in hearty sympathy with the object and purpose of the legislation proposed in this bill, but I do not believe that all the provisions in the proposed measure are wise. In my opinion some are dangerous to the business and commercial interests of the country and will do more harm than good. On the whole, the bill if enacted into law would be a great disappointment to the country. It certainly can not be regarded as a broad, comprehensive, carefully prepared measure which will protect the general public from the evils of big business and at the same time open to the legitimate business interests of the country a highway upon which to travel with safety and certainty. While in all so-called antitrust legislation we must keep in mind the welfare of the people generally, we must not ignore the fact that any material injury to the business of the country reacts and injures the people, whose interests it is our first duty to serve.

Taking the antitrust provisions of the bill as a whole, if they were all enacted into law they would not destroy a single trust, abolish a single monopoly, or add materially to the competition now existing. The provisions of the bill, if placed on the statute books, will not reduce the size of our great corporations or materially lessen the power they now possess to arbitrarily control prices. Enact this bill into law and big business will go on and on with no adequate restraint, either in the way of broad, comprehensive statutory enactments or in the way of a properly empowered administrative or semi-judicial commission, which I regard as absolutely necessary for the protection of the people as well as for the substantial and permanent prosperity of our industrial and business interests, both at home and abroad. It is true that there are some provisions of this bill which strike at existing evils in our interstate commerce which will tend to

prevent some unfair practices and business methods now resorted to, but great corporations, controlled and managed by vicious and unscrupulous directors, while desisting from the few practices prohibited in this bill will invent other methods equally reprehensible and equally effective to enable them to accomplish their ends. We can not assume that evil-disposed business men have exhausted their ingenuity in the invention of obnoxious business methods. So next Congress we will have something new to prohibit, and so on from year to year, but in the meantime nothing is settled and no real relief is afforded the people. To illustrate: Section 2 of this bill makes it unlawful to discriminate in price with the intent or purpose to destroy or wrongfully injure a competitor. The only discrimination here prohibited is discrimination in price. But there are thousands of ways by which we may discriminate. This section easily could be made more comprehensive in its scope by making it unlawful to discriminate in price, terms, or otherwise. We would then make all kinds of discrimination unlawful—not only the kind of discrimination with which we are now familiar, but the prohibition would include all acts, practices, and methods which may be used in the future in perpetrating discrimination.

Again, section 2 prohibits only discrimination with the intent or purpose to destroy a competitor. Here is another illustration of the extreme narrow application of the provisions of the bill. It may be that Congress should seek to protect one competitor from another, but the great primary, fundamental purpose of this legislation should be to protect the masses of the people, to safeguard the public welfare against a well-known evil. If discrimination should be prohibited, we should prohibit discrimination done with the intent and purpose to establish and maintain the evil which we wish to eradicate. This evil is monopoly. The one thing we are seeking to maintain in our business and industrial world is healthy, effective competition. It follows, therefore, that we should prohibit not only discrimination done with intent to destroy or injure a competitor, but above all we should prohibit discrimination perpetrated with the intent to establish monopolistic conditions or to materially or substantially lessen competition. I know that it may be said that the Sherman law now prohibits an attempt to monopolize. But the same argument is made by those who oppose all antitrust legislation. They assert that the Sherman law is all-sufficient to prevent monopoly and maintain competition. If it is necessary to enact a special law to prohibit discrimination, we should prohibit all kinds of discrimination, done with the purpose or intent to establish a monopoly, to destroy or substantially lessen competition, or with the intent to accomplish any purpose that is inconsistent with good business ethics, or that is inimical to the public interests.

I think no one will deny this proposition: Business should have the greatest freedom consistent with the public good. Like individual freedom, liberty in business should be limited, restricted, and circumscribed only when necessary for the public good. Even our State governments should assume control of private business only when the private business becomes impressed with a public use. For greater reasons the Federal Government should interfere with private buiness only when the private business becomes of public consequence from a national viewpoint. And I thoroughly believe

there are many private business concerns engaged in industrial commerce which have become of public consequence, which from a national viewpoint have become impressed with a public use, and in the interests of the people of the Nation should be placed under strict Federal supervision and control. But I think it is very unwise to enact laws which will place almost an innumerable number of small business concerns under Federal laws, which will be a source of annoyance to owners of such concerns, hamper and hinder them in the management, development, extension of their business, multiply lawsuits, crowd our Federal courts with litigation, without materially benefiting the people or substantially contributing to the solution of the real business problems confronting us as a Nation. Would it not be a better policy to limit Federal enactments which restrict the freedom of private business to those concerns which have clearly become impressed with a public use and which are of public consequence from a national viewpoint?

The National Government is entering upon dangerous ground when it enters upon the policy of enforcing uniformity in prices to all persons and all sections. The policy of the Government is to maintain competition. That was the object of the Sherman antitrust law. That is the object of the proposed legislation. Monopoly means the absence of competition. Competition means a contest for business, for customers. The object of competition is to insure purchasers reasonable prices for articles purchased. Reduction of price has been universally regarded as a legitimate method of securing business. Merchants, manufacturers, and dealers have been left to fix their own prices. Is the National Government ready to enact a law that will tend to compel uniformity of prices—that will not permit a merchant or manufacturer to lower his prices to secure customers, to obtain business? Is not competition which reduces prices the kind of competition that will benefit the people? Here is the difficulty with the competition that now exists. The big concerns do not compete in price. The so-called independent concerns follow the prices fixed by the trusts. This tendency appeared in the testimony of one witness who testified before the committee in behalf of the independent oil dealers. He frankly admitted that the independent dealers sold at the price fixed by the Standard Oil Co.

Section 7 authorizes the existence and operation of labor, agricultural, and other organizations instituted for mutual help and not having capital stock and not conducted for profit. The provisions of this section certainly can not be satisfactory to labor organizations, to farmers, or even to the organization of business men who oppose any modification of the Sherman law which will exclude labor organizations from its provisions. It would hardly seem necessary in this day and age of the world to enact a law which merely permits the existence of labor organizations. If labor and farmer organizations are not to be given some substantial recognition by statutory enactment, it would seem unwise to place a new provision in the law, which can be of no material benefit to labor organizations, but which is bound to bring doubt and uncertainty as to what, if any, additional rights labor and farmers' organizations and the members thereof have under the new statute. If the provisions of our antitrust laws should not apply to labor organizations, Congress should in plain and clear language so declare. We should not speak

in the doubtful, uncertain, indefinite terms which characterize the provisions of section 7 of this bill.

One of the elements of the high cost of living is the expensive system of the sale and distribution of the products of the farm and the factory. The producer and consumer must be brought closer together. The provisions of this bill would not permit consumers to organize if the associations had capital stock, or were organized for profit. Under the provisions of section 7 of this bill farmers' organizations with capital stock, organized for profit, would be left subject to the provisions of the Sherman antitrust law. The law not only should not prohibit but should encourage farmers to organize with a view to purchasing implements, machinery, and other farm supplies at less cost and with the view to collective bargaining in the sale of their products and in the purchase of supplies. In France, Germany, and other European countries farmers' organizations are authorized by law. The line along which these organizations can act is definitely defined. Governmental aid, direction, and assistance is given. Such organizations are encouraged to engage in a wide field of purely business transactions. These organizations have contributed immensely to the expansion of the agricultural interests of these countries. It would be exceedingly unfortunate at this time, when we are about to enter upon the important task of providing our farmers with better credit facilities, to enact a law which may be construed to make all farmers' organizations unlawful except such as are organized for the mutual benefit of members along literary, insurance, and social lines.

I do not care to express my objections to all the provisions of this bill. I agree in the main with criticisms made by other members of the minority on the Judiciary Committee.

It has been nearly 24 years since the enactment of the Sherman antitrust law. Its meaning was long in doubt and obscurity. It is now better understood. The business world knows, in a way at least, its meaning. The law was not a success in preventing the concentration of business into large industrial units. We have large business organizations to-day, and there is no indication that through the enforcement of the Sherman law, or the enactments and enforcement of any new laws, our industrial units are to be materially lessened. The Sherman law has failed through the absence of proper administrative machinery to enforce its provisions. It is folly to enact more laws when existing laws are not effective for lack of adequate enforcing agencies. What the country needs now is a law that will define and promulgate a well-defined national policy toward the great business interests of the country which will be just to our industrial forces, and which will be fair to the people, and fully protect them from exactions of business concerns possessed of monopolistic power.

Practically every other business is highly organized but the business of farming. There are about 6,500,000 farmers. Something like 12,000,000 persons over 10 years of age toil on the farm. The farmers are at a great disadvantage. Labor is organized. Business is organized. Concentration, combination, cooperation everywhere except among the farmers. With the most intelligent farmers of the world, in business cooperation our farmers are far behind the less intelligent farmers of other countries. To aid our farmers in

the line of greater cooperation has now become a national duty, and it would be hardly short of a public calamity to enact a statute which on its face restricts and limits to a narrow sphere the purposes for which agricultural associations may be formed.

In my judgment, it is unfortunate that one committee should not have had exclusive jurisdiction over the proposed legislation to create a Federal trade commission and all antitrust legislation. The creation of a Federal commission with certain jurisdiction over industrial corporations engaged in interstate trade will mark an epoch in our national policy in Federal control of private business. Manifestly all legislation for the supervision, regulation, and control of private business engaged in interstate commerce will and should center in and around the national commission, whether its jurisdiction and power be great or small. So it seems to me, if the Sherman law is to be amended, the new statutory provisions should be drawn with the trade commission and its power in view. Because we are entering upon a new field of Federal activity in the control of private business all our enactments should be suited to our new enforcing agency—the proposed Federal commission. But over this proposed legislation the Judiciary Committee has no jurisdiction, and it is not proper for me to discuss any of the provisions relative thereto.

DICK T. MORGAN.

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